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***PROTOCOLS OF POWER: LESSONS FROM ICANN FOR  
INTERNATIONAL REGIME THEORY***

***PAUL ANTONY WHITE***

***A thesis submitted to the University of Huddersfield in partial  
fulfilment of the requirements for the degree of Doctor of  
Philosophy***

***The University of Huddersfield***

***February 2012***

**Dedicated to the memory of my father**

**Jack White**

**1944-2010**

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# **Abstract**

This dissertation explores the nature of the Internet Corporation for Assigned Names and Numbers (ICANN) as a governance organisation in the context of international regime theory. It examines the hypothesis that ICANN represents a new type of hybrid political entity, one that both challenges established concepts in IR theory, and that may be representative of emerging trends in other areas of global issue management.

The concept of international regimes, initially defined in the early 1980s by Stephen Krasner, has become one of the key elements of contemporary International Relations theory. Despite ongoing debates between proponents of various theoretical paradigms over some key questions, such as how and why regimes form and are sustained, the basic concept of the international regime has remained fairly clearly defined. ICANN, however, has been widely interpreted as a new approach to global governance in an emerging issue-area, one based upon ‘multistakeholder’ decisionmaking involving a range of interested actor types, as opposed to the traditional model of a predominantly state-based ‘inter-national’ organisation. This dissertation seeks to examine the extent to which concepts drawn from existing regime theories remain useful as analytical tools for interpreting the types of emerging global governance arrangements represented by the ICANN system.

The dissertation begins with a review of ICANN’s history and organisational structure, followed by a literature review exploring some competing interpretations of ICANN. It then utilises three case studies of the ICANN policy development process in action, in an effort to explore how ICANN policy is made in practice and which types of actors and interests appear to have most influence within the regime. The analysis reveals certain commercial interests, together with governments, to be the predominant actors within the ICANN system. Subsequent chapters draw upon these findings to explore how ontological models drawn from various paradigms on regime theory, including realist, neoliberal institutionalist, neo-Marxist and social constructivist approaches, might be applied to the ICANN regime. The study demonstrates that concepts drawn from each of these paradigms, and particularly

neoliberal institutionalism and social constructivism, are readily applicable to the ICANN case. The dissertation concludes that ICANN can be usefully interpreted as a regime using a definition based on Krasner's, albeit of a modified type better described as a 'global governance' rather than an 'inter-national' regime. Finally, it attempts to evaluate the extent to which lessons from the ICANN case may be applicable to emerging trends in other issue-areas of international politics.

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# Glossary of terms

**A-label** - The A-label is what is transmitted in the DNS protocol and is the ASCII-compatible (ACE) form of an IDNA string; for example "xn--11b5bs1di".

**ACE** - ASCII Compatible Encoding. ACE is a system for translating non-Latin character sets into ASCII equivalents, encoding Unicode so that each character can be transmitted using only the letters a-z, 0-9 and hyphens. It is used to allow non-Latin character sets to be represented in IDN domain names without having to redesign the underlying DNS technology.

**ALAC** – ICANN’s At-Large Advisory Committee. The role of the ALAC is to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. It consists of ten members selected by Regional At-Large Organisations (RALOs) and five members selected by the Nominating Committee.

**ARPA** - Advanced Research Projects Agency. A technical research agency of the United States Department of Defense. Also known as DARPA (Defense Advanced Research Projects Agency).

**ARPANET** – Advanced Research Projects Agency Network. The first wide-area packet-switching network, initially created in 1969 and funded by the US Department of Defense. ARPANET formed the core network of what later became the Internet.

**ASCII** - American Standard Code for Information Interchange. ASCII is a commonly used numerical code for computers and other devices that work with text. Computers can only store and process data as numbers, so a method is required of assigning a numerical value to each character of text. An ASCII code is the numerical representation of a character such as 'a' or '@'. ASCII only supports characters from the Latin script.

**ASO** – ICANN’s Address Supporting Organisation. The Address Supporting Organisation (ASO) is made up of representatives of the RIRs, and deals with policy issues relating to the operation, assignment, and management of IP addresses.

**At-Large Constituency** - the former ICANN organisation responsible for coordinating the global At-Large user community and coordinating global elections for one-third of ICANN directors. Disbanded 2002, partly replaced by the ALAC.

**Backbone** – Historically, the central link connecting the various networks making up the Internet. Today superseded by multiple Internet Exchange (IX) points that allow major ISPs to exchange data directly.

**BC** – Alternative term for the CBUC.

**CBUC** - Commercial & Business Users Constituency. One of the GNSO Constituencies, representing commercial and business users.

**CCNSO** – ICANN’s Country Code Names Supporting Organisation. The ccNSO deals with policy relating to country-code top-level domains (ccTLDs), and is made up of representatives of the ccTLD registries.

**ccTLD** - Country Code Top Level Domain. Two letter domains, such as .uk (United Kingdom), .de (Germany) and .jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and some ccTLD registries limit use of the ccTLD to citizens of the corresponding country.

**Device** – In a networking context, a computer or other piece of equipment capable of sending and receiving data on the network. Also known as a node or host.

**Domain Name** - A name that identifies a computer or computers on the Internet. These names appear as a component of a Web site's URL, e.g. www.microsoft.com, and are also used for other purposes in the Domain Name System (DNS), for example following the @ sign in an email address. Domain names are organised as a hierarchy, beginning with Top Level Domains, such as .com or .org, under which are second-level domains (SLDs) such as microsoft.com, third level domains (such as support.microsoft.com) and so on.

**DNS** - Domain Name System. DNS is a user-friendly system that allows users to find their way around the Internet. Every computer on the Internet has a unique numerical address – essentially similar in concept a telephone number – known as an IP (Internet Protocol) address. However, IP addresses are cumbersome and difficult to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the ‘domain name’) to be used instead of the arcane IP address. DNS is organised as a distributed database, based around a hierarchical system of interlinked servers. At the top of the hierarchy lie the thirteen ‘root’ servers.

**DNSO** – Domain Name Supporting Organisation. A former ICANN Supporting Organisation with responsibility for policy pertaining to Top-Level Domains (TLDs). Split into the GNSO and ccNSO in 2002.

**GNSO** – ICANN’s Generic Names Supporting Organisation. The GNSO deals with policy relating to generic top-level domains (gTLDs), and is made up of representatives from a number of stakeholder ‘Constituencies’, including: the Business and Commercial Users Constituency; the Non-Commercial Users Constituency; the gTLD Registries Constituency; the Registrars Constituency; the Intellectual Property Constituency; and the ISPs Constituency.

**gTLD** - Generic Top Level Domain. Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored" TLDs. Generally speaking, an unsponsored TLD operates under policies established directly through the ICANN process, while a sponsored TLD is a specialised TLD intended for use by a particular community. The TLD sponsor represents that community and may set criteria for

registration. For example, .museum is sponsored by the International Council of Museums and restricts registrations to recognised museum institutions.

**GAC** – ICANN Governmental Advisory Committee. The GAC is made up of representatives of national governments, and is intended to provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

**Host** – a computer or device connected to the Internet. Also known as a node.

**IAB** – Internet Architecture Board. The IAB is the steering committee of the IETF, and is responsible for defining the overall architecture of the Internet, providing guidance and broad direction to the IETF. The IAB also serves as the technology advisory group to the Internet Society, and oversees a number of critical activities in support of the Internet.

**IANA** – Internet Assigned Numbers Authority. The original IANA was ICANN's predecessor as the organisation responsible for top-level management of the Internet's naming and numbering systems. The present IANA is a department of ICANN. The "IANA function" refers to the core task of global coordination of the DNS root, IP addressing, and other Internet protocol resources. IANA manages the DNS Root Zone; coordinates the global IP and AS number space, and allocates these to Regional Internet Registries; and acts as the central repository for protocol name and number registries, used in many Internet protocols.

**ICANN** – Internet Corporation for Assigned Names and Numbers. Formally organised as a non-profit corporation under Californian law, ICANN is responsible for development of policy pertaining to the management and use of the Internet's core IP addressing and domain name systems. It draws its authority to manage these systems from a contract with the US Department of Commerce, which claims legal ownership of the root.

**IDNs** -Internationalised Domain Names. IDNs are domain names represented by language characters other than the standard ASCII character set. These domain names may contain characters with diacritical marks (required by many European languages) or characters from non-Latin scripts such as Arabic, Cyrillic or Chinese.

**IDNA** - Internationalised Domain Names in Applications. IDNA is a protocol that makes it possible for applications to handle domain names with non-ASCII characters. IDNA converts domain names with non-ASCII characters to ASCII labels that the DNS can handle.

**IDN A Label** - The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible (ACE) form of an IDN A string. For example "xn-11q90i".

**IDN U Label** - The U-label is what should be displayed to the user and is the representation of the IDN in Unicode. For example "北京" ("Beijing" in Chinese).

**IESG** – Internet Engineering Steering Group. The IESG is responsible for technical management of IETF activities and the Internet standards process. As part of the ISOC, it administers the process according to the rules and procedures which have been ratified by the ISOC Trustees. The IESG is directly responsible for the actions associated with entry into and movement along the Internet "standards track," including final approval of specifications as Internet Standards.

**IETF** – Internet Engineering Task Force. The IETF is the main Internet standards body, and operates under ISOC. It is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the operation of the Internet. The actual technical work of the IETF is done in its working groups, which are organized by topic into several areas (e.g., routing, transport, security, etc.).

**Internet Exchange (IX) point** – A physical connection between the networks of two major ISPs, allowing direct data transfer between them. The use of these points is usually governed by peering agreements between the two parties.

**IPC** - Intellectual Property Constituency. One of the GNSO Constituencies, representing intellectual property interests.

**ISP** – Internet Service Provider. An entity, usually a private company, that provides connections to the Internet.

**ISPCP** - Internet Service & Connection Providers Constituency. One of the GNSO Constituencies, representing ISPs.

**ISO** - International Organisation for Standardisation. An international standard-setting body composed of representatives from various national standards organisations, which promulgates worldwide proprietary, industrial, and commercial standards. It has produced various standards relevant to the domain names field, including a list of 'countries' (ISO-3166-1) upon which assignment of country-code top-level domains is based.

**ISOC** – Internet Society. ISOC is a professional membership organisation of Internet experts that comments on policies and practices and oversees a number of other boards and task forces dealing with network policy issues, including the IAB, IETF and IESG.

**ITU** – International Telecommunications Union. The UN agency dealing with international telecommunications regulation.

**IP address** - An IP address is a unique numeric identifier assigned to each computer or device connected to the Internet. Its function is to facilitate communication by distinguishing that particular computer from any other on the network, and is somewhat analogous to a postal address for conventional mail, or to a telephone number on a conventional voice telecommunications system; it allows data to be forwarded to or requested from that particular device. Under the IPv4 system utilised since 1983, an IP address consists of a 32-bit binary number, e.g. 11000000101010000000101000001010. However, on a computer-human interface,

the address is usually expressed in ‘dotted decimal’ format for ease of interpretation, for example 192.168.10.10.

**Label** – in the domain name context, a label is one element of a URL. For example, the URL `www.microsoft.com` contains the labels `www`, `microsoft` and `com`.

**LDH** - Letter Digit Hyphen. The hostname convention used by domain names before internationalisation. This meant that domain names could only practically contain the letters a-z, digits 0-9 and the hyphen "-". The term "LDH code points" refers to this subset. With the introduction of IDNs this rule is no longer relevant for all domain names. The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org".

**NCUC** - Non-Commercial Users Constituency. One of the GNSO Constituencies, representing non-commercial users.

**Node** - a computer or device connected to the Internet. Also known as a host.

**NomCom** – ICANN Nominating Committee. The NomCom appoints members to various ICANN bodies, including a proportion of the Board.

**NSF** – US National Science Foundation. In 1986 NSF created the NSFNet, a new ‘backbone’ linking the various networks that make up the Internet together. NSF also implemented the ‘No commerce’ rule, prohibiting use of the backbone (and therefore effectively the Internet) for purposes ‘not in support of Research and Education’. This rule was dropped in 1991.

**NSI** – Network Solutions Inc. A private company, NSI was contracted to provide registration services across all gTLDs between 1993 and 1998, and also held a contract from the United States government to directly administer the DNS root zone file. Following ICANN’s creation, NSI’s monopoly over name registration came to an end. ICANN policy prohibited vertical integration of registries and registrars, and NSI was forced to separate its registry and registrar operations into separate businesses. However, NSI continued to hold the contract for administration of the root zone, pursuant to a contract with the Department of Commerce that required NSI to cooperate with policy decisions made by ICANN. NSI was subsequently taken over by VeriSign in 2000; however, in 2003 VeriSign sold the registrar arm of the business, which continues to operate under the Network Solutions brand.

**PCP** - Public Comments Period.

**PDP** - Policy Development Process.

**Protocol** – In computer networking, a set of rules and formats governing communications on a network. For two devices on a network to be able to exchange data, they must be using the same protocols – effectively, ‘speaking the same language’.

**PSO** – Protocol Supporting Organisation. A former ICANN Supporting Organisation, disbanded in 2002. The PSO's function was to advise the ICANN Board with respect to matters relating to the assignment of parameters for Internet protocols. It was partly succeeded by the SSAC and RSSAC.

**Punycode** - Punycode is the ASCII-compatible encoding algorithm described in Internet standard RFC3492. It is the method for encoding IDNs into sequences of ASCII characters in order for the Domain Name System (DNS) to understand and manage the names.

**RALOs** – Regional At-Large Organisations. These are regional groupings of the ICANN At-Large community that host discussions at a regional level. They are intended to gather grass-roots input on the views of the global Internet-using community, to be forwarded on to the At-Large Advisory Committee (ALAC). Each RALO appoints two members of the ALAC (for a total of ten members out of fifteen). The RALOs are open for membership to interested individuals and organisations in the relevant region. Each RALO has a regional Chair and a Secretariat. In addition to their annual General Assemblies, the regions hold monthly teleconferences to develop a regional view on current policy issues and to provide input for the At-Large policy process. There are five such RALOs – the African Regional At-Large Organisation (AFRALO); the Asian, Australasian and Pacific Islands Regional At-Large Organisation (APRALO); the European Regional At-Large Organisation (EURALO); the Latin American and Caribbean Islands Regional At-Large Organisation (LACRALO); and the North-American Regional At-Large Organisation (NARALO).

**Registrar** – Registrars act as ‘middlemen’ between the registries and the end-user. Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. The registrar keeps records of the contact information and submits the technical information to the registry. Registrar services in the ccTLDs are decided by the ccTLD manager and ccTLD registrars are not accredited by ICANN. Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in .biz, .com, .info, .name, .net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services.

**RC-Registrar Constituency.** One of the GNSO Constituencies, representing registrars

**Registry** - A registry is the authoritative, master database of all domain names registered in each Top Level Domain. However, the term is also commonly used to refer to the registry operator, the entity that manages this database. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Domain name registrants do not interact directly with the registry operator, instead registrars act as ‘middlemen’ between registrants and registries.

**RyC** - Registry Constituency One of the GNSO Constituencies, representing gTLD registries.

**RFC** - Request for Comment. The main method for documenting an Internet standard. These are numbered sequentially, beginning with RFC 1 in April 1969. Initially, any researcher working on the ARPANET could write an RFC, and, if enough people agreed and used the idea, the design became a standard. The RFC system continues to this day under the IETF, though it has become more formalised over the years.

**RIR** – Regional Internet Registry. ICANN allocates large blocks of addresses to organisations known as Regional Internet Registries (not to be confused with TLD registries). There are five such RIRs, made up of representatives from various interested parties, such as Internet service providers (ISPs), telecommunication organisations, educational institutions, governments, regulatory agencies, and large corporations. RIRs allocate smaller blocks of IP addresses to ISPs and other large organisations, which then in turn allocate individual IP addresses to end-users.

**Root** – the top level of the DNS namespace hierarchy. All domain names on the Internet can be regarded as ending in a full stop character, e.g. "www.microsoft.com.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an IP address. The empty string (blank space) after the final dot is called the root domain, and all other domains (e.g. .com, .org, .net, etc.) are contained within the root domain.

**Root server** - A root nameserver is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to refer to the thirteen nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System. The most authoritative of these servers, to which the others defer is, known as the 'A' root server.

**RSSAC** – ICANN's Root Server System Advisory Committee. The RSSAC is a technical body that provides advice with regards to the technical operation of the root servers, to guide policymaking and help to ensure ICANN's commitment to preserving the stability of the DNS is fulfilled.

**SSAC** – ICANN's Stability and Security Advisory Committee. The SSAC is a technical body that provides advice with regards to the technical operation of the domain name system with emphasis on security and stability matters, to guide policymaking and help to ensure that ICANN's commitment to preserving the stability of the DNS is fulfilled.

**sTLD** - Sponsored Top Level Domain. These are a special category of restricted gTLDs, e.g. .museum, which are operated by a Sponsor (sponsoring organisation), e.g. the International Council of Museums operates the .museum TLD. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting

the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator.

**String** – A sequence of characters. In the domain name context, used to refer to domain name labels, e.g. org and com.

**Supporting Organisation** – ICANN sub-groups that deal with specific areas of ICANN policymaking. There are currently three such Supporting Organisations, the Address Supporting Organisation (ASO), the Generic Names Supporting Organisation (GNSO), and the Country-Code Supporting Organisation (CCNSO). Previously existing Supporting Organisations included the Protocol Supporting Organisation (PSO) and the Domain Name Supporting Organisation (DNSO).

**TCP/IP** - Transmission control protocol / Internet protocol. The Internet's main protocol suite since 1983.

**Unicode** – a commonly used encoding standard that supports a much wider range of characters than ASCII. Like ASCII, it assigns a unique numerical code to each character. Unicode supports a wide variety of languages and scripts, and continues to be expanded. The Unicode standard contains tables that list the code points for each local character identified. These tables continue to expand as more characters are digitalised.

**Unicode Consortium** - A not-for-profit organisation founded to develop, extend and promote use of the Unicode standard.

**URL** – Uniform Resource Locator. The URL is the full address of a resource (such as a Web page) on the Internet, including protocol labels and domain name, e.g. <http://www.hud.ac.uk>

**WHOIS** – A database of registration details and contact information for domain name registrants. Current ICANN policy is that such details must be fully disclosed and made publically available for registrants in the gTLD namespaces. WHOIS policy for ccTLDs is left to the national ccTLD registries. A 'strong' or 'thick' WHOIS model refers to a requirement for detailed data to be provided and made available, while a 'thin' WHOIS model would require less personal information.

**WIPO** – The World Intellectual Property Organisation. The UN agency dealing with international regulation of intellectual property protection.

# **Chapter 1**

## **Introduction**

### **Overview and rationale for project**

This dissertation will explore the nature of the Internet Corporation for Assigned Names and Numbers (ICANN) as a governance organisation in the context of international regime theory.

ICANN is a non-profit corporation created in 1998 to assume control of the Internet's core naming and addressing systems, a function previously performed by an agency of the United States government. Originally claimed to be a private sector, apolitical technical agency, ICANN deals with an issue area that in practice has become increasingly politicised over the last decade and a half. This dissertation examines the hypothesis that ICANN represents a new type of hybrid political entity, one that both challenges established concepts in international regime theory, and that may be representative of emerging trends in other areas of global issue management. The project investigates how the ICANN case can be related to broader patterns in global governance, and probes the adequacy of international regime theories as an analytical tool for understanding both the ICANN system, and, by extension, similar emerging developments in other areas of global governance.

The notion of international 'regimes' is one of the key concepts in contemporary International Relations theory. An international regime is a set of arrangements that governs behaviour pertaining to a given issue-area in international politics, and consists of a set of principles, norms and rules, usually together with some kind of decision-making procedures. Regimes may be formalised institutions based around international treaties and managed by formal international organisations, or they may simply consist of informal arrangements and 'rules of the game'. They exist in almost every area of international activity, and govern matters as diverse as nuclear arms control, food assistance, international trade, whaling, banking, human rights, drug trafficking, shipping and air traffic regulation, environmental protection and radio frequency allocation, to list but a few examples. Regime theory, a subset of

International Relations theory, has developed over the last few decades as a framework for analysis of these phenomena, and has become a key plank in our understanding of patterns in global governance. The issue of Internet governance, however, represents a new area in global politics that may test the veracity of existing regime theories.

The study of international regimes has become well established since Stephen Krasner first defined the term in 1983.<sup>1</sup> There are ongoing debates between adherents of various paradigms on regime theory on some key questions, such as how and why regimes form and are sustained, but despite this, the basic concept of the international regime remains fairly clearly defined. Regimes display recognisable characteristics, based around the existence of identifiable principles, norms, rules and decisionmaking procedures. Although they may well incorporate private actors, they usually do so within an overarching framework agreed between sovereign states. Regimes in related issue-areas often have similar characteristics. For example, regimes in the areas of transportation and communications, such as shipping, postal, air traffic and ‘conventional’ telecommunications (primarily telegraph / telephone / broadcasting) show strong similarities, including sets of similar norms related to jurisdictional rights and obligations, damage control problems, technical and procedural barriers, and prices and market shares.<sup>2</sup>

Despite existing in an apparently similar issue-area to these regimes, however, ICANN is a significantly different animal. ICANN is, at the time of writing, a more or less unique organisation. Its purpose is to provide co-ordination and top-level management of the global IP addressing and Domain Name Systems (DNS), a set of naming and addressing resources essential for the functioning of the Internet. Created in 1998, ICANN was intended to be a new approach to governance in a brand new global issue-area, based not on interstate treaties and intergovernmental decisionmaking, but instead on multistakeholder representation of the major actors and interest groups involved in the issue-area, including meaningful direct representation of the global Internet-using public. Its decisionmaking processes would be based on facilitating and identifying ‘bottom up’ consensus among these groups.

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<sup>1</sup> Krasner, S. D. (1983). ‘Structural causes and regime consequences: regimes as intervening variables.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press: 2-22. P2.

<sup>2</sup> See Zacher, M.W. and Sutton, B.A. (1996). *Governing Global Networks: International regimes for Transportation and Communications*. Cambridge: Cambridge University Press.

However, looking at the ICANN of today, it is clear that the model has changed significantly. Governments, originally intended to have a very limited advisory role only, seem to have become much more influential in policymaking. Meanwhile, the emphasis on direct representation of the global Internet-using public appears to have been very much reduced; for example, mechanisms for direct election of a third of ICANN's Board of Directors have been removed. From the original vision of a wholly private organisation with elements of direct democracy, ICANN appears to have morphed into a public-private governance organisation dominated by governments and powerful commercial interests.

This dissertation investigates these issues in more depth. It attempts to gain more insight into ICANN's internal dynamics and a fuller understanding of how ICANN policy is made in practice. It investigates how far the original ideals of multistakeholderism and 'consensus-based' decisionmaking have survived, and attempts to explain why changes in the organisational model have occurred. It ultimately explores the question of just how far ICANN has, in reality, turned out to be different from more conventional approaches to international issue management. This question is initially explored via empirical investigation of the ICANN policymaking process in action. Later stages of the investigation use evidence gathered from the empirical stage to analyse ICANN in the context of international regime theories, asking whether ICANN really is fundamentally different to previous approaches to global issue-management as described by the concept of the international regime, or whether it can in fact be understood as a regime and interpreted through the lenses of regime theory. The penultimate chapter also explores whether one paradigm on regime theory in particular, social constructivism, can help to explain the shift away from ICANN's original organisational design.

Finding answers to these questions matters, for two reasons. Firstly, Internet governance is a major issue-area in its own right, because of the Internet's economic, political and social importance in modern-day global politics. ICANN's work impacts upon matters such as questions of state sovereignty and jurisdiction, economics, virtual property rights and the distribution of some critical resources. A fuller understanding of the regime is therefore a matter of considerable import in its own right. Secondly, ICANN provides a useful case study to explore just how far

conventional approaches to governance are being challenged in the contemporary global arena. Numerous scholars have identified a shift away from a world dominated by state actors, towards one in which states are one actor type among several; a world where governments must form working partnerships with other types of actors in a hybrid public-private governance model. Such developments pose a challenge to the Westphalian state model that has traditionally dominated both the academic field of International Relations and actual diplomatic practice. The state-centric nature of the conventional international regime concept has meant that its applicability to non-state governance arrangements has been dismissed by scholars such as Susan Strange.<sup>3</sup> However, others, such as A. Claire Cutler, argue there is no reason why Krasner's definition of international regimes cannot be applied to private or semi-private governance arrangements.<sup>4</sup> The ICANN case therefore offers an opportunity to explore these questions further. There is a need to develop an understanding of the extent to which, and in what ways, the global institutions of the future will differ from conventional models of international organisation. While the ICANN model is fairly unusual so far, it may prove to be an early example of a new type of institution that will become increasingly important as the 21<sup>st</sup> century goes on, and therefore could have major implications for the study of International Relations.

Thus, there are two dimensions to the theoretical part of the project. It explores the question of whether regime theory can help us to understand ICANN, but also ultimately asks whether ICANN holds any lessons for regime theory. Is the regime concept defunct when dealing with a new type of governance organisation like ICANN, or can ICANN be fundamentally understood as a regime? There is also a need to consider just how far the ICANN model is likely to be representative of wider trends in global governance; whether ICANN is a 'one off', or a prototype for other global institutions of the future.

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<sup>3</sup> Strange, S. (1997). 'Cave! Hic Dragones: A Critique of Regime Analysis.' *The Politics of Global Governance: International Organizations in an Interdependent World*. P. F. Diehl. London, Lynne Rienner: 41-55. P52.

<sup>4</sup> Cutler, A. C. (2007). 'Private international regimes and interfirm cooperation.' *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 24-41. P27.

## **Introduction to the issue-area: Critical Internet resources and the role of ICANN**

### Introduction to IP addressing and DNS

In order for networked computers to communicate, there must be some means of distinguishing each individual computer or device from any other on the network. On the Internet, this requirement is fulfilled at a basic technical level by IP (Internet Protocol) addresses, unique numeric identifiers assigned to each computer or device. Their function is somewhat analogous to a postal address for conventional mail, or to a telephone number on a conventional voice telephone system; the use of a unique identifier allows data to be forwarded to or requested from that particular device. Under the IPv4 system utilised since 1983, an IP address consists of a 32-bit binary number, e.g. 11000000101010000000101000001010. However, on a computer-human interface, the address is usually expressed in ‘dotted decimal’ format for ease of interpretation, for example 192.168.10.10.

Although IP addresses are adequate to provide basic functionality, they are cumbersome and difficult for humans to remember. In response to this, a second level addressing system, utilising names instead of numbers, was created; the Domain Name System (DNS), familiar to all Internet users today. The system exists entirely for human convenience, as computers can communicate perfectly well using IP addresses alone. For example, the BBC’s Web server uses the IP address 212.58.244.71. Typing `http://212.58.244.71` into a Web browser would access the front page of the BBC website.<sup>5</sup> However, typing `http://www.bbc.co.uk` is much more user-friendly. Additionally, IP addresses are subject to change for numerous reasons. Some addresses are dynamically assigned and change on a regular basis, and sometimes whole blocks of addresses can switch around due to changes within organisations or reassignment to new entities. Advertising a given server based on a domain name avoids the problems associated with IP address change.

At a technical level, DNS works by mapping IP addresses to domain names. However, there are literally millions of servers on the Internet, each with different IP address and domain name details, and these change on a daily basis. A dynamic, constantly updated and publicly accessible resolution database of domain names and

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<sup>5</sup> IP address accurate at time of writing, January 2011

IP addresses is therefore required. Furthermore, this system must be capable of accommodating extremely heavy traffic, as many billions of DNS requests are made every day. For these reasons, it would be a practical impossibility to centralise all DNS information in a single location; a single integrated database would be too cumbersome and unable to handle the sheer volume of traffic. Instead, DNS is organised as a distributed database system, based around a hierarchical structure of interlinked nameservers. At the top of the naming hierarchy lies the ‘root’, a set of thirteen servers storing the IP addresses for the nameservers that handle the top-level domains (TLDs), such as .uk, .com, .org, and so on. The TLD nameservers are ‘authoritative’ for each top-level domain namespace (that is, the DNS file held on these servers is deemed to be the ‘official’, current version for that namespace, to which other nameservers defer). The root servers store the IP addresses of the TLD nameservers, but do not need to store information below that level.

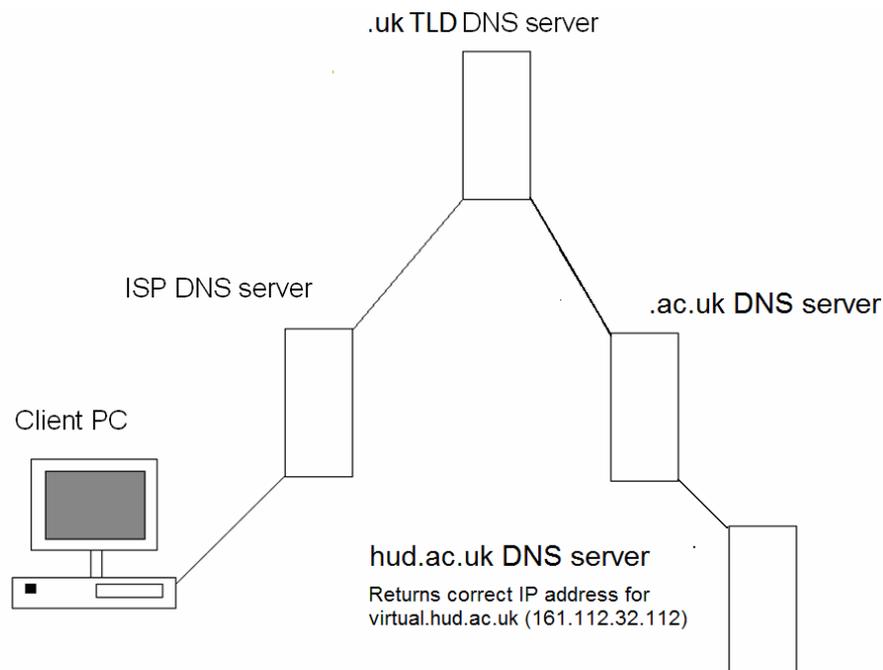
Under each TLD are second-level domains (SLDs), which include namespaces such as .co.uk or microsoft.com. Second-level domains have their own authoritative nameservers (one server may be authoritative for many second-level domains) to which queries for name resolution in that namespace are forwarded. The TLD nameserver keeps track of the database of second-level names under each TLD and the IP address of the SLD nameserver dealing with that namespace, but does not need to keep track of information below that level.

A large company such as Microsoft has numerous third-level domain names under its microsoft.com SLD (such as support.microsoft.com and technet.microsoft.com). Microsoft therefore maintains its own DNS servers for microsoft.com, to which all queries for name resolution under that namespace are redirected. The same is true for country-specific SLDs, such as .co.uk, which have their own authoritative nameservers; below these sit nameservers authoritative for third-level namespaces such as bbc.co.uk, and so on.

When a client computer is presented with a domain name such as virtual.hud.ac.uk, it will attempt to contact a DNS server to discover the IP address associated with that name. It will initially contact its local DNS server (for a home computer, this will usually be a server belonging to the ISP) for name resolution of virtual.hud.ac.uk. The local DNS server may or may not have the relevant data cached (i.e., stored for immediate retrieval) to be able to resolve the query itself. If the DNS server does not

have an entry for virtual.hud.ac.uk, it is capable of redirecting the request to another DNS server. If necessary, it will ‘go back to root’; that is, it will query the root servers in order to locate a nameserver authoritative for the .uk namespace. The .uk nameserver will then forward the request to a nameserver for the .ac.uk second-level namespace; this server will be aware of the address of the University of Huddersfield’s nameserver (which deals with the hud.ac.uk namespace) and will forward the request to that server, which will then make the final name resolution and forward the correct IP address for virtual.hud.ac.uk back to the client’s local DNS server, which will then return it to the client.

Figure 1.1: Domain name resolution



This is a slightly simplified account of how DNS works, but in essence this is the basic principle. It will be seen, therefore, that control and efficient management of the root and the top-level domain namespaces is essential for the DNS system to function correctly. This is the role of ICANN.

### Role of ICANN

Because the Internet developed haphazardly without collective international regulation, and because of the way it developed from ARPANET, a US government funded network, the US Department of Defense assumed unilateral control over important aspects of the Internet's core structure, particularly assignment of domain names and addresses (this oversight authority was later transferred to the Department of Commerce in recognition of the Internet's changing nature). As the funding source for ARPANET, the US government became the de facto owner of the DNS and IP addressing systems, but actual management of these systems was left in the hands of a small technical community. Following the opening up of the Internet to commerce, its exponential growth in the 1990s placed strains on the somewhat ad hoc system for managing the core naming and numbering resources. ICANN was created in 1998 to take over top-level management of these systems from the Internet Assigned Numbers

Authority (IANA), a small technical organisation that had operated under DoC authority.

ICANN was initially established as an ostensibly ‘private’, ‘multistakeholder’ organisation. Despite assurances that ICANN would become fully independent of US governmental control, however, the US government has never entirely relinquished its authority over the Internet’s core systems or its claim to legal ownership of the root. ICANN is formally a non-profit corporation incorporated under California law, and holds a contract from the US Department of Commerce (DoC) to manage DNS and IP addressing arrangements. In formal legal terms, therefore, ICANN is theoretically answerable to the US government for fulfilment of this contract. At least in theory, the DoC could choose to withdraw the contract and allocate it to another agency. There is also another contractual element to US governmental oversight of the DNS, namely a co-operative agreement with a private company named VeriSign, which controls the DNS root zone file at an operational level. The agreement ensures that ICANN policy is actually implemented at the root level, but it does also potentially give the DoC the option to veto any changes to the root.<sup>6</sup>

ICANN is made up of a number of bodies representing various ‘stakeholders’ in the domain name and IP addressing industry. It sits at the head of a hierarchy of organisations, to which day-to-day management of various aspects of the naming and numbering systems are delegated. Each TLD created in the DNS root is managed by an organisation known as a ‘registry’. Registries do not normally sell second-level domain names directly to the consumer; this is the role of ‘registrars’, third-party organisations (usually private companies) acting as middlemen between the registries and end-users. TLDs, while identical from a technical perspective, are divided into four types in terms of management and intended use. Generic top-level domains (gTLDs), such as .com, .biz, .net or .org, are managed by registries (mostly for-profit companies) under contract with ICANN, for example VeriSign is the registry for .com. gTLD registries are required to sign formal Registry Agreements agreeing to abide by ICANN policies. Country-code top-level domains (ccTLDs), such as .uk, .fr

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<sup>6</sup> United States Department of Commerce: National Telecommunications and Information Administration (2010). Domain Names: Management of Internet Names and Addresses. Cooperative Agreement Between the Department of Commerce and VeriSign (Network Solutions). Last amended July 6 2010. Retrieved 27 September 2011, from <http://www.ntia.doc.gov/legacy/ntiahome/domainname/nsi.htm>

or .jp are usually managed by a public or private registry operator in the relevant country, for example Nominet is the registry for .uk. Unlike gTLD registries, ccTLD registries are not required to sign mandatory Registry Agreements, though the majority have entered into formalised agreements with ICANN on a voluntary basis. Also, unlike gTLD registries, ccTLD registries are not obliged to provide mandatory financial contributions to ICANN, though they are encouraged to do so voluntarily. A special restricted category of gTLDs, sponsored top-level domains (sTLDs) are managed by the relevant sponsoring organisation, for example .museum is managed by the International Council of Museums. Finally, certain domains are reserved for the use of US public authorities, such as .mil, .gov and .edu.

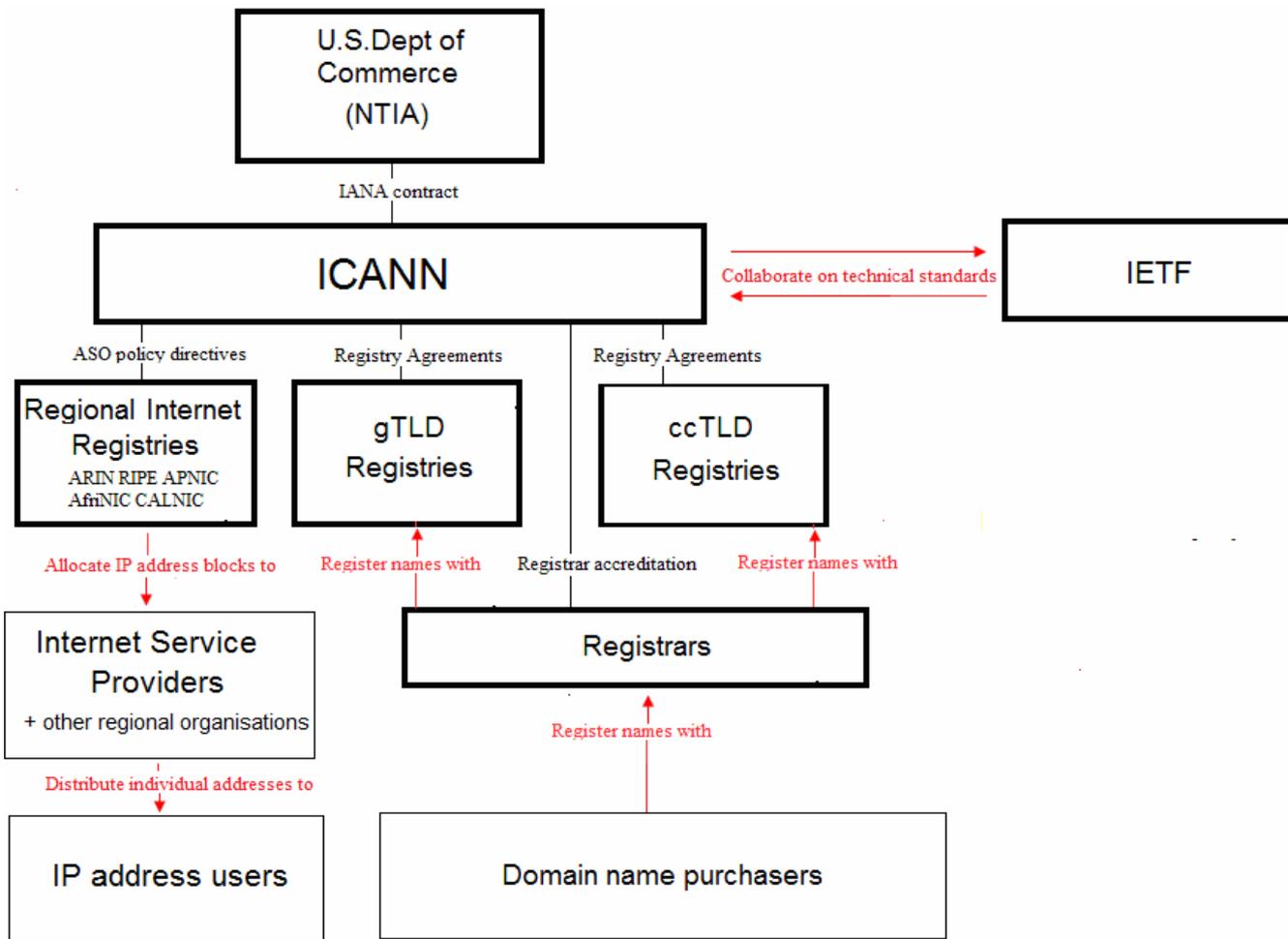
With regards to IP address allocation, ICANN allocates large blocks of addresses to organisations known as Regional Internet Registries (RIRs, not to be confused with domain name registries). There are five such RIRs, made up of representatives from various interested parties, such as Internet service providers (ISPs), telecommunications organisations, educational institutions, governments, regulatory agencies, and large corporations. RIRs allocate smaller blocks of IP addresses to ISPs and other large organisations, which then in turn allocate individual IP addresses to end-users.

ICANN also has a close relationship with the Internet Engineering Task Force (IETF). IP addressing and DNS technology are not static; they are modified and updated over time. ICANN recognises the IETF as the authoritative body for defining Internet standards. The relationship is a two-way one; while ICANN is tasked with implementing IETF standards, ICANN also asks the IETF to produce specific standards that ICANN identifies as being required. The ICANN-IETF relationship is formalised via a Memorandum of Understanding between the two organisations.<sup>7</sup> There is also a permanent Liaison assigned by the IETF to ICANN.

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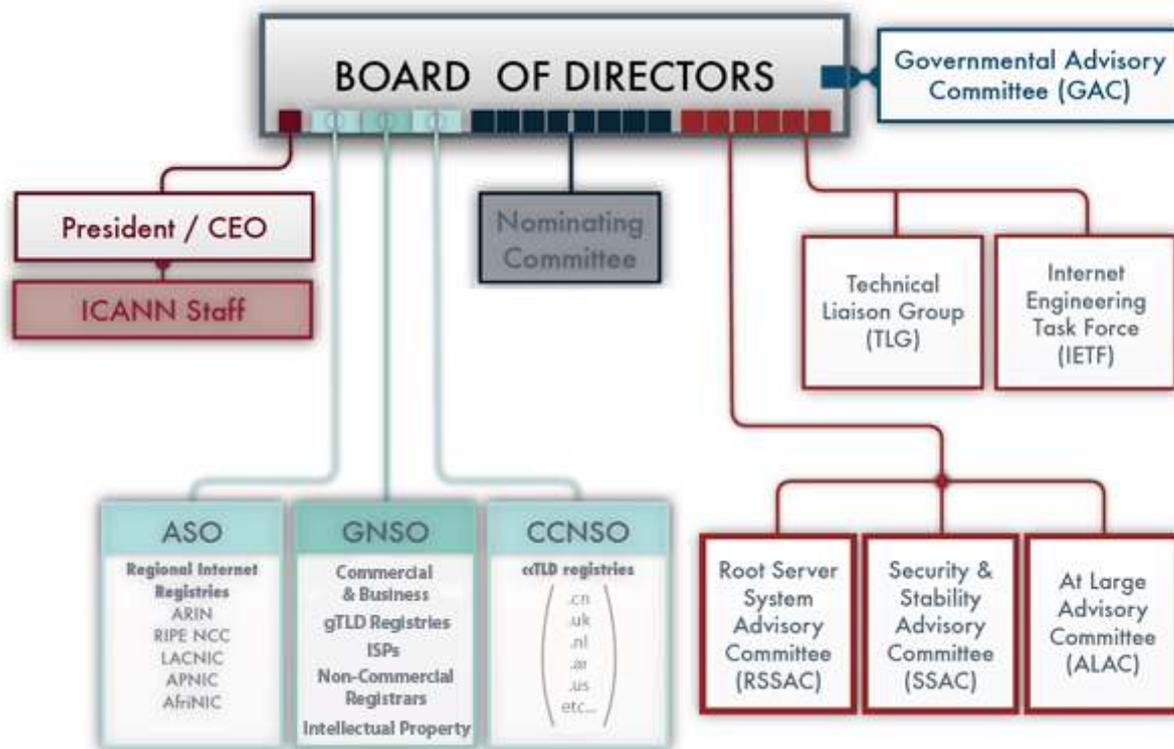
<sup>7</sup> IETF-ICANN (2000). Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority. Signed on 1 March 2000. Retrieved 5 August 2010, from <http://www.icann.org/en/general/ietf-icann-mou-01mar00.htm>

Figure 1.2: Internet naming & numbering resource governance - structure



## ICANN – internal organisational structure

Figure 1.3: ICANN organisational structure



Source: ICANN (2009). Retrieved 16 September 2009, from <http://www.icann.org/en/about/>

ICANN's organisational structure is set out in its key 'constitutional' document, the ICANN Bylaws.<sup>8</sup> Its chief decision-making body is its Board of Directors, which has final authority in all areas of ICANN decision-making, and sole authority to exercise the powers of ICANN, control its property and direct its business and affairs (or to delegate these powers as it sees fit).<sup>9</sup> It can also modify the Bylaws.<sup>10</sup> The Board consists of sixteen voting members (Directors), including: eight members selected by the Nominating Committee; six members selected by the Supporting Organisations (two each); one member selected by the At-Large Community; and the President of

<sup>8</sup> ICANN (2011). Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>9</sup> ICANN (2011). Article II, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>10</sup> Ibid

ICANN.<sup>11</sup> The Bylaws go to considerable lengths to ensure international representation on the Board<sup>12</sup>, which currently represents twelve nationalities.<sup>13</sup> No official of a national government or IGO may serve as a Director.<sup>14</sup>

The three Supporting Organisations (SOs) are intended to represent the major stakeholders in the industry, and play a major role in development of policy proposals to be passed to the Board for approval. The Address Supporting Organisation (ASO) is made up of representatives of the RIRs, and deals with policy issues relating to the operation, assignment, and management of Internet addresses.<sup>15</sup> The Country Code Names Supporting Organisation (CCNSO) deals with policy relating to ccTLDs, and is made up of representatives of the ccTLD registries.<sup>16</sup> The Generic Names Supporting Organisation (GNSO) deals with policy relating to gTLDs, and is made up of representatives from a number of stakeholder ‘Constituencies’, including: the Business and Commercial Users Constituency; the Non-Commercial Users Constituency; the gTLD Registries Constituency; the Registrars Constituency; the Intellectual Property Constituency; and the ISPs Constituency.<sup>17</sup>

In addition, there are a number of advisory committees, including the Governmental Advisory Committee (GAC); the At-Large Advisory Committee (ALAC); the Root Server System Advisory Committee (RSSAC); and the Stability and Security Committee (SSAC). The GAC is made up of representatives of national governments, and is intended to ‘provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where

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<sup>11</sup>ICANN (2011). Article IV, Section 1, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>12</sup> ICANN (2011). Article IV, Sections 2, 3 and 5, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>13</sup>ICANN (2011). “Board Representation by Nationality.” Retrieved 26 July 2011, from <http://www.icann.org/en/maps/board.htm>

<sup>14</sup> ICANN (2011). Article IV, Section 4, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>15</sup> ICANN (2011). Article VIII, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>16</sup> ICANN (2011). Article IX, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>17</sup> ICANN (2011). Article X, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

they may affect public policy issues.’<sup>18</sup> The role of the ALAC is ‘to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users.’ It consists of ten members selected by Regional At-Large Organisations (RALOs) and five members selected by the Nominating Committee.<sup>19</sup> The RSSAC and SSAC are technical bodies that provide advice with regards to the technical operation of the domain name system to guide policymaking and help to ensure ICANN’s commitment to preserving the stability of the DNS is fulfilled.<sup>20</sup>

The IETF Liaison is intended to co-ordinate ICANN’s activities with that organisation. The Technical Liaison Group is intended to ‘connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN’s activities’ and is made up of representatives from four further Internet standards bodies: the European Telecommunications Standards Institute (ETSI); the International Telecommunication Union’s Telecommunication Standardisation Sector (ITU-T); the World Wide Web Consortium (W3C); and the Internet Architecture Board (IAB).<sup>21</sup>

The Nominating Committee (NomCom) is responsible for the selection of eight ICANN Directors as well as members of some other ICANN bodies. Its voting membership is made up of five delegates selected by the ALAC; seven delegates selected from the GNSO Constituencies; one delegate selected by the CCNSO; one delegate selected by the ASO; one delegate selected by the IETF; and one delegate selected by the Technical Liaison Group.<sup>22</sup>

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<sup>18</sup> ICANN (2011). Section 1, Article XI, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>19</sup> ICANN (2011). Section 4, Article XI, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>20</sup> ICANN (2011). Sections 2 and 3, Article XI, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>21</sup> ICANN (2011). Section 2, Article XI-A, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>22</sup> ICANN (2011). Article VII, Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

## Economic and political significance of DNS

With commercialisation and the rapid growth in the Internet's scale and reach in the 1990s, businesses and other entities came to appreciate the importance of the Internet as an online public face and as a tool for marketing and trading. As a result, domain names came to be regarded as an important economic resource, as identifiers and brand names for an organisation's presence online. As attractive domain names began to become scarce, particularly in the popular .com namespace, disputes over names became increasingly common, and pressure mounted for the creation of new TLDs to alleviate this bottleneck. From a technical perspective, new TLDs were easy to implement, but were opposed by intellectual property rights holders who already faced mounting problems with 'cybersquatters' (speculators who registered domain names corresponding to trademarks and held them for profit). From the early 1990s trademark owners pressed for a solution to the cybersquatting issue.<sup>23</sup>

With the number of names being registered rising rapidly, the provision of registration services was outsourced to a private-sector contractor, Network Solutions Inc. (NSI). Whereas registrations had previously been free, NSI was given the authority to charge a \$50 annual registration fee for each domain name. The fee, and NSI's monopoly, led to growing discontent from many registrants.<sup>24</sup> These pressures led to a plan by the Internet Society and the IANA to create a new organisation under the ITU to take over top-level management of the DNS and IP addressing systems.<sup>25</sup>

However, as will be explained in more depth in Chapter 2, the US government blocked this plan by refusing to hand over control of the root, instead putting forward its own proposals to 'privatise' management of the DNS.<sup>26</sup> The broad outlines of this policy were set out in 1998 by the Department of Commerce in a Green Paper<sup>27</sup>.

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<sup>23</sup> Abel, S.M. (1999). "Trademark Issues in Cyberspace: The Brave New Frontier." Michigan Telecommunications and Technology Law Review 5(1): 91-140. PP93-98.

<sup>24</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." Duke Law Journal 50(1): 187-260. PP200-201.

<sup>25</sup> IAHC (1997). Final Report of the International Ad Hoc Committee: "Recommendations for Administration and Management of gTLDs." February 4, 1997. Retrieved March 25, 2010, from <http://www.iahc.org/draft-iahc-recommend-00.html>.

<sup>26</sup> Clinton, W. J. (1997). The White House, Office of the Press Secretary, July 1 1997. Memorandum for the heads of executive departments and agencies. Subject: Electronic Commerce. Retrieved 25 July 2009, from <http://www.fas.org/irp/offdocs/pdd-nec-ec.htm>

<sup>27</sup> NTIA (1998). "A proposal to improve technical management of Internet names and addresses." Discussion draft, 30 January 1998. ('Green Paper') Retrieved 25 July, 2007, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1)

Meanwhile, other governmental authorities, notably the European Union, had begun to express understandable concern about the United States' control of a critical element of a global communication and commercial resource, upon which they foresaw their economies and societies becoming ever more dependent.<sup>28</sup> Moreover, control over ccTLDs, being associated with their respective national territories, began to be viewed as an aspect of state sovereignty by some scholars and governments.<sup>29 30</sup>

The Green Paper was followed by a White Paper<sup>31</sup>, which left the specifics of the new organisation to the 'private sector' to self-organise. This resulted in a series of initiatives and discussions involving the main private stakeholders in the industry about how to form a suitable organisation, a process that eventually led to the creation of ICANN. ICANN was subsequently recognised by the Department of Commerce and was awarded a contract to manage the DNS and IP addressing systems. Despite the unilateral actions of the US government in initiating the 'privatisation' approach, certain concessions were made to other governmental actors regarding the final shape of the ICANN regime, including the creation of an intergovernmental 'advisory' body at the behest of the EU,<sup>32</sup> the inclusion of a significant number of non-Americans on the Board,<sup>33</sup> and, it has been claimed, the 'vetting' of the initial Board by the EU and the Australian governments.<sup>34</sup>

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<sup>28</sup> See, for instance, European Union (1997). Bonn Ministerial Declaration on the role of global networks for the information society (8 July 1997). Retrieved 25 July, 2009, from <http://europa.eu.int/ISPO/policy/isf/documents/declarations/Bonn-Ministerial-Declaration.htm> and

Council of the European Union (1998). Internet Governance: Reply of the European Community and its Member States to the US Green Paper. (16 March 1998). Retrieved 25 July, 2009, from <http://web.archive.org/web/20000815093245/http://www.ispo.cec.be/eif/policy/govreply.html>

<sup>29</sup> Mueller, M. L. (2002). Ruling the Root: Internet Governance and the Taming of Cyberspace. Cambridge, Massachusetts, MIT Press. P243.

<sup>30</sup> Hagen, G. R. and K. G. von Arx (2002). "Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control." Richmond Journal of Law & Technology 9(1). Online journal. Retrieved 29 September 2008, from <http://jolt.richmond.edu/v9i1/article4.pdf> PP5-13.

<sup>31</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses." ('White Paper'). 5th June 2007. Docket Number: 980212036-8146-02. Retrieved 5 October 2008, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>32</sup> Leib, V. (2002). "ICANN – EU can't: Internet governance and Europe's role in the formation of the Internet Corporation for Assigned Names and Numbers." Telematics and Informatics 19(2): 159-171. P168.

<sup>33</sup> Ibid, PP168-170.

<sup>34</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media, 1(6):497-520. P507.

Political controversy over governance of the Internet's core systems continued after ICANN's foundation and was expressed in particular during the World Summit on the Information Society (2003 and 2005).<sup>35</sup> Various governments and other actors have expressed a desire to see ICANN replaced with an alternative, possibly an intergovernmental body, but any possibility of such a move has so far been blocked both by US intransigence and by lack of agreement among ICANN's critics about the form an alternative should take.<sup>36</sup> Meanwhile, as will be shown in Chapters 4-6, an array of actors, both private and governmental, continue to compete within the ICANN regime on an ongoing basis for influence over its policy decisions, as they attempt to advance their often conflicting interests.

In summary, by the late 1990s, as a consequence of commercialisation and the rapid increase in the Internet's importance from a research network into a critical communications infrastructure, what had once been primarily technical issues became political, legal, and economic problems that attracted high-level official attention. Whereas management of the naming and addressing systems was previously based on principles of rough consensus among a relatively small technical community, finding consensus was always likely to be much more difficult with so many diverse interests at stake. The politics of DNS was born.

### **Relevance of international regime theory**

As the organisation set up to manage DNS, an issue area that involves competing political and economic interests, ICANN is inevitably more than a mere technical co-ordinator. It is a global governance institution that produces public policy, yet in many respects it is unconventional in nature. ICANN was not set up in the context of any international treaty or intergovernmental convention. It is neither a conventional interstate organisation nor a wholly nongovernmental organisation, but incorporates both governmental and private sector actors in its organisational structure. ICANN's unusual features raise questions about the extent to which the organisation represents a new model for issue management at the global level and a departure from conventional approaches to global governance.

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<sup>35</sup> See Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge. PP 97-125.

<sup>36</sup> *Ibid*, PP123-124.

The international regime concept appears to be an appropriate tool for exploring some of these questions, since it offers a yardstick or baseline against which ICANN can be compared. By comparing ICANN to pre-existing models of global governance described by the international regime concept, it should be possible to explore the extent to which ICANN differs from those models and thus the extent to which it represents a fundamentally new approach to global governance.

Regime theory is, however, not a single unified body of theory. Though the actual concept of the international regime is fairly well defined, there are competing views on some key questions, such as how and why regimes come into being and are sustained. These tie in to broader debates between proponents of various paradigms in International Relations theory.

Rationalist theories encompass both realist and neoliberal institutionalist approaches. Both of these begin from some similar ontological assumptions. They stress the importance of state actors and state power as a basis for the international system structure, and assume conditions of anarchy in the international system; that is, a situation in which there is no overall authority above and beyond that of individual sovereign states. However, whereas realists believe that these conditions lead inevitably to competition and conflict between state actors, with any co-operation being short-term and tactical, neoliberal institutionalists argue that, because of mutual interdependence, there is an incentive for actors to build long-term co-operative arrangements. Realists such as Charles Kindleberger<sup>37</sup>, Robert Gilpin<sup>38</sup>, Stephen Krasner<sup>39</sup> and Daniel Drezner<sup>40</sup> have tended to explain successful international regimes in terms of the imposition of order, either by a single hegemonic state or by a small group of great-power states acting in concert. In this model, the stability of the regime is dependent upon the persistence of the existing distribution of power in the

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<sup>37</sup>See Kindleberger, C. P. (1973). *The World in Depression: 1929-1939*. Berkeley, University of California Press.

and

Kindleberger, C. P. (1981). "Dominance and Leadership in the International Economy: Exploitation, Public Goods and Free Rides." *International Studies Quarterly* 25(2): 242-254.

<sup>38</sup> See Gilpin, R. (1987). *The Political Economy of International Relations*. Princeton: Princeton University Press.

<sup>39</sup> Webb, M. C. and S. D. Krasner (1989). "Hegemonic Stability Theory: An Empirical Assessment." *Review of International Studies* 15(2): 183-98. PP183-184.

<sup>40</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. PP3-14.

international system. If the hegemon's relative capabilities decline, the regime will collapse.<sup>41</sup> Neoliberal institutionalists such as Robert Keohane, by contrast, assert that mutual recognition among actors of the rationality of co-operation leads to the establishment of understandings between them, a process of 'convergence of expectations', which can then become crystallised into full-blown international regimes.<sup>42</sup>

Neo-Marxist type approaches, put forward by scholars such as Robert Cox<sup>43</sup> and Vincent Mosco<sup>44</sup>, emphasise the economic and social forces of capitalism as the starting point for understanding of global political economy and as the ultimate basis for international regimes and institutions. Such approaches view the current world order as an integrated capitalist system in pursuit of capital accumulation. Under this system, resources are stripped of their 'intrinsic' value and turned into commodities in a market that dictates their exchange value. Neo-Marxist approaches focus on the organisation of production, exchange and property, and how governance relates to those broader economic relations and structures. They focus on a view of power as economic exploitation and see the role of both market economy states and international institutions as being to entrench and serve the interests of the dominant capitalist world system. This system produces an international order better described as a world political economy, which includes both formal governance arrangements and non-state organisations, and is supported by a prevailing set of ideas.<sup>45</sup>

Constructivist approaches challenge the core assumptions of both rationalist and neo-Marxist paradigms on IR, arguing that what is assumed to be 'real' in the political world is in fact socially constructed. There are various strands of constructivism, ranging from out-and-out postmodernist and poststructuralist perspectives to the more moderate 'thin' or 'social' constructivist approaches of scholars like Alexander

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<sup>41</sup> Young, O. R. (1983). "Regime dynamics: the rise and fall of international regimes." *International Regimes*. S. D. Krasner. New York, Cornell University Press: 93-114. P116.

<sup>42</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. PP53-54.

<sup>43</sup> See Cox, R. W. (1981). "Social Forces, States and World Orders: Beyond International Relations Theory." *Millennium - Journal of International Studies* 10(2): 126-155.

<sup>44</sup> See Mosco, V. (1996). *The Political Economy of Communication*. London, Sage Publications. PP146-147.

<sup>45</sup> See, for example, Cox, R. with T. J. Sinclair (1996). *Approaches to World Order*. Cambridge, Cambridge University Press.

and  
Mosco, V. (1996). *The Political Economy of Communication*. London, Sage Publications.

Wendt<sup>46</sup> and David Dessler.<sup>47</sup> Constructivism seeks to demonstrate how structure in the global system is created and sustained by ongoing processes of social practice and interaction. Actors' behaviour within the system is the result of identities and interests; these are not the inevitable product of material forces, but are grounded in socially constructed ideas.

These debates can be linked to some of the competing perspectives on ICANN's nature that will be explored in Chapter 3. For example, the view that ICANN is a regime created and controlled by states, as postulated by writers such as Daniel Drezner<sup>48</sup>, has much in common with traditional 'rationalist' perspectives on international regime theory. 'Liberal democratic' interpretations of ICANN, advocated by scholars such as Jonathan Weinberg<sup>49</sup>, Kathleen Fuller<sup>50</sup> and Jonathan G. S. Koppell<sup>51</sup>, echo liberal perspectives on IR, which revolve around concepts such as pluralism, diplomacy, interdependence, co-operation, representation and legitimacy. Perspectives emphasising the role of corporate actors in ICANN, as advanced by writers like Hans Klein<sup>52</sup> and Geoff Huston<sup>53</sup>, find echoes in alternative branches of IR theory, including neo-Marxist type approaches, that stress the logic of the global capitalist system as the ultimate basis for international regimes and institutions. Constructivist perspectives on IR can also be usefully applied to the ICANN case, since many of the issues surrounding Internet governance reflect conceptualisations that have emerged over the last two decades. The domain name space, while in reality being no more than a series of files held on linked computers, is conceptualised as something much more. It is a roadmap to the virtual world; it is the key to online identity; and thus, for corporate actors, it is an economic resource of

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<sup>46</sup>See Wendt, A. (1999). *Social Theory of International Politics*. Cambridge, Cambridge University Press.

<sup>47</sup> See Dessler, D. (1989). "What's at Stake in the Agent-Structure Debate?" *International Organisation* 43(3): 441-473.

<sup>48</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. PP113-117.

<sup>49</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260.

<sup>50</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html> PP2-42.

<sup>51</sup> Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"." *Public Administration Review* 65(1): 94-108.

<sup>52</sup> Klein, H. (2005). 'ICANN Reform: Establishing the Rule of Law. A policy analysis prepared for The World Summit on the Information Society (WSIS).' Tunis. 16-18 November 2005. Retrieved 10 January 2010, from <http://www.internetgovernance.org/pdf/ICANN-Reform-Establishing-the-Rule-of-Law.pdf> P4.

<sup>53</sup> Huston, G. (2005). "ICANN, the ITU, WSIS, and Internet Governance." *The Internet Protocol Journal* 8(1): 19-24.

enormous value. For governments, the identifiers used to represent country-code top-level domains have become seen as extensions of national sovereignty. All of these views of the namespace rest ultimately on socially constructed values. Thus, a constructivist approach can also provide valuable insights into the politics of Internet resource governance.

Questions around ICANN's hybrid public / private nature also tie in to wider debates concerning emerging governance models in an era of globalisation, and the extent to which these challenge the statist basis of international organisation. For example, some scholars, such as Dan Schiller, identify a 'takeover' by the corporate-led market system of key social functions previously the domain of the nation-state.<sup>54</sup> On the other hand, other writers, such as Drezner, are sceptical of claims that the traditional Westphalian state system is being eclipsed by the forces of globalised capitalism.<sup>55</sup> ICANN, as an organisation featuring ongoing competition between governmental and corporate actors for control of policymaking, seems to sit at the heart of this debate.

As will be demonstrated in subsequent chapters, findings from the empirical phase of the research support the application of concepts drawn from more than one paradigm on regime theory to the ICANN case. ICANN is a multifaceted regime, aspects of which could be justifiably interpreted from the perspectives of hegemonic stability theory, neoliberal intuitionist co-operative models, or capitalist / neo-Marxian perspectives. However, as will be shown, an analysis based on social constructivism can be utilised to draw these various interpretations of the regime together to produce a broader overall understanding, as well as to explain the process by which ICANN has evolved as an organisation over time.

### **Aims of the project**

As discussed in the first section of this chapter, the overall aim of the project is to understand ICANN's nature as a governance organisation, how it relates to broader patterns in global governance, and the extent to which it represents a fundamentally new approach to global issue-management.

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<sup>54</sup> Schiller, D. (1999). *Digital Capitalism: Networking the Global Market System*. Cambridge, MA, MIT Press. P205.

<sup>55</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. P3.

These questions can be divided into a number of interrelated objectives:

- 1) To explore the extent to which ICANN has changed as an organisation compared to the model set out in 1998, and to explain why such change has occurred;
- 2) To explore ICANN's internal dynamics and how it makes policy in practice, and to explore whether the 'consensus based decisionmaking' ideal is adhered to in reality;
- 3) To understand the extent to which ICANN diverges from conventional models of issue-management at the global level as described by various paradigms on regime theory;
- 4) To explore what lessons ICANN can offer about the continuing applicability of the international regime concept, and whether and in what ways regime theory may need to be modified to deal with emerging new models of global governance as exemplified by the ICANN case.

### **Methodology and sources**

Although the underlying questions have theoretical import, it was necessary to gain a detailed working understanding of ICANN before any comparison with the models offered by regime theories could be made. This involved an in-depth study of the organisation, beginning by looking at its origins and history, and moving on to examine how various scholars have previously interpreted the organisation. This was followed by an in-depth empirical study of the ICANN policymaking process in action, in an attempt to gain insight into the roles played by various actors, the relative amount of influence each held, and the power relationships between them. The results of these investigations formed the basis for an understanding of the organisation that then informed subsequent efforts to compare ICANN to the governance models offered by regime theories.

The first part of the thesis begins to explore Objective 1 by looking at the regime's history, including the circumstances and events that lead to its creation, the details of the initial organisational model, and ICANN's subsequent development over the next dozen years. Sources for this stage of the investigation included pre-existing histories

of the Internet, particularly those written by the Internet pioneers themselves, such as Vint Cerf<sup>56</sup> and Barry Leiner.<sup>57</sup> Other accounts of the Internet's history were also utilised, including works by scholars such as Jack Goldsmith and Tim Wu,<sup>58</sup> John Mathiason<sup>59</sup> Wolfgang Kleinwaechter,<sup>60</sup> Richard T. Griffiths,<sup>61</sup> and Milton Mueller.<sup>62</sup> Where relevant, contemporary media reports from reputable sources, such as the BBC, were also utilised. The intention was to use a range of sources to gain a comprehensive picture and also to safeguard against the possibility of any one source giving a biased interpretation of events.

In addition, a wealth of primary source material was readily available. These sources included first-hand documentation of the events, for example the US Government's Green and White Papers of 1998, which laid the groundwork for the formation of ICANN. Other primary source documents provided first-hand evidence of the attitudes, goals and motivations of key actors and interest groups, for example the EU's statements of policy, national governmental proposals to the World Summit on the Information Society (WSIS) or the World Intellectual Property Organisation's 1999 Report on the Internet Domain Name Process.

The next section of the dissertation turns to existing scholarly perspectives on ICANN in relevant academic literature. It reflects an attempt to categorise some of the extensive literature on ICANN into a number of groupings, including 'technical caretaker' models, 'liberal democratic' perspectives, corporatist perspectives, statist / intergovernmental approaches and 'public-private partnership' models. These competing perspectives on the sort of governance system ICANN represents reflect

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<sup>56</sup> Cerf, V. (2010). "A Brief History of the Internet and Related Networks." Internet Society. Retrieved 28 July, 2010, from <http://www.isoc.org/internet/history/cerf.shtml>

<sup>57</sup> Leiner, B. M., V. G. Cerf, et al (2010). "A Brief History of the Internet." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>

<sup>58</sup> Goldsmith, J. L. and T. Wu (2006). *Who Controls the Internet? Illusions of a Borderless World*. New York, Oxford University Press.

<sup>59</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge.

<sup>60</sup> Kleinwaechter, W. (2007). 'The History of Internet Governance' in Möller, C. and A. Amouroux. (2007). "Governing the Internet: Freedom and Regulation in the OSCE Region." Organization for Security and Co-operation in Europe (OSCE). Retrieved 29 July, 2007, from [http://www.osce.org/publications/rfm/2007/07/25667\\_918\\_en.pdf](http://www.osce.org/publications/rfm/2007/07/25667_918_en.pdf) PP41-66.

<sup>61</sup> Griffiths, R.T. (2010). "History of the Internet." Lieden, Lieden University, 2010. Retrieved 24 August, 2010, from <http://www.leidenuniv.nl/letteren/internethistory/index.php3-c=5.htm>

<sup>62</sup> Mueller, M. L. (2002). *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge, Massachusetts, MIT Press.

some of the ontological questions about ICANN's nature that were explored by this project.

Chapters 4-6 document how Objectives 1 and 2 were further addressed by examining three in-depth case studies of major ICANN policy development areas. The aim of this was to explore in depth how ICANN policy is created, and to identify which actors and interests wield the greatest influence over policymaking in practice, in an effort to gain insight into the organisation's internal dynamics and how far it lives up to the original principles set out in 1998. As shown in later chapters, the results of these investigations subsequently formed the basis of efforts to evaluate the various aforementioned scholarly perspectives on the nature of the regime. For example, evidence of strong governmental influence over policymaking would have helped to support a statist / intergovernmental interpretation of ICANN, while evidence that corporate actors dominate policymaking would have supported interpretations of ICANN as an essentially private, commercial regime. Evidence of collaboration and / or compromise between governmental and private actors in policy creation would have lent weight to the 'public private partnership' interpretation of the organisation. The 'liberal democratic' model would have been given support by evidence of real influence over policymaking by the 'public at-large', via channels such as the public comments process and the ICANN At-Large organisation.

The case studies chosen for this purpose included New gTLDs policy, Internationalised Domain Names and the Uniform Domain-Name Disputes Resolution Policy. These particular policy areas were chosen, firstly because they represent some of the most important policy issues dealt with by ICANN during its first dozen years, and secondly because each highlights the role of different actors within the ICANN regime.

Some of the issues addressed in this phase included:

- To what extent is ICANN a public policymaker as opposed to a technical coordinator?
- To what extent is ICANN a globalised nonstate actor divorced from the Westphalian state system? To what extent do states shape policy?

- To what extent is ICANN policymaking based on 'bottom-up consensus'? Does the 'multistakeholder' model stand up to scrutiny?
- How far is ICANN policy influenced by input from the global Internet-using community?
- To what extent is ICANN policymaking captured by a set of major corporate interests?
- To what extent are ICANN norms now settled and stable, and to what extent do they continue to be challenged?

Each case study took the form of a step-by-step investigation into each stage of the policy development process, examining the work of the various policy development committees and attempting to evaluate the relative influence of various actors and interest groups in producing the specific policy outcomes resulting from their work.

The majority of the data for these investigations was drawn from primary source documents pertaining to ICANN's activities, such as minutes of meetings, committee reports and finalised policy statements. There were no major problems with source survival and availability; the relevant documentary sources are in the public domain and are readily available, mostly from ICANN's own website. Indeed, such a vast amount of source material was available that the main difficulty lay in sifting, sorting and identifying the most relevant documents for the purposes of the investigation.

Despite the large volume of documentary evidence available, however, there were certain gaps in the record; for example, there are no minutes of meetings for the GAC or of certain relevant GNSO committees. Moreover, there are clearly certain potential limitations with such documentary sources; for example, there is no guarantee that minutes of meetings will capture everything that was discussed, while reports could arguably be deliberately written to present ICANN activities in a more positive light to the public.

In an effort to overcome these limitations, as well as fill in some of the gaps in the documentary record, some relevant individuals were contacted where appropriate and asked to give interviews by telephone and / or email. These included current and past members of some of the ICANN policymaking committees under scrutiny, as well as a number of GAC representatives. Although not all individuals contacted responded, a

significant number did so and were mostly open and willing to discuss the issues. Where possible, several members of each committee were contacted to provide corroboration. While the written record was sufficient to provide most of the required data, the information from these contacts helped to fill in certain gaps and answer certain specific questions, and also assisted in interpretation of the written record. Such interviews were carried out on a largely unstructured basis and took the form of telephone or email conversations between the author and the respondents. It was recognised that face-to-face interviews might possibly have yielded more information in some respects, but this approach would have been difficult to carry out due to the constraints of physical distance and finance; almost all of the respondents were based outside the UK, and many outside Europe.

An example of such an email conversation is included in Appendix 1.3. Records of other email conversations are available on request. In order to meet ethics requirements, each of the interview respondents was given the option to have their names remain confidential; however, none requested this. A sample of the initial interview request email is included in Appendix 1.1. A list of persons contacted is included in Appendix 1.2.

Another avenue of investigation involved study of the role of Public Comments Periods (PCPs). If the ‘liberal democratic’ or indeed ‘broad multistakeholder’ models fit reality, public comments would be expected to have some significant impact on policy development. This was explored by examining the comments from PCPs, all of which are archived by ICANN, and identifying some themes and proposals, particularly any that seem to have broad support across a significant proportion of commentators. These were then compared to the output of the policy formulation committees in an effort to determine whether input from public commentators tends to get incorporated into actual policy recommendations. The ICANN personnel who were contacted were also asked directly to comment on how public comments were taken into account.

With regards to the third case study chapter which focused on ICANN’s Uniform Domain-Name Disputes Resolution Policy, the question of whether the policy appears to disproportionately favour a particular set of interests (namely trademark holders) was relevant. This question was explored by examining the details of a sample of 250

case histories of arbitration decisions made under the UDRP, looking for evidence of bias, inconsistency and deviation from the rules. The case histories were selected at random from the online databases of three of the four ICANN dispute resolution providers and cover the period 2000-2009.

Further details of specific methodology for the empirical phase of the study will be made clear in the case study chapters (Chapters 4-6).

Following the case study chapters, the scholarly analyses of ICANN were revisited and evaluated in light of the evidence from the case studies, in an effort to produce some final responses to objectives 1 and 2.

The next phase of the dissertation then moves to the theoretical level in order to explore objectives 3 and 4. The extent to which ICANN diverges from conventional models of issue-management was explored by comparing the evidence gained in the earlier phases of the investigation to models of global governance offered by international regime theories. The first step in this process was to examine the extent to which ICANN can be interpreted as an international regime using Krasner's definition. The patterns of interaction between participants in the ICANN system, as revealed by the policy case studies, were utilised in an effort to evaluate the extent to which ICANN resembles the regime concept described by Krasner and others. This was followed by an attempt to define the ICANN regime in terms of its principles, norms, rules and decisionmaking procedures.

ICANN was then compared to the models offered by various paradigms on regime theory, in an attempt to evaluate the extent to which these models fitted the ICANN case. For example, if the policy case studies had produced evidence that ICANN policymaking was dominated by states, this would have provided the basis for a statist / realist interpretation of the organisation, while evidence that ICANN was dominated by commercial actors would have lent weight to a neo-Marxist interpretation. In the event, the evidence from the case studies demonstrated that ICANN policy is the outcome of interactions between a set of governmental and nongovernmental actors, all of whom compete to advance their specific interests but also have a mutual interest in maintaining the interconnectivity of the Internet and the stability of its core systems. Furthermore, the case studies demonstrated that interactions of the key

regime participants have caused the regime framework to become modified over time. As is explained in Chapter 8, this evidence favoured the application of neoliberal institutionalist models of regime theory as a starting point for understanding ICANN, but modified by the application of concepts taken from social constructivism and particularly structuration theory.

The answers to these questions were ultimately used to help determine how the ICANN model might fit into a broader understanding of global governance in the early twenty-first century. The final part of the dissertation explores whether lessons from the ICANN case study can inform our understanding of regime theory, and the extent to which the regime concept remains a useful conceptual tool for interpreting new emerging approaches to global governance as represented by ICANN.

In addition to the sources listed, technical reference material pertaining to Internet infrastructure was utilised where required.

# **Chapter 2**

## **A brief history of ICANN**

### **Overview**

In order to fully understand the ICANN regime, it is necessary to examine the background to its creation, as well as the ways in which it has evolved since 1998. This chapter will examine that historical background, exploring the actors and forces that brought ICANN into being and influenced its continued development.

### **History of the Internet – summary**

The Internet was ultimately built upon pre-existing electronic communications networks, the telephone and telegraph systems, that originated in the nineteenth century. In the 1960s, the feasibility of utilising these systems as a means of data transfer between electronic digital computers began to be explored.

Early experiments in computer networking began in the 1950s and early 1960s, and included military projects such as the US SAGE air defence system, commissioned in the late 1950s.<sup>63</sup> In 1964, Paul Baran, a researcher at RAND (a US governmental think-tank), produced the concept of a wide area network of computers with multiple redundant connections between them. The main purpose was to be a military communications network with a high degree of survivability in the event of a nuclear attack.<sup>64</sup> The Pentagon's Advanced Research Projects Agency (ARPA) subsequently took up this concept.

In 1965, Larry Roberts and Thomas Merrill connected a computer at MIT to one in California via a standard telephone line, thus proving the feasibility of creating wide area computer networks using the existing telecommunications system.<sup>65</sup> In 1967

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<sup>63</sup> Forrester, J.W., and Everett, R.R. (1990). "The Whirlwind computer project." IEEE Transactions on Aerospace and Electronic Systems 26(5):903-910. P903, 906

<sup>64</sup> RAND (2010). "Paul Baran and the Origins of the Internet." Retrieved 29 July, 2010, from <http://www.rand.org/about/history/baran.html>

<sup>65</sup> Leiner, B. M., V. G. Cerf, et al. (2010). "A Brief History of the Internet." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>.

Roberts published a plan for a wide-area network to be known as ARPANET. After its publication, he discovered that similar work had been proceeding at RAND and also at the British National Physical Laboratory, and from 1967 onwards there was an exchange of ideas between these three communities of researchers.<sup>66</sup> In 1968, the first prototype packet-switching network was tested by the NPL. The following year, ARPA funded a larger-scale experiment resulting in the foundation of the ARPANET, which initially linked four mainframe computers (known as ‘nodes’ or ‘hosts’) around the United States.<sup>67</sup>

Over the next few years, more computers were added to the ARPANET, including nodes in Hawaii, Norway and London. In December 1970, the Network Working Group (NWG), a semi-formal grouping of researchers working under Steve Crocker, finished the initial ARPANET host-to-host protocol, called the Network Control Protocol (NCP). This was implemented during the period 1971-1972, and made possible the development of the first network applications such as email. The first email send and receive software was developed in 1972 by Roberts and Ray Tomlinson at Bolt Beranek and Newman Inc. (BBN, a private sector technology research company), and email went on to become the ‘killer application’ of the ARPANET over the next decade.<sup>68</sup>

Instead of authority-based decisionmaking, early network standard creation relied on a process that ARPANET researchers termed ‘rough consensus and running code.’ This was based around a format for distributing memoranda on network methods, behaviours and innovations, known as Requests for Comments (RFCs). RFCs were numbered sequentially, beginning with RFC 1 in April 1969. Initially, any researcher working on the ARPANET could write an RFC, and, if enough people agreed and used the idea, the design became a standard. The RFC system continues today under the IETF, and still forms the main method for documenting Internet standards, although it has become more formalised over the years.<sup>69</sup>

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<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> ISOC (1999). RFC 2555: ‘30 Years of RFCs.’ Retrieved 29 July, 2010, from <http://www.rfc-editor.org/rfc/rfc2555.txt>

Other wide-area networks, initially unconnected to the ARPANET, began to appear in various geographical locations, including academic networks between mainframes at universities in the USA, Europe, Canada, Hong Kong and Australia. These networks were initially mostly incompatible with each other.<sup>70</sup> In 1973, ARPA initiated a programme called the ‘internetting project’, to develop communication protocols that would allow data transfer across dissimilar networks.<sup>71</sup> It eventually produced a protocol suite known as TCP/IP, named after the two initial protocols to be developed, Transmission Control Protocol and Internet Protocol.<sup>72</sup> TCP/IP became the standard protocol suite on the ARPANET in 1983, allowing other networks, such as the UK’s JANET, to be connected to the ARPANET. By the mid-1980s, the term ‘Internet’ began to come into widespread use to describe the resultant interconnected network. Advancing technology and the growing popularity of desktop computers and LANS in the 1980s allowed the nascent Internet to flourish.<sup>73</sup> By 1984, over one thousand computers were connected to the Internet, rising to ten thousand a mere three years later.<sup>74</sup>

In 1983, the US military portion of the network was separated off to form the MILNET, leaving ARPANET as a pure research network<sup>75</sup> (though the US Department of Defense continued to hold oversight authority over its naming and numbering systems). In 1986, the U.S. National Science Foundation (NSF) initiated the development of the NSFNET, a new ‘backbone’ linking the various networks together. NSF elected to support ARPA’s existing organisational infrastructure, hierarchically arranged under the Internet Activities Board (IAB), a descendant of the Network Working Group. NSF also implemented an ‘Acceptable Use Policy’ which prohibited backbone usage for purposes ‘not in support of Research and Education’; i.e., commercial traffic was not permitted.<sup>76</sup>

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<sup>70</sup> Leiner, B. M., V. G. Cerf, et al. (2010). "A Brief History of the Internet." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>

<sup>71</sup> Cerf, V (2010). "A Brief History of the Internet and Related Networks." Internet Society. Retrieved 28 July, 2010, from <http://www.isoc.org/internet/history/cerf.shtml>.

<sup>72</sup> Ibid

<sup>73</sup> Leiner, B. M., V. G. Cerf, et al (2010). "A Brief History of the Internet ." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>

<sup>74</sup> Zakon, R. (1998). RFC 2235: ‘Hobbes’ Internet Timeline.’ Retrieved 28 July, 2007, from <http://tools.ietf.org/html/draft-rfced-info-hobbes-00>.

<sup>75</sup> Leiner, B. M., V. G. Cerf, et al (2010). "A Brief History of the Internet." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>

<sup>76</sup> Ibid

In 1989, the number of connected computers exceeded 100,000.<sup>77</sup> The following year, the ARPANET name was dropped and the term 'Internet' officially adopted as the term for the unified global network.<sup>78</sup> In the same year, Tim Berners-Lee at CERN developed HTML and the Hypertext Transfer Protocol (HTTP), allowing the creation of the first Web pages.<sup>79</sup> In the 1990s, the World Wide Web would go on to become the new 'killer application', underpinning the Internet's explosive growth in popularity.<sup>80</sup> Another development of enormous significance was the dropping in 1991 of the non-commercial rule, opening up the network to business traffic and thus to commercial investment.<sup>81</sup> Private Internet Service Providers (ISPs) appeared and opened up the Internet to home and small business users for the first time. New 'peering' arrangements were agreed for direct data transfer between ISPs via new Internet exchange (IX) points. These are physical connections allowing ISPs to exchange Internet traffic between their networks directly, thus eliminating the need for a third-party 'backbone'.<sup>82</sup>

In 1992, the Internet Activities Board was reorganised into the Internet Architecture Board (IAB), the Internet Engineering Task Force (IETF), the Internet Research Task Force (IRTF) and the Internet Engineering Steering Group (IESG). These bodies would operate under the auspices of the Internet Society (ISOC), a new not-for profit corporation based in Geneva.<sup>83</sup> This represented a formalisation of some previously quite ad-hoc structures and procedures.

The decade following commercialisation saw an explosive growth in the number of computers and users on the Internet, reaching 60 million computers by 2000.<sup>84</sup> Growth continued to accelerate beyond 2000, particularly in regions where uptake had

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<sup>77</sup> Zakon, R. (1998). RFC 2235: 'Hobbes' Internet Timeline.' IETF. Retrieved 28 July, 2007, from <http://tools.ietf.org/html/draft-rfc2235-00>.

<sup>78</sup> Ibid

<sup>79</sup> Berners-Lee, T. (1990). "WorldWideWeb: Proposal for a HyperText Project." Retrieved 28 July, 2007, from <http://www.w3.org/Proposal.html>

<sup>80</sup> Griffiths, R.T. "History of the Internet." Chapter 2: 'From Arpanet to World Wide Web.' Lieden University, 2010. Retrieved 24 August, 2010, from <http://www.leidenuniv.nl/letteren/internethistory/index.php3-c=5.htm>

<sup>81</sup> Leiner, B. M., V. G. Cerf, et al (2010). "A Brief History of the Internet." Internet Society. Retrieved 29 July 2010, from <http://www.isoc.org/internet/history/brief.shtml>

<sup>82</sup> BGP Advanced Internet Routing Resources (2010). "Global Internet Exchange Points / BGP Peering Points / IXP." Retrieved 9 August, 2010, from <http://www.bgp4.as/internet-exchanges>

<sup>83</sup> Cerf, V., Kahn, B., and Chapin, L. (1992). "Announcing ISOC." Internet Society. Retrieved 28 July, 2010, from <http://www.isoc.org/internet/history/isochistory.shtml>.

<sup>84</sup> Zakon, R. (1998). RFC 2235: 'Hobbes' Internet Timeline.' IETF. Retrieved 28 July, 2010, from <http://tools.ietf.org/html/draft-rfc2235-00>.

<sup>84</sup> Ibid

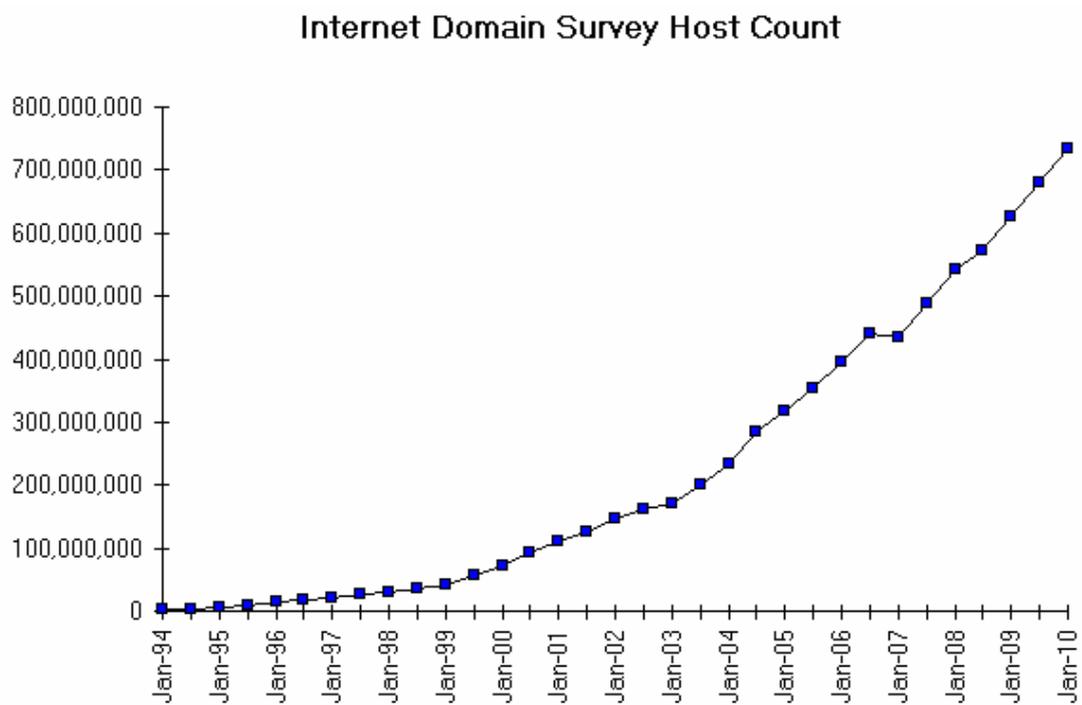
previously been low. In the 1990s, most Internet users were concentrated in Europe and North America, but increasingly since 2000 the Internet's greatest growth has been in developing states.<sup>85</sup>

Within a matter of years, the Internet had become established as a critical communications and commercial infrastructure. As a consequence, governance of the network, previously more or less ignored by governments, became a matter of considerable political significance.

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<sup>85</sup> Miniwatts (2010) "Internet Usage Statistics: The Internet Big Picture: World Internet Users and Population Stats." Retrieved 30 March 2010 from <http://www.internetworldstats.com/stats.htm>

**Figure 2.1 Internet Host Count 1994-2010**



Source: Internet Systems Consortium (2010). "Domain Survey, Host Count." Retrieved 14 March 2010, from <http://www.isc.org/solutions/survey>

**Table 2.1 Internet Users Count 1995-2009**

<u>Date</u>	<u>Number of users worldwide</u>
December 1995	16 million
December 1996	36 million
December 1997	70 million
December 1998	147 million
December 1999	248 million
December 2000	359 million
April 2002	558 million
March 2003	608 million
December 2003	719 million
December 2004	817 million
December 2005	1018 million
December 2006	1093 million
December 2007	1319 million
December 2008	1574 million
December 2009	1802 million

Source: internetworldstats.com (2010). "Internet Growth Statistics." Retrieved 30 March 2010, from <http://www.internetworldstats.com/emarketing.htm>

### **History of naming and numbering systems governance**

#### Early years

Administration of the DNS root from its inception in 1984 until the late 1990s was the responsibility of Jon Postel and a small team of assistants at the University of Southern California. The decision to add any new top-level domains, including country code top-level domain names, was entirely at Postel's discretion, as was the decision as to which entities would be assigned responsibility for management of a ccTLD.<sup>86</sup> In defining the ccTLDs, Postel used an existing list (ISO 3166) of 243

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<sup>86</sup> Kleinwaechter, W. (2007). 'The History of Internet Governance.' Governing the Internet: Freedom and Regulation in the OSCE Region.' C. Möller and A. Amouroux. Vienna, Organization for Security and Co-operation in Europe (OSCE): 41-64. Retrieved 29 July, 2010, from [http://www.osce.org/publications/rfm/2007/07/25667\\_918\\_en.pdf](http://www.osce.org/publications/rfm/2007/07/25667_918_en.pdf) P46

‘countries’ and territories recognised by the International Organisation for Standardisation (ISO) as a guide.<sup>87</sup> He explained this decision in RFC 1591, asserting that his team was ‘not in the business of deciding what is and what is not a country’, whereas the ISO had a procedure for determining ‘which entities should be and should not be on that list’.<sup>88</sup> Postel sought to ensure that there was substantial backing for a ccTLD applicant from ‘significantly interested parties’ who should agree that the applicant was the appropriate party to manage the ccTLD.<sup>89</sup> Registration services for the gTLDs were handled by the Network Information Center at Stanford Research Institute, while registrations under the ccTLDs were the responsibility of the ccTLD managers. Stanford’s NIC also administered the root nameservers and IP number assignments under a US Department of Defense contract.<sup>90</sup>

The Bush (senior) administration oversaw a somewhat more formal institutionalisation of these arrangements. A 1989 contract between the Defense Advanced Research Projects Agency and Postel’s Information Science Institute at the University of Southern California established the Internet Assigned Numbers Authority (IANA) to manage the naming and numbering systems at top level. However, the IANA remained a compact organisation consisting of Postel and his small team.<sup>91</sup>

In the early 1990s, responsibility for funding of registration services passed from the Department of Defense to the National Science Foundation (NSF).<sup>92</sup> In 1993 NSF outsourced the provision of registration services to a private-sector contractor, Network Solutions Inc. (NSI). In 1995, NSI and NSF agreed that NSF would no longer fund registrations; instead, NSI would charge a \$50 annual registration fee for each registrant. Previously, registration had been free, and the fee led to growing discontent from domain name registrants.<sup>93</sup> The commercialisation of domain name registration, and particularly the monopolistic nature of NSI’s contract, was also

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<sup>87</sup> Ibid

<sup>88</sup> Postel, J. (1984). RFC 1591: ‘Domain Name System Structure and Delegation.’ Network Working Group, March 1984. Retrieved 27 July, 2007, from <http://www.ietf.org/rfc/rfc1591.txt>

<sup>89</sup> Ibid

<sup>90</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." Duke Law Journal 50(1): 187-260. P199

<sup>91</sup> Ibid

<sup>92</sup> Ibid, P198

<sup>93</sup> Ibid, PP200-201

resented by many in the technical community.<sup>94</sup> There was further discontent over NSI's policy of suspending domain names on receipt of a complaint from a trademark owner, regardless of whether the trademark owner had been shown to have a superior legal claim to the domain name.<sup>95</sup>

### IAHC and the gTLD-MoU

While NSI now held the contract for domain name registrations, management of the core systems, and associated 'policy' authority (such as the power to add TLDs) remained mainly in the hands of Postel's IANA.<sup>96</sup> Postel, like others in the technical community, was dissatisfied with the NSI monopoly on registrations, and in May 1996 he persuaded ISOC to set up a collaborative panel to produce recommendations for reform of the core systems management arrangements.<sup>97</sup> The panel, known as the International Ad-Hoc Committee (IAHC), comprised representatives from the International Telecommunication Union (ITU), the World Intellectual Property Organisation (WIPO), the International Trademark Association (INTA), ISOC, the IANA, and the Internet Architecture Board (IAB).<sup>98</sup> The IAHC's Final Report (February 1997) put forward a conception of the DNS as a 'public resource' to be governed in accordance with the interests of stakeholders and the public.<sup>99</sup> It proposed the creation of seven new gTLDs and replacement of the NSI monopoly with a competitive market for registration services, based around separation of the top-level registry database operation from the 'retail' function of registering names for end customers. The latter function would be undertaken by private, competing registrars sharing access to the same TLDs. The registry itself would be operated by a not-for-profit monopoly, co-owned by the registrars, to be known as the Council of Registrars, or CORE.<sup>100</sup>

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<sup>94</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." *Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 1(6): 497-520. P500

<sup>95</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260. PP200-201

<sup>96</sup> Goldsmith, J. L. and T. Wu (2006). *Who Controls the Internet? : Illusions of a Borderless World*. New York, Oxford University Press. P35

<sup>97</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2010, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf). PP14-15

<sup>98</sup> *Ibid*, P15

<sup>99</sup> IAHC (1997). *Final Report of the International Ad Hoc Committee: "Recommendations for Administration and Management of gTLDs."* February 4, 1997. Retrieved March 25, 2010, from <http://www.iahc.org/draft-iahc-recommend-00.html>.

<sup>100</sup> *Ibid*

Details of this proposal were set out in an agreement entitled the ‘Generic Top-Level Domain Memorandum of Understanding’ (gTLD-MoU) <sup>101</sup>, initially signed by the IANA and ISOC, and then offered for signature by other interested parties in the Internet community.<sup>102</sup> The gTLD-MoU also proposed to establish a Policy Oversight Committee (POC) composed of the six groups that had participated in the IAHC, as the highest decision-making authority over domain names.<sup>103</sup> The POC would take advice from a Policy Advisory Board (PAB) that any signatory to the gTLD-MoU could join.<sup>104</sup>

The ITU, an agency of the UN, acted as official depository of the agreement, giving it a certain international credibility, and a formal signing ceremony was held in Geneva on May 1 1997.<sup>105</sup> 266 entities ultimately signed the document.<sup>106</sup> However, the IAHC’s attempt to assume control of the Internet’s core systems stood on shaky legal ground.<sup>107</sup> <sup>108</sup> No governments were invited to the Geneva signing ceremony.<sup>109</sup> In particular, the absence of agreement from the US government, which still claimed legal authority over the DNS and IP addressing systems, was a crucial weakness. The assumption seemed to be that the US government would freely hand over control of the naming and numbering systems without any objection. This assumption proved to be in error.

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<sup>101</sup> IAHC (1997). Memorandum of Understanding on the generic top level domain space of the Internet Domain Name System (gTLD-MoU). February 28, 1997. Retrieved March 25, 2010, from <http://www.gtld-mou.org/gTLD-MoU.html>.

<sup>102</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of ‘self-regulation’." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 1(6): 497-520. PP 501-502

<sup>103</sup> IAHC (1997). Memorandum of Understanding on the generic top level domain space of the Internet Domain Name System (gTLD-MoU). February 28, 1997. Retrieved March 25, 2010, from <http://www.gtld-mou.org/gTLD-MoU.html>.

<sup>104</sup> Ibid

<sup>105</sup> ITU (1997). “Internet Domain Names: Information Session and Meeting of Signatories and Potential Signatories of the Generic Top Level Domain Memorandum of Understanding (gTLD-MoU) April 29 - May 1, 1997.” Retrieved 4 August 2009, from <http://www.itu.int/net-itu/dnsmeet/agenda.htm>

<sup>106</sup> ITU (1997). “List of Signatories of the Generic Top Level Domain Memorandum of Understanding (gTLD-MoU).” Retrieved 4 August 2009, from <http://www.itu.int/net-itu/gtld-mou/signat.htm>

<sup>107</sup> Goldsmith, J. L. and T. Wu (2006). Who Controls the Internet?: Illusions of a Borderless World. New York, Oxford University Press. P39

<sup>108</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of ‘self-regulation’." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 1(6): 497-520. P502

<sup>109</sup> Goldsmith, J. L. and T. Wu (2006). Who Controls the Internet? : Illusions of a Borderless World. New York, Oxford University Press. P40

Following the signing ceremony, US Secretary of State Madeleine Albright wrote to ITU Secretary-General Pekka Tarjanne, accusing him of exceeding his mandate by signing the gTLD-MoU without any formal consultations with ITU member states, including the US government.<sup>110</sup> A few weeks later, Ira Magaziner, the Clinton Administration's Internet policy advisor, put together an inter-agency working group including representatives from the Commerce Department, the Federal Communication Commission, and the Justice and State Departments.<sup>111</sup> This group rejected the authority of the gTLD-MoU.<sup>112</sup> The Clinton administration appears to have been unconvinced that the proposed arrangements would guarantee the same stability as that offered by US oversight, and also feared they might lead to ITU 'overregulation'.<sup>113 114</sup>

The European Commission likewise expressed dissatisfaction with the gTLD-MoU, which, it argued, had engaged insufficient participation, allowed insufficient time for consultation, and proposed a licensing mechanism for registrars that did not meet the Commission's requirements for transparency.<sup>115</sup> There was also opposition from other significant actors, including NSI<sup>116</sup>; the European RIR (RIPE);<sup>117</sup> some of the ccTLD registries<sup>118</sup>; and various other organisations. Many policy analysts and user groups criticised the gTLD-MoU as a sellout to trademark interests; conversely, many

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<sup>110</sup> Kleinwaechter, W. (2007). 'The History of Internet Governance.' *Governing the Internet: Freedom and Regulation in the OSCE Region.* C. Möller and A. Amouroux. Vienna, Organization for Security and Co-operation in Europe (OSCE): 41-64. Retrieved 29 July, 2010, from [http://www.osce.org/publications/rfm/2007/07/25667\\_918\\_en.pdf](http://www.osce.org/publications/rfm/2007/07/25667_918_en.pdf) PP49-50

<sup>111</sup> Goldsmith, J. L. and T. Wu (2006). *Who Controls the Internet? : Illusions of a Borderless World.* New York, Oxford University Press. P41

<sup>112</sup> Ibid

<sup>113</sup> Ibid, P42

<sup>114</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." *Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 1(6): 497-520. P503

<sup>115</sup> O'Reilly, N. (1997). "Report on EU Commission Meeting with TLD Registry representatives, 9 April 1997." IE Domain Registry, University College Dublin Computing Services. Retrieved 25 July, 2007, from <http://tbtf.com/resource/EU-vs-IAHC.html>

<sup>116</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." *Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 1(6): 497-520. P502

<sup>117</sup> O'Reilly, N. (1997). "Report on EU Commission Meeting with TLD Registry representatives, 9 April 1997." IE Domain Registry, University College Dublin Computing Services. Retrieved 25 July, 2007, from <http://tbtf.com/resource/EU-vs-IAHC.html>

<sup>118</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1109

trademark interests were still unhappy with the proposed creation of additional TLDs and criticised INTA for its participation.<sup>119</sup>

Faced with these pressures, the US government went on to formally intervene, setting in motion an alternative reform process that led ultimately to the formation of ICANN.

### US Government intervention

On July 1 1997, President Clinton directed the Secretary of Commerce to support efforts towards the creation of a new governance system for the DNS, to be run on private, competitive self-regulatory lines and incorporating a mechanism for resolution of conflicts between domain name usage and trademark law on a global basis.<sup>120</sup> On July 2, the DoC issued a request for public comments on 'issues relating to the overall framework of the DNS system, the creation of new top-level domains, policies for registrars, and trademark issues.'<sup>121</sup>

The emphasis on 'private' governance of the DNS reflected the Clinton administration's commitment to competition and deregulation in the telecommunications sector. This was reflected in a White House statement of policy entitled 'A Framework for Global Electronic Commerce', which emphasised that, despite governmental financing for the initial development of the Internet, its expansion had been driven primarily by the private sector. For electronic commerce to flourish, the 'private sector must continue to lead', and the network should operate as a 'market driven arena'.<sup>122</sup>

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<sup>119</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 1(6): 497-520. P502

<sup>120</sup> Clinton, W. J. (1997). The White House, Office of the Press Secretary, July 1 1997. Memorandum for the heads of executive departments and agencies. Subject: Electronic Commerce. Retrieved 25 July 2007, from <http://www.fas.org/irp/offdocs/pdd-nec-ec.htm>

<sup>121</sup> Referenced in: NTIA (1998). "A proposal to improve technical management of Internet names and addresses." Discussion draft, 30 January 1998. (Green Paper). Retrieved 25 July, 2007, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1)

<sup>122</sup> Gore, A. (1997). "A Framework for Global Electronic Commerce." The White House, July 1 1997. Retrieved 27 July, 2007, from <http://s3.amazonaws.com/lcp/cibercultura/myfiles/A-Framework-for-Global-Electronic-Commerce-Al-Gore.pdf>

On 30<sup>th</sup> January, the DoC published a conceptual Green Paper<sup>123</sup>, which proposed to create a ‘new, private, non-commercial corporation’ (‘NewCo’) to take over governance of the Internet’s naming and numbering systems. ‘NewCo’ would be guided by four core principles: stability, competition, private bottom-up coordination, and representation<sup>124</sup>, and would take over operational responsibility for the naming and numbering systems by a target date of October 1998. The DoC would initially continue to participate in policy oversight for a period to ensure stability, but would withdraw from this role no later than September 30, 2000.<sup>125 126</sup>

A draft governance structure was outlined for the new corporation.<sup>127</sup> Note 2.1 The Green Paper also proposed separation of the registry and registrar functions, the creation of five new gTLDs<sup>128</sup>, and a system whereby disputes over domain names would be submitted to the jurisdiction of specified courts. The introduction of a streamlined disputes resolution mechanism as an alternative to litigation was also mooted, but no detailed proposals were offered.<sup>129</sup> Finally, the Green Paper also indicated that NSI’s monopoly would end on September 30, 1997.<sup>130</sup>

Over 500 distinct comments on the Green Paper were received from individuals, organisations and governments.<sup>131</sup> Some groups supported the main thrust of the

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<sup>123</sup> NTIA (1998). “A proposal to improve technical management of Internet names and addresses.” Discussion draft, 30 January 1998. (‘Green Paper’). Retrieved 25 July, 2007, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1)

<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Ibid

<sup>127</sup> Note 2.1 Under the Green Paper proposal, ‘NewCo’ would consist of three representatives of the RIRs, two members designated by the Internet Architecture Board (IAB) to represent the technical community, two members representing domain name registries and domain name registrars, seven members designated by a membership association representing Internet users, and a Chief Executive Officer. The Green Paper further asserted that the new corporation’s processes should be ‘fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders’; that its decision-making processes should be ‘sound and transparent’; and that supermajority or even consensus requirements ‘may be useful to protect against capture by a self-interested faction’. The new corporation’s charter should also provide a mechanism whereby its governing body would evolve to reflect changes in the constituency of Internet stakeholders. (NTIA (1998). “A proposal to improve technical management of Internet names and addresses.” Discussion draft, 30 January 1998. (Green Paper). Retrieved 25 July, 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1))

<sup>128</sup> NTIA (1998). “A proposal to improve technical management of Internet names and addresses.” Discussion draft, 30 January 1998. (Green Paper). Retrieved 25 July, 2007, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1)

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Mathiason, J. (2009). Internet Governance: The new frontier of global institutions. New York, Routledge. P54

proposals, including the IAB.<sup>132</sup> Others were less satisfied. Proposals to refer domain name disputes to US courts, though widely supported by US trademark holders, were protested by trademark holders and domain name registrants outside the United States, who characterised this as an inappropriate attempt to impose U.S. trademark law as the law of the Internet.<sup>133</sup> The International Trademark Association (INTA) felt that the proposals did not adequately protect trademark interests, and expressed a need for a uniform dispute resolution policy.<sup>134</sup> Postel himself was dissatisfied with the detailed proposals on how new gTLDs, registrars and registries would be established, and the restriction to only five new gTLDs.<sup>135</sup>

The European Council's response to the Green Paper emphasised the global nature of the Internet and called on the US government to refer decisions on the future governance of the core systems to 'an appropriate internationally constituted and representative body'.<sup>136</sup> Magaziner replied to this criticism, arguing that the purpose of the proposals was to improve the 'technical management' of the DNS only and that the Green Paper did not propose a 'monolithic Internet Governance system'. However, he proposed that the composition of a 'NewCo' board of directors should be balanced and representative of the functional and geographic diversity of the Internet.<sup>137</sup>

On 3 June 1998, the DoC released a White Paper, 'Management of Internet Names and Addresses'.<sup>138</sup> Like the Green Paper, it took as its basis the principles of

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<sup>132</sup> Carpenter, B. E. (1998). Email from Brian E Carter to Ira Magaziner: 'IAB comments on Green Paper.' 23 February 1998. Retrieved 4 August 2009, from <http://www.interesting-people.org/archives/interesting-people/199802/msg00044.html>

<sup>133</sup> Referenced in: United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses." ('White Paper'). 5<sup>th</sup> June 2007. Docket Number: 980212036-8146-02. Retrieved 5 October 2008, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>134</sup> INTA (1998). INTA Comments on Green Paper. Retrieved 14 February 2010, from

<http://www.inta.org/Advocacy/Documents/INTA%20Comments%20on%20Green%20Paper.pdf>

<sup>135</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P23

<sup>136</sup> Council of the European Union (1998). Internet Governance: Reply of the European Community and its Member States to the US Green Paper. Brussels, 16 March 1998. Retrieved 25 July, 2007, from <http://web.archive.org/web/20000815093245/http://www.ispo.cec.be/eif/policy/govreply.html>

<sup>137</sup> Kleinwaechter, W. (2007). 'The History of Internet Governance.' Governing the Internet: Freedom and Regulation in the OSCE Region.' C. Möller and A. Amouroux. Vienna, Organization for Security and Co-operation in Europe (OSCE): 41-64. Retrieved 29 July, 2007, from [http://www.osce.org/publications/rfm/2007/07/25667\\_918\\_en.pdf](http://www.osce.org/publications/rfm/2007/07/25667_918_en.pdf) P52.

<sup>138</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses." ('White Paper'). 5th June 2007. Docket Number: 980212036-8146-02. Retrieved 5 October 2008, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

‘competition, stability, private, bottom-up coordination, and representation’ and proposed that management of the naming and numbering systems be transferred to a private, not for profit corporation (‘NewCo’). However, unlike the Green Paper, the White Paper did not include any specifications for ‘NewCo’, instead calling for a suitable corporation to be self-organised by the ‘private sector’.<sup>139</sup> It set a timescale of four months for the private sector to form a suitable corporation that commanded ‘consensus’ among stakeholders.<sup>140</sup> The DoC would then recognise this corporation and transfer to it the IANA functions. The White Paper also called upon the World Intellectual Property Organisation (WIPO) to ‘initiate a process to: develop recommendations for a uniform approach to resolving trademark/domain name disputes involving “cyberpiracy”; to recommend a process for protecting famous trademarks; and to evaluate the effects of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders.’<sup>141</sup>

Milton Mueller identifies some confusion in the US government’s position, characterising the White Paper as ‘an improvised response to political pressures pulling in various directions.’ On one side, he asserts, corporate lobbyists pressed for governmental involvement to ensure ‘stability’ and to create a trademark protection system. However, the DoC also faced pressure from ISOC to leave control in the hands of the ‘Internet community’, as well as pressure from European and Australian governments for more formal, international and governmental involvement. Mueller feels that ‘industry self-regulation’ was merely a public label for a process that could be more accurately described as the US government brokering a ‘behind-the-scenes deal’ among what it perceived as the major players, both private and governmental.<sup>142</sup>

In its formal response to the proposals, the European Commission found that the White Paper did, to a large extent, respond to the comments and criticisms of the Green Paper made by the EU and other entities. It noted that the White Paper had recognised the need to move away from a US-centric approach and towards a

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<sup>139</sup> Ibid

<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of ‘self-regulation’." *Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 1(6): 497-520. P504

multilateral basis for Internet core systems management. However, it expressed continued reservations about the new corporation being set up under US law.<sup>143</sup>

### Formation of ICANN

Following the release of the White Paper, a number of groups began to hold discussions regarding formation of the 'NewCo'. The most important of these became the International Forum on the White Paper (IFWP), an 'ad hoc coalition of professional, trade and educational associations representing a diversity of Internet stakeholder groups, including ISPs, content developers, trademark holders, networkers, intergovernmental groups, policy experts, end-users and others.'<sup>144</sup> The IFWP was backed by numerous large corporations, including NSI. It held a series of seminars and workshops including meetings in Virginia, Geneva, Singapore and Buenos Aires. Ultimately, the IFWP did not succeed in producing a fully articulated plan for the 'NewCo', but nonetheless acted as a catalyst that moved the process forward.<sup>145</sup> At the same time, Postel and the IANA initiated a global online discussion, which took the form of emails from individuals, governmental and nongovernmental institutions worldwide.<sup>146</sup>

In September 1998, the IFWP tried to bring IANA, NSI and various other groups together to work out a formal constitution for the new corporation. This meeting was known as the Boston Working Group; however, IANA declined to participate in it.<sup>147</sup> Instead, using input from the online discussions, Postel and the IANA put together a series of drafts of the Articles of Incorporation and Bylaws for a 'NewCo', to be named the Internet Corporation for Assigned Names and Numbers.<sup>148</sup> The most

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<sup>143</sup> European Commission (1998). Internet Governance: Management of Internet Names and Addresses: Analysis and Assessment from the European Commission of the United States Department of Commerce White Paper (COM 476, final). Retrieved 27 July 2007, from [www.ispo.cec.be/eif/com98476.html](http://www.ispo.cec.be/eif/com98476.html)

<sup>144</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P27

<sup>145</sup> Ibid

<sup>146</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1113

<sup>147</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." *Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 1(6): 497-520. P507

<sup>148</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1124. PP1112-1114

important of these was released on September 17 with the endorsement of NSI and was known as the 'IANA / NSI draft'.<sup>149</sup> Postel sent these drafts on October 2 to the DoC.<sup>150</sup>

On October 16, 1998, Jon Postel unexpectedly died. However, the IANA / NSI draft, following a final round of revisions, was ultimately accepted by the DoC as the basis for 'NewCo'.<sup>151</sup> On November 25, the Internet Corporation for Assigned Names and Numbers, which had been incorporated under California law on September 18, was formally recognised by the DoC as the 'NewCo' described in the White Paper.<sup>152</sup>

ICANN was formally incorporated as a non-profit corporation under the California Nonprofit Public Benefit Corporation Law.<sup>153</sup> Two contracts were signed between ICANN and the DoC: the IANA contract, which gave ICANN control of the coordination of domain names, IP addresses and related protocol parameters<sup>154</sup>; and the Memorandum of Understanding (MoU), which set out ICANN's specific responsibilities and targets. The MoU was specified to be for a two-year transition period only, after which, under the condition that ICANN fulfilled its functions, all remaining responsibilities were to be transferred and ICANN was to become fully independent.<sup>155</sup>

Mueller explains the DoC's acceptance of the IANA / NSI draft as the result of a lack of clear consensus emerging out of the IFWP.<sup>156</sup> He is critical of the way the process

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<sup>149</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P27-28

<sup>150</sup> Postel, J (1998). Letter from Dr. Jon Postel to the Honorable William Daley, US Secretary of Commerce. 'Re: Management of Internet Names and Addresses'. October 2, 1998. Retrieved 29 July 2007, from <http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/letter.htm>

<sup>151</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P29

<sup>152</sup> Ibid

<sup>153</sup> ICANN (1998). Articles of Incorporation of Internet Corporation for Assigned Names and Numbers. As Revised November 21, 1998. Retrieved 30 August, 2007, from <http://www.icann.org/en/general/articles.htm>

<sup>154</sup> ICANN / United States Department of Commerce (2000). Contract Between ICANN and the United States Government for Performance of the IANA Function. 9 February 2000. Retrieved 1 August 2007, from <http://www.icann.org/en/general/iana-contract-09feb00.htm>

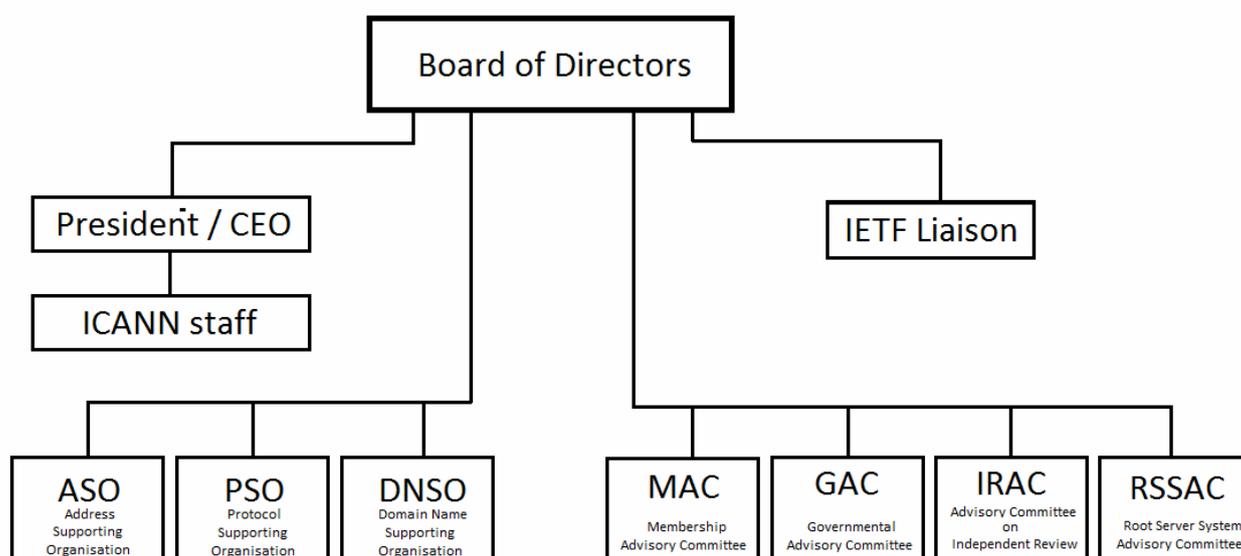
<sup>155</sup> ICANN / United States Department of Commerce (2000). Memorandum of Understanding between the US Department of Commerce and Internet Corporation for Assigned Names and Numbers. 25 November 1998. Retrieved 1 August 2007, from <http://www.icann.org/en/general/icann-mou-25nov98.htm>

<sup>156</sup> <sup>156</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of 'self-regulation'." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 1(6): 497-520. PP507-8

was managed, arguing that the ‘Internet’s constitutional convention’ had been ‘reduced to two government contractors negotiating in secret.’<sup>157</sup> Despite the White Paper’s public call for the private sector to self-organise, he argues, the process that unfolded ‘reflected a behind-the-scenes agreement that IANA-ISOC and their corporate allies would be the ones in control of the new organisation and that a specific program acceptable to the trademark lobby, the US Commerce Department and the Europeans would be executed.’<sup>158</sup>

### ICANN initial structure

**Figure 2.2: ICANN initial structure**



As can be seen from Figure 2.2, ICANN’s initial organisational structure was considerably different from that of the present day.

Following the corporation’s formal establishment, the Supporting Organisations essentially organised themselves. The PSO was set up by the IETF technical community<sup>159</sup> and the ASO by the Regional Internet Registries.<sup>160</sup> The initial seven

<sup>157</sup> Ibid, P507

<sup>158</sup> Ibid, P508

<sup>159</sup> Mathiason, J. (2009). Internet Governance: The new frontier of global institutions. New York, Routledge. P77

DNSO constituencies were granted provisional recognition by the Board, and met in Berlin in May 1999 to establish a Names Council and set up an internal structure.<sup>161</sup>

The initial, ‘interim’ Board was made up of nine members unilaterally selected by Postel and the IANA. This list of members was, however, ‘vetted’ by Ira Magaziner and also, it has been claimed, by the EU and the Australian government.<sup>162</sup> A tenth Board member was added in the position of President and CEO of ICANN.<sup>163</sup> Under the Bylaws, the interim Board was to be succeeded by a full Board composed of nineteen members chosen from the Supporting Organisations, and a further nine intended to represent ‘the public at large’, chosen by some form of online election.<sup>164</sup> The interim Board was geographically quite balanced, with four members from the US, three from Europe and two from Asia.<sup>Note 2.2</sup>

The Membership Advisory Committee (MAC) was set up to develop a structure for the At-Large constituency and produce criteria for At-Large Membership and the rights and obligations of members.<sup>166</sup>

### ICANN in operation: 1998-2002

Although NSI had initially helped to bring ICANN into being, NSI and ICANN were soon at loggerheads over ICANN’s proposal to implement a ‘Shared Registry

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<sup>160</sup> RIPE (2011). “The Address Supporting Organization: History.” Retrieved 14 February 2011, from [http://www.ripe.net/internet-coordination/internet-governance/internet-technical-community/aso?b\\_start:int=15](http://www.ripe.net/internet-coordination/internet-governance/internet-technical-community/aso?b_start:int=15)

<sup>161</sup> ICANN (1999). Minutes of special meeting of the Board, 18 October 1999. Retrieved 2 August 2009, from <http://www.icann.org/en/minutes/minutes-18oct99.htm>

<sup>162</sup> Mueller, M. (1999). "ICANN and Internet Governance: Sorting through the debris of ‘self-regulation’." Info, the Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media, 1(6):497-520. P507

<sup>163</sup> ICANN (1998). Bylaws for Internet Corporation for Assigned Names and Numbers. As effective 6 November 1998. Retrieved 15 February 2010, from <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>

<sup>164</sup> Ibid

<sup>Note 2.2</sup> The initial nine Directors included: Geraldine Capdeboscq, an officer of Bull, a France-based information technology company; George Conrades, formerly an officer of GTE Internetworking, BBN, and IBM; Greg Crew, Chairman of the Australian Communications Industry Forum; Frank Fitzsimmons, an officer of Dun & Bradstreet; Hans Kraaijenbrink, Chair of the European Telecommunications Network Operators Association; Jun Murai, professor at Keio University (Japan); Eugenio Triana, formerly an official at the European Commission and the Spanish Ministry of Industry and Energy; and Linda Wilson, President of Radcliffe College. Esther Dyson, a venture capitalist and writer with links to the Electronic Frontier Foundation, was appointed as Chair.<sup>165</sup> The first President was Michael M. Roberts, an academic. (Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." Duke Law Journal 50(1): 187-260.)

<sup>166</sup> ICANN (1999). “ICANN structural overview as of 7 16 99.” Retrieved 11 November 2011, from <http://web.archive.org/web/20011118160417/http://www.icann.org/structure.htm>

Service'. This would involve a division of Network Solutions into two entities, a registry and a registrar, and accreditation of a number of new registrars to compete with the latter. NSI resisted this proposal.<sup>167</sup> In October 1998, NSI had signed a new co-operative agreement with the DoC, under which NSI continued to control the actual root zone file at an operational level; this specified that NSI must enter into a contract with 'NewCo' to provide the services that they had previously provided to the US government.<sup>168</sup> However, NSI simply refused to recognise ICANN as being the 'NewCo' described in the Cooperative Agreement.<sup>169</sup> Nonetheless, ICANN pushed forward with its plans, and in April 1999 selected 34 competitors for NSI in registration of domain names. Following its failure to secure Congressional support for its stance<sup>170 171</sup>, NSI elected to come to an agreement. On November 4, NSI recognised ICANN's authority in return for continued control over the WHOIS directory for at least four years, and ICANN's recognition of NSI as an accredited registrar. The agreements provided that NSI would have to separate its registry and registrar operations. NSI continued to act as registry for .com, .net and .org, but agreed to allow competing firms to register names in those TLDs for a 'wholesale' price of \$6 a year. Competing registrars were to pay NSI an annual \$10,000 fee for access to WHOIS. NSI also agreed to pay ICANN \$1.25m to cover the following year's fees. A few weeks later, the DoC also accepted these revised agreements.<sup>172</sup> In May 2001, ICANN entered into a revised agreement with VeriSign (which had bought out NSI), under which VeriSign would relinquish control of the .org TLD in 2002 and .net in 2005, but would retain control of .com (by far the largest and most lucrative TLD) until at least 2007.<sup>173</sup>

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<sup>167</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P30

<sup>168</sup> United States Department of Commerce: National Telecommunications and Information Administration (2010). Amendment 11 to the DOC/NSI Cooperative Agreement. October 6, 1998 Retrieved 27 September 2011, from <http://www.ntia.doc.gov/legacy/ntiahome/domainname/nsi.htm>

<sup>169</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P31

<sup>170</sup> Patience, N. (1999). "ICANN, NSI & Others Put Their Case to Congress." Computer Business Review, 22 July 1999. Retrieved 3 August, 2007, from [http://www.cbronline.com/news/icann\\_nsi\\_others\\_put\\_their\\_case\\_to\\_congress](http://www.cbronline.com/news/icann_nsi_others_put_their_case_to_congress)

<sup>171</sup> Greene, T. C. (1999). "Congress roasts NSI at ICANN hearing." The Register, 26 July 1999. Retrieved 1 August, 2007, from [http://www.theregister.co.uk/1999/07/26/congress\\_roasts\\_nsi\\_at\\_icann/](http://www.theregister.co.uk/1999/07/26/congress_roasts_nsi_at_icann/)

<sup>172</sup> Rader, R. W. M. (2001). "One History of DNS." Retrieved 10 July, 2007, from [www.byte.org/one-history-of-dns.pdf](http://www.byte.org/one-history-of-dns.pdf) P33

<sup>173</sup> ICANN (2001). Announcement: 'ICANN and VeriSign Sign on the Dotted Line.' 25 May 2001. Retrieved 4 August, 2009, from <http://www.icann.org/en/announcements/icann-pr25may01.htm>

ICANN's initial years of operation saw further important policy initiatives, including implementation of a Uniform Domain Name Disputes Resolution Policy (UDRP) based on the WIPO report commissioned by the US Government (see Chapter 6). It also introduced seven new gTLDs (see Chapter 4). Furthermore, following a series of studies<sup>174</sup>, the Board approved a mechanism for direct election of one-third of Directors by the global 'At-Large' user community in March 2000.<sup>175</sup> Note 2.3 The election was duly held in October 2000 and five 'At-Large' Directors were elected.<sup>176</sup>

### Reform process 2002-03

Despite the target set by the White Paper, US governmental oversight did not come to an end in October 2000, as ICANN was judged not to have met the criteria specified in the MoU.<sup>177</sup> The accession of the Bush administration in 2001 was also significant; some scholars, such as Wolfgang Kleinwachter, identify a greater unwillingness on the part of the Bush government to relinquish US oversight of the core Internet systems.<sup>178</sup>

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<sup>174</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge. PP79-80

<sup>175</sup> ICANN (2000). Minutes of regular meeting of the Board, 10 March 2000. Retrieved 2 August 2009, from <http://www.icann.org/en/minutes/minutes-10mar00.htm>

Note 2.3 The Board resolved that five Directors would be elected by a direct ballot of qualified ICANN members in each of the five Geographical Regions, to serve a term from 1 November 2000 to the ICANN Annual Meeting in 2002. Anyone worldwide over the age of 16 with an email address and a physical postal address could apply to participate in the election. (ICANN (2000). "Rules for 2000 At Large Director Selection Process." Retrieved 5 August, 2009, from <http://members.icann.org/rules.html>) Around 158,000 applications were received from Internet users around the world, of which around 76,000 applicants activated their memberships prior to the September 8 deadline. (ICANN (2000). "At Large Membership and Elections." Retrieved 5 August, 2009, from <http://www.icann.org/en/committees/at-large/at-large.htm>) The Board set up a nominating committee to nominate candidates, but additional candidates could be nominated by members. A total of 18 candidates were proposed by the nominating committee and nine by members. (ICANN (2000). "ICANN @Large Regional Nominees." Retrieved 4 August 2009, from <http://members.icann.org/nominees.html>) Voting was outsourced to a third party company, election.com. (ICANN (2000) Announcement: 'ICANN Selects election.com to Conduct One of World's Largest All-Internet Votes.' 21 September 2000. Retrieved 4 August, 2009, from <http://www.icann.org/en/announcements/icann-pr21sep00.htm>) 34,035 members actually voted. (ICANN (2001). "At Large Membership Study Committee, Final Report on ICANN At-Large Membership." November 5, 2001. Retrieved 5 August, 2009, from [http://www.atlargestudy.org/final\\_report.shtml#\\_toc000422652](http://www.atlargestudy.org/final_report.shtml#_toc000422652))

<sup>176</sup> U.S. Office of Public Policy of the Association for Computing Machinery (2000). *ACM Washington Update*. October 31, 2000. Volume 4.7. Retrieved 20 August 2009, from <http://usacm.acm.org/usacm/update/update47.html>

<sup>177</sup> Kleinwachter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1118

<sup>178</sup> *Ibid*, P1120

Various scholars have argued that ICANN was in disarray by 2002. Susan Crawford, David Post and David P Johnson argue that the principle of consensus based decisionmaking was not working. They identify two reasons for this; firstly an alleged failure of the ICANN Board and staff to publicly exert leadership in calling for the creation of consensus policies and running the process; and secondly, deep factionalism in the DNSO.<sup>179</sup> However, they did not believe that the consensus principle should be abandoned; rather, they argued that ICANN should 'more effectively implement the consensus theory' through stronger Board and staff leadership.<sup>180</sup>

George Christou and Seamus Simpson identify, over ICANN's first three years, an ongoing contestation of several key procedures and associated norms with regard to issues such as representativeness, the process of creating new generic TLDs and ICANN's relationship with national country code TLD administrators.<sup>181</sup> Kleinwaechter identifies a tension among national governments over the appropriateness of public functions being performed by a private corporation as being one of the key pressures for reform of ICANN.<sup>182</sup> He believes the major turning point came in 2001, when the original ideals of private governance and broad representation were superseded by other priorities after the burst of the .com bubble and the terrorist attacks of 11 September 2001. As a consequence, Kleinwaechter asserts, the broader political and economic environment for Internet governance changed dramatically. Security and stability of the Internet became the first priority; and as a consequence, he argues, ICANN turned from a project on 'cyberdemocracy' into an instrument for 'cybersecurity'.<sup>183</sup>

Against this backdrop, ICANN underwent a reform process. This was internally initiated by the publication, in February 2002, of a President's Report authored by

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<sup>179</sup> Johnson, D., Post D.P., and Crawford, C. (2003). "A Commentary on the ICANN 'Blueprint' for Evolution and Reform." *Loyola of Los Angeles Law Review* 36(3): 1127-1148. P1131

<sup>180</sup> *Ibid*, P1133

<sup>181</sup> Christou, G. and S. Simpson (2007). "Gaining a Stake in Global Internet Governance: The EU, ICANN and Strategic Norm Manipulation." *European Journal of Communication* 22(2): 147-164. P156

<sup>182</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1118

<sup>183</sup> Kleinwaechter, W. (2004). "Beyond ICANN vs ITU? How WSIS Tries to Enter the New Territory of Internet Governance " *Gazette: The International Journal for Communication Studies* 66(3-4): 233-251. P240

Lynn and entitled 'ICANN: The Case for Reform'.<sup>184</sup> Lynn acknowledged there were problems with ICANN's organisation, which he described as being 'overburdened with process'. He was unequivocal that 'ICANN needs reform: deep, meaningful, structural reform' and proposed to replace its 'unstable institutional foundations' with 'an effective public-private partnership, rooted in the private sector but with the active backing and participation of national governments', a major departure from the original conception of ICANN as a wholly private, non-governmental organisation. Lynn went on to propose a reduction in the size of the Board, an increase in its authority, and an end to direct Board elections in favour of a greater role for governmental representatives.<sup>185</sup> Kleinwächter interprets Lynn's report as a response both to the 'obvious deficiencies' in the management structure but also to the new security challenges. He believes Lynn's proposal for a new public-private partnership was aimed at avoiding two extremes; an intergovernmental takeover, or a totally independent ICANN governed by providers and users of services.<sup>186</sup>

The GAC welcomed this new approach, stating that 'a private-sector/public-sector partnership will be essential to ICANN's future success.'<sup>187</sup> The move towards a public-private model was also in accordance with the direction favoured by the EU.<sup>188</sup> The US government remained officially silent during the reform process. However, Congressional hearings were held to look into 'long-standing complaints about

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<sup>184</sup> Lynn, S. (2002). President's Report: "ICANN: The Case for Reform." 24 February 2002. Retrieved 15 August, 2009, from <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>

<sup>185</sup> Ibid

<sup>186</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1121

<sup>187</sup> ICANN (2002). GAC Communique XII - Accra, Ghana, 11 March 2002. Retrieved 15 August, 2009, from <http://gac.icann.org/web/communiques/gac12com.htm>

<sup>188</sup> See, for example European Commission, (2000). Communication from the Commission to the Council and the European Parliament. "The Organisation and Management of the Internet." Articles 7.10 and 7.14 11. April 2000. Retrieved 15 August, 2009, from

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xxi/2310.htm>

and European Council (2000). Council Resolution of 3 October 2000 on the Organisation and Management of the Internet. 2000 O.J. (C 293) 3. Retrieved 15 August, 2009, from [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c\\_293/c\\_29320001014en00030004.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_293/c_29320001014en00030004.pdf)

and European Parliament (2001). European Parliament Resolution on the Commission Communication to the Council and the European Parliament on "The Organisation and Management of the Internet—International and European Policy Issues 1998–2000." (COM(2000)202-C5-0263/2000-2000/2140(COS)) (No. A5-0063/2001) Retrieved 15 August, 2009, from <http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/EPResolution15March2001>

ICANN's lack of accountability, stability and security',<sup>189</sup> at which DoC officials made statements. These acknowledged the desirability of ICANN reform, but also stated the department's continuing support for private sector management of the DNS, with an effective advisory role for governments, rather than having ICANN's functions performed by an intergovernmental body, such as the ITU.<sup>190</sup>

Following Lynn's report, the Board established a Committee on Restructuring, subsequently renamed the Committee on ICANN Evolution and Reform (ERC),<sup>191</sup> consisting of three members (all Directors)<sup>192</sup> <sup>Note 2.4</sup> and tasked with making recommendations to the Board on possible changes to the structure of ICANN, taking into account input from 'the community'.<sup>193</sup> The ERC's report, 'A Blueprint for Reform', was published in June 2002. It proposed to reduce the Board to fifteen voting members; eight selected by the Nominating Committee, two from each Supporting Organisation, and the President. At-Large elections would be abandoned. Additionally, there would be five non-voting Liaisons, from the GAC, IAB / IETF, RSSAC, and SSAC. The DNSO would be split into a Generic Names Supporting Organisation (GNSO) and a Country Code Names Supporting Organisation (CCNSO). The PSO was to be abolished. No changes were recommended for the ASO.<sup>194</sup> The GAC would remain an advisory committee and would appoint a non-voting liaison to the Board, as well as one delegate to the Nominating Committee, and non-voting liaisons to each of the SO Councils and to the RSSAC, the TAC, and the SAC.<sup>195</sup>

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<sup>189</sup> McCullagh, D. (2002). "Congress to Enter ICANN Fray". Retrieved 19 August, 2009, from <http://www.wired.com/politics/law/news/2002/03/51041>

<sup>190</sup> US Department of Commerce (2002). Testimony of Nancy J. Victory, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, United States Department of Commerce, before the Subcommittee on Science, Technology and Space, Committee on Commerce, Science, and Transportation, United States Senate, on ICANN Governance. June 12, 2002. Retrieved 19 August, 2009, from <http://www.ogc.doc.gov/ogc/legreg/testimon/107s/victory0612.htm>

<sup>191</sup> ICANN (2002). ICANN Meeting in Bucharest, Preliminary Report. 28 June 2002. Retrieved 16 August, 2009, from <http://www.icann.org/en/minutes/prelim-report-28jun02.htm>

<sup>192</sup> ICANN (2002). "Committee on ICANN Evolution and Reform." Retrieved 16 August, 2009, from <http://www.icann.org/en/committees/evol-reform/>

<sup>Note 2.4</sup> Members included Alejandro Pisanty (chair), Lyman Chapin, and Nii Quaynor. (ICANN (2002). "Committee on ICANN Evolution and Reform." Retrieved 16 August, 2009, from <http://www.icann.org/en/committees/evol-reform/>)

<sup>193</sup> ICANN (2002). "Committee on ICANN Evolution and Reform." Retrieved 16 August, 2009, from <http://www.icann.org/en/committees/evol-reform/>

<sup>194</sup> ICANN (2002). Committee on ICANN Evolution and Reform: "ICANN: A Blueprint for Reform". 20 June 2002. Retrieved 18 August, 2009, from <http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm>

<sup>195</sup> Ibid

On 2nd October, the ERC proposed new Bylaws, based mostly on the Blueprint for Reform.<sup>196</sup> These were posted for public comment from 2<sup>nd</sup> October and discussed at the Public Forum at the ICANN meeting at Shanghai on 30 October. Following minor modifications,<sup>197</sup> on 31<sup>st</sup> October, the Board adopted the proposed Bylaws with one dissenting vote.<sup>198</sup>

As previously proposed, the PSO was abolished, partly succeeded by the Technical Liaison Group. The DNSO was split into the GNSO and CCNSO. The ASO was retained, but conducted internal reforms; the RIRs formed their own coordination body, the Number Resource Organisation (NRO), the members of which became the new ASO Address Council via a 2004 agreement between ICANN and the NRO.<sup>199</sup> An At-Large Advisory Committee (ALAC) was formed to represent the interests of end-users. It was to some degree a successor to the old At-Large Constituency, but with considerably less power; it appointed no Directors and was to be merely an advisory body, though it was given the power to select five voting delegates to the Nominating Committee, together with one non-voting liaison to the Board. The scrapping of At-Large elections had already been approved by the Board at Accra, Ghana, on 14 March 2002.<sup>200</sup> The GAC's role was enhanced, arguably further than had been envisaged in the Blueprint. The Board was now obliged to notify the GAC of any proposal raising public policy issues and was required to take GAC recommendations 'duly . . . into account, both in the formulation and adoption of policies.' If the Board rejected a GAC recommendation, it must state its reasons in writing.<sup>201</sup> The GAC was to appoint a non-voting liaison to the Board together with one delegate to the Nominating Committee, and was given the option to designate a

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<sup>196</sup> ICANN (2002). Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform. 23 October 2002. Retrieved 18 August, 2009, from <http://www.icann.org/en/committees/evolution-reform/proposed-bylaws-23oct02.htm>

<sup>197</sup> Ibid

<sup>198</sup> ICANN (2002). Minutes of regular meeting of the Board. 31 October 2002. Retrieved 18 August, 2009, from <http://www.icann.org/en/minutes/minutes-31oct02.htm>

<sup>199</sup> Number Resource Organisation (2010). "About the NRO." Retrieved 30 August, 2010, from <http://www.nro.net/about/index.html>

<sup>200</sup> ICANN (2002). Minutes of regular meeting of the Board. 14 March 2002. Retrieved 2 August 2009, from <http://www.icann.org/en/minutes/minutes-14mar02.htm>

<sup>201</sup> ICANN (2002). Bylaws for Internet Corporation for Assigned Names and Numbers. As adopted effective 15 December 2002. Retrieved 18 August, 2009, from <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>

non-voting liaison to each of the SO Councils and Advisory Committees. In addition, staffing of ICANN increased significantly,<sup>202</sup> as did its level of expenditure.<sup>203</sup>

Overall, most analysts agree that the reforms brought a significant shift in ICANN's nature, moving away from the original ideals of direct user representation and towards the 'public-private' model promoted by Lynn and the EU. These changes were criticised by some analysts, such as Michael Fromkin, who argued that the scrapping of direct At-Large elections tipped the balance of power towards certain governments and certain business interests and away from public participation.<sup>204</sup> Kleinwächter focused on the enhanced role taken on by governments, contending that the GAC had now acquired 'something akin to veto power' as a result of the new rule obliging the Board to supply reasons in writing if it should elect to reject GAC advice.<sup>205</sup>

### ICANN since 2002

In September 2003, ICANN again clashed with VeriSign (NSI's successor) over the latter's introduction of a service called SiteFinder, under which users accessing any unregistered domains under the .com and .net TLDs (for example, as the result of a typo) would be redirected to a VeriSign web portal advertising VeriSign products. ICANN issued a formal demand to VeriSign that SiteFinder be suspended, stating that VeriSign had exceeded the terms of its contract.<sup>206</sup> VeriSign complied, but later filed a lawsuit claiming that ICANN had overstepped its authority over the SiteFinder affair, and including an antitrust component.<sup>207</sup> This continued until October 2005, when VeriSign agreed to drop the legal action as part of a settlement which would see VeriSign's contract to run .com extended until 2012, and an agreement that SiteFinder would not be reinstated without ICANN approval.<sup>208</sup> In February 2006, the Board

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<sup>202</sup> ICANN (2003). "Plan for Organisation of ICANN Staff." 22 May 2003. Retrieved 24 August, 2010, from <http://www.icann.org/en/general/staff-organization-plan-22may03.htm>

<sup>203</sup> ICANN (2003). "ICANN, Historical Financial Information, Fiscal Year Ending 30 June 2003." Retrieved 24 August, 2010, from <http://www.icann.org/en/financials/historical.htm>

<sup>204</sup> Fromkin, A.M. (2002). "ICANN 2.0: Meet the new boss." *Loyola of Los Angeles Law Review* 36(3): 1087-1101. P1089

<sup>205</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1121

<sup>206</sup> Twomey, P. (2003). Letter from Paul Twomey to Russell Lewis, Executive Vice President, General Manager, VeriSign Naming and Directory Services. 3 October 2003. Retrieved 19 August, 2009, from <http://www.icann.org/correspondence/twomey-to-lewis-03oct03.htm>

<sup>207</sup> BBC (2004). "VeriSign sues net oversight body." *BBC News*, 27 February 2004. Retrieved 19 August, 2009, from <http://news.bbc.co.uk/1/hi/technology/3492240.stm>

<sup>208</sup> BBC (2005). "Deal lets VeriSign hold onto .com." *BBC News*, 25 October 2005. Retrieved 19 August, 2009, from <http://news.bbc.co.uk/1/hi/technology/4375206.stm>

approved this settlement via a majority vote (9 to 5 in favour, one abstention), and allowed VeriSign to raise registration fees by up to 7% per annum.<sup>209</sup> This dispute demonstrated that some aspects of the regime were still in a state of flux; there was an ongoing lack of certainty about just how far ICANN's authority over the registries extended, with ICANN seeking to impose centralised control and at least some registries, particularly VeriSign, seeking to resist what they saw as ICANN exceeding its authority (or at least to extract significant concessions in return for compliance).

In a similar way, ICANN has moved in recent years to extend its control over the registrars. In 2007, following a legal dispute with registrar RegisterFly over the ICANN's right to terminate RegisterFly's accreditation<sup>210</sup> <sup>Note 2.5</sup>, ICANN stated its intention to reform the registrar accreditation process.<sup>211</sup> A new RAA was created, though this did not come into effect until May 2009 and would only apply to registrars accredited (or re-accredited) after that date.<sup>212</sup> ICANN also began to demonstrate a new willingness to enforce contracts with registrars.<sup>213</sup> The result was a considerably

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<sup>209</sup> ICANN (2006). Minutes of special meeting of the Board. 28 February 2006. Retrieved 19 August, 2009, from <http://www.icann.org/en/minutes/minutes-28feb06.htm>

<sup>210</sup> United States District Court, Central District of California (2007) Notice of Hearing on Permanent Injunction. Case number CV 07-2089. June 5, 2007. Facsimile retrieved 20 June 2010, from <http://www.icann.org/en/legal/icann-v-registerfly/icann-v-registerfly-notice-hearing-pi-26apr07.pdf>

<sup>Note 2.5</sup> In March 2007, a class action lawsuit was undertaken by customers of domain registrar RegisterFly against both Registerfly and ICANN. (United States District Court for the Middle District of North Carolina (2007). Anne Martinez v RegisterFly, ICANN et. al. Case 07cv00188. Retrieved 19 August 2009, from <http://docs.justia.com/cases/federal/district-courts/north-carolina/nmcdce/1:2007cv00188/45393/2/>) Allegations against RegisterFly included a track record of failing to renew or transfer domain names or respond to customer support issues, overcharging, failing to deliver services and misuse of funds. (ICANNWatch (2007). "RegisterFly Scandal Culminates in Class Action". ICANNWatch, March 31 2007. Retrieved 20 June, 2010, from <http://www.icannwatch.org/article.pl?sid=07/03/31/200217&mode=thread>) ICANN was accused of failing to enforce its Registrar Accreditation Agreement (RAA) with RegisterFly, and thus neglecting its duty to protect the public. (Dummit Law Firm (2007). Class Action Lawsuit Against RegisterFly, ICANN, and ENOM. Retrieved 19 August 2009, from <http://www.registerfly-lawsuit.com/>) When ICANN attempted to terminate RegisterFly's accreditation as a registrar, RegisterFly took the matter to the US courts. The decision proved to be in ICANN's favour, and ICANN was allowed to terminate RegisterFly's accreditation immediately. (United States District Court, Central District of California (2007). Notice of Hearing on Permanent Injunction. Case number CV 07-2089. June 5, 2007. Facsimile retrieved 20 June 2010, from <http://www.icann.org/en/legal/icann-v-registerfly/icann-v-registerfly-notice-hearing-pi-26apr07.pdf>)

<sup>211</sup> ICANN (2007). Announcement: 'Registrar Accreditation Policy and Process Must be Reviewed'. 21 March 2007. Retrieved 20 June, 2010, from <http://www.icann.org/en/announcements/announcement-21mar07.htm>

<sup>212</sup> ICANN (2009). May 2009 Registrar Accreditation Agreement. Retrieved 20 June, 2010, from <http://www.icann.org/en/registrars/agreements.html>

<sup>Note 2.5</sup> On May 23, 2008, ICANN issued enforcement notices against a number of registrars, including ten that had been identified as being the registrars for the majority of websites advertised in spam emails. On October 1, 2008, ICANN also issued Breach Notices against Joker.com and Beijing Innovative Linkage Technology Ltd for failing to take "reasonable steps to investigate" Whois inaccuracy claims. These registrars were given fifteen days to rectify their Whois investigation efforts. (ICANN (2008). Notices of Breach, Termination and Non-Renewal. "Breach Notices Sent to Joker.com

enhanced policy enforcement regime over the registrar market and thus a strengthening of another aspect of ICANN's authority.

On September 29, 2006, ICANN signed a new agreement with the DoC, termed the Joint Project Agreement (JPA).<sup>214</sup> The JPA effectively extended the previous MoU for a further three years, with some minor amendments.<sup>215</sup> Three years later, on expiry of the JPA in September 2009, ICANN and Commerce signed an 'Affirmation of Commitments' replacing the former agreement.<sup>216</sup> Unlike the JPA / MoU, however, this agreement was intended to be permanent and was not set to expire after a fixed period. It removed the requirement that ICANN would report to Commerce, and explicitly stated that ICANN was a private entity not under the control of any one authority. Under the agreement, ICANN affirmed its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the USA with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organisation with input from the public, 'for whose benefit ICANN shall in all events act.'<sup>217</sup> ICANN was committed to organise a review of its execution of the above commitments at least once every three years, with the first review concluding no later than December 31, 2010. The review was to be performed, not by the DoC as in the past, but by a team including the Chair of the GAC, the Chair of the Board of ICANN, a DoC representative, representatives of ICANN Advisory Committees and Supporting Organisations, and independent experts. The precise composition of the review team was to be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Recommendations from the reviews were to be provided to the Board and posted for public comment. The Board was committed to take action within six months of receipt of the

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and DNS.com.cn". 1 October 2008. Updated: 3 October 2008. Retrieved 20 June, 2010, from <http://www.icann.org/en/compliance/>).

<sup>214</sup> ICANN / United States Department of Commerce (2006). Joint Project Agreement between the United States Department of Commerce and Internet Corporation for Assigned Names and Numbers. Signed 29 September 2006. Retrieved 20 June, 2010, from <http://www.icann.org/en/general/JPA-29sep06.pdf>

<sup>215</sup> Mueller, M. (2006). "In Historic Vote on WHOIS Purpose, Reformers Win by 2/3 Majority." ICANNWatch, post by Mueller on Wednesday April 12 2006. Retrieved 20 August 2009, from <http://www.icannwatch.org/article.pl?sid=06/04/12/1639223&mode=thread>

<sup>216</sup> ICANN / United States Department of Commerce (2009). Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. Signed 30 September 2009. Retrieved 20 June, 2010, from <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>217</sup> Ibid

recommendations.<sup>218</sup> In addition, oversight panels including GAC representatives were to be set up to conduct regular reviews of ICANN's work in three other areas: WHOIS policy, competition among gTLDs, and the security of the network.<sup>219</sup>

The Affirmation was widely seen as freeing ICANN from US governmental oversight,<sup>220</sup> although it should be remembered that the US government still retains ultimate control of the DNS root and ICANN continues to derive its authority to manage the core systems from the IANA contract, which remains unaltered. Furthermore, the DoC retains a permanent seat on the AoC review panel. Notwithstanding, it is clear that the replacement of the JPA with the AoC represents an important loosening of US governmental oversight. It is interesting that this change of policy followed the election of the Obama administration, although the Obama team had made no previous statements regarding ICANN either prior to or after the election. ICANN independence had, of course, previously been promised under the Clinton administration, but had failed to materialise during the eight years of the Bush government.

The GAC's oversight role seems to be significantly extended, which might be seen as moving ICANN a step closer to an intergovernmental oversight model. ICANN's own commentary on the agreement noted that the GAC's role was 'reaffirmed' and that the GAC is a key participant in selecting the membership of the review teams.<sup>221</sup> However, ICANN also asserts that the AoC places oversight power mainly with the hands of the 'ICANN community', constituting 'recognition that the multi-stakeholder model is robust enough to review itself'.<sup>222</sup>

Mueller sees the Affirmation as eliminating at a stroke some of the key objections to ICANN from powers such as the EU. He argues that, by elevating the GAC in status, the Affirmation has been used to provide a 'soft internationalisation' without tying ICANN to the United Nations or other type of intergovernmental agreement; the

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<sup>218</sup> Ibid

<sup>219</sup> Ibid

<sup>220</sup> Fildes, J. (2009). "US relaxes grip on the internet." BBC News, 30 September 2009. Retrieved 24 August, 2010, from <http://news.bbc.co.uk/1/hi/8283310.stm>

<sup>221</sup> ICANN (2009). Announcement: 'ICANN CEO Talks About the New Affirmation of Commitments'. 30 September 2009. Retrieved 20 June, 2010, from <http://www.icann.org/en/announcements/announcement-30sep09-en.htm>

<sup>222</sup> Ibid

result, he asserts, is to solidify international acceptance of ICANN as a privatised governance entity.<sup>223</sup>

### **ICANN, WSIS and the IGF**

ICANN came under important international scrutiny at the World Summit on the Information Society (WSIS) in 2003 and 2005. WSIS, jointly organised by the UN and ITU, was seen as an experiment in holding a ‘tripartite’ international conference, with representation for governments, business and civil society, as opposed to the traditional, purely intergovernmental, model. Mathiason sees WSIS as the formal emergence of the international political dimension of Internet governance.<sup>224</sup>

WSIS was endorsed by the UN General Assembly in January 2002.<sup>225</sup> The first phase of the summit (WSIS I) was held in Geneva in December 2003. It adopted a Declaration of Principles on which the ‘Information Society’ should be built<sup>226</sup>; however, it failed to produce any meaningful agreement on substantive issues of Internet governance, including the future of DNS. The Geneva summit also produced a Plan of Action, which requested the UN Secretary-General to set up a working group on Internet governance (WGIG)<sup>227</sup>, to include representatives from all three stakeholder groups (governments, the private sector and civil society) and detailed to: develop a working definition of Internet governance; identify public policy issues relevant to Internet governance; develop a common understanding of the respective roles and responsibilities of governments and existing international organisations as well as the private sector and civil society; and prepare a report on the results of this activity to be presented at the second phase of WSIS in Tunis in 2005. The WGIG was duly established, consisting of some forty members and chaired by Nitin Desai

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<sup>223</sup> Mueller, M. (2010). *Networks and States*. Cambridge, Massachusetts, MIT Press. P250

<sup>224</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge. P97

<sup>225</sup> United Nations (2002). Resolution adopted by the General Assembly: 56/183. “World Summit on the Information Society.” 31 January 2002. Retrieved 24 August, 2010, from [http://www.itu.int/wsis/docs/background/resolutions/56\\_183\\_unga\\_2002.pdf](http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002.pdf)

<sup>226</sup> WSIS (2003). Declaration of Principles: “Building the Information Society: a global challenge in the new Millennium.” Document WSIS-03/GENEVA/DOC/4-E. 12 December 2003. Retrieved 27 August, 2010, from <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

<sup>227</sup> WSIS (2003). Plan of Action. Document WSIS-03/GENEVA/DOC/5-E. 12 December 2003 Retrieved 27 August, 2010, from <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

(Special Adviser to the Secretary-General).<sup>228</sup> It worked over the next eighteen months and presented its Final Report in July 2005.<sup>229</sup>

As with WSIS I, WSIS II was preceded by a series of preparatory conferences known as ‘PrepComs’, at which several major governments indicated a desire to see the ICANN regime replaced by some other arrangement, such as an intergovernmental body. The Chinese delegation at Prepcom 2 (February 2005) advocated that the WGIG should examine and undertake research into establishing a single multinational organisation to control various aspects of Internet governance, including DNS.<sup>230</sup> Brazilian delegates advocated reform of naming and numbering systems governance, on the grounds that current arrangements excluded national governments and civil society. The Indian delegation also spoke of the need for reform of DNS governance arrangements, as did the Columbian representatives, together with the NGO caucus. Chinese representatives also criticised the IP address allocation system, which they saw as inherently unfair, based on a ‘first come, first served’ principle that, they felt, had led to a scarcity before many developing nations had the chance to request addresses, resulting in an effective bottleneck to development.<sup>231</sup>

Prior to the main Summit, Argentina put forward proposals to reform ICANN to reinforce the role of governments with regard to ‘relevant internet public policy issues’ and also to continue its ‘internationalisation’.<sup>232</sup> A similar stance was taken by Russia<sup>233</sup> and in the African common position paper submitted by Ghana.<sup>234</sup> The EU proposed that ICANN be removed from US oversight and a new ‘co-operation model’ put in place, based on a regular meeting of states and including a new arbitration and

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<sup>228</sup> WGIG (2005). Report of the Working Group on Internet Governance. Retrieved 27 August, 2010, from <http://www.wgig.org/docs/WGIGREPORT.pdf> P20-22

<sup>229</sup> Ibid

<sup>230</sup> Cameron, A. (2005). Report from the World Summit on the Information Society (WSIS) PrepCom2, Geneva, February 17-25, 2005. Retrieved 27 August, 2010, from [http://rights.apc.org.au/wsisis/2005/03/report\\_wsisis\\_prepcom2.php](http://rights.apc.org.au/wsisis/2005/03/report_wsisis_prepcom2.php)

<sup>231</sup> Ibid

<sup>232</sup> WSIS (2005). Document WSIS-II/PC-3/DT/18-E, Argentina Proposal to the WSIS. 30 September 2005. Retrieved 2 August 2009, from <http://www.itu.int/wsisis/docs2/pc3/working/dt18.pdf>

<sup>233</sup> WSIS (2005). Document WSIS-II/PC-3/DT/24-E, 30 September 2005. Position of Russian Federation / Azerbaijan / Belarus / Moldova. Retrieved 2 August 2009, from <http://www.itu.int/wsisis/docs2/pc3/working/dt24.pdf>

<sup>234</sup> WSIS (2005). Document WSIS-II/PC-3/DT/17-E, 30 September 2005. African Common Position on Internet Governance. Retrieved 2 August 2009, from <http://www.itu.int/wsisis/docs2/pc3/working/dt17.pdf>

dispute resolution system.<sup>235</sup> <sup>236</sup> Iran and Pakistan proposed an ‘Intergovernmental Council for Global Public Policy and Oversight’, a UN body that would oversee ICANN. It would include an advisory role for the private sector and intergovernmental agencies.<sup>237</sup> <sup>238</sup> The Arab Group echoed the Chinese position in proposing the establishment of a world council on the Internet.<sup>239</sup>

The US, however, made plain that it had no intention of countenancing alternative arrangements for DNS governance. A few months before the summit, the US assistant commerce secretary, Michael Gallagher, stated that the US would ‘maintain its historic role in authorising changes or modifications to the authoritative root zone file’.<sup>240</sup> He justified this in terms of the need to ensure stability and security of the system. This announcement was met with support from Australia<sup>241</sup> but was criticised by other states, including Japan<sup>242</sup> and the EU.<sup>243</sup>

The WGIG Report (July 2005) suggested four possible models for future governance of Internet naming and numbering resources:

- Model 1): Creation of a UN body named the Global Internet Council, which would replace the GAC and take over oversight of ICANN. Governments would play the leading role in the GIC, with the private sector and civil society in an advisory capacity. The GIC would also have a wider role in governance

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<sup>235</sup> WSIS (2005). Document WSIS-II/PC-3/DT/21-E, 30 September 2005. European Union Proposal for addition to Chair’s paper Sub-Com A internet Governance on Paragraph 5 “Follow-up and Possible Arrangements”. Retrieved 2 August 2009, from <http://www.itu.int/wsis/docs2/pc3/working/dt21.pdf>

<sup>236</sup> Wray, R. (2005). "Who's proposing what?" Guardian, 12 October 2005. Retrieved 27 August, 2010, from <http://www.guardian.co.uk/technology/2005/oct/12/news>

<sup>237</sup> ITU (2005). World Summit on the Information Society: Summit Newsroom. Retrieved 2 August 2009, from [http://www.itu.int/wsis/tunis/newsroom/background/internet-governance\\_print.html](http://www.itu.int/wsis/tunis/newsroom/background/internet-governance_print.html)

<sup>238</sup> Wray, R. (2005). "Who's proposing what?" Guardian, 12 October 2005. Retrieved 27 August, 2010, from <http://www.guardian.co.uk/technology/2005/oct/12/news>

<sup>239</sup> ITU (2005). World Summit on the Information Society: Summit Newsroom. Retrieved 2 August 2009, from [http://www.itu.int/wsis/tunis/newsroom/background/internet-governance\\_print.html](http://www.itu.int/wsis/tunis/newsroom/background/internet-governance_print.html)

<sup>240</sup> BBC (2005). "US holds onto key internet role." 1 July, 2005. Retrieved 27 August, 2010, from <http://news.bbc.co.uk/1/hi/technology/4640441.stm>

<sup>241</sup> Kotadia, M. (2005). “Australia backs Internet status quo.” ZDNet Australia, 8 July, 2005. Retrieved 27 August, 2010, from <http://www.zdnet.co.uk/news/networking/2005/07/08/australia-backs-internet-status-quo-39208297/>

<sup>242</sup> Ibid

<sup>243</sup> Reding, V. (2005). “Opportunities and challenges of the Ubiquitous World and some words on Internet Governance: Report of the European Commissioner for Information Society and Media to 2005 Summit of the Global Business Dialogue on electronic commerce.” Brussels, 17 October 2005 Retrieved 21 June 2010, from [http://ec.europa.eu/commission\\_barroso/reding/docs/speeches/ubiquitous\\_world\\_20051017.pdf](http://ec.europa.eu/commission_barroso/reding/docs/speeches/ubiquitous_world_20051017.pdf)

of other Internet-related public policy issues, such as spam, privacy, cybersecurity and cybercrime.

- Model 2): No changes apart from strengthening of ICANN'S GAC.
- Model 3): Creation of an International Internet Council outside the UN system, which would take over oversight of ICANN and possibly replace the GAC. Governments would take a leading role in the IIG, with the private sector and civil society in an advisory role.
- Model 4): Creation of three new bodies: a World Internet Corporation for Assigned Names and Numbers, overseen by governments, to take over ICANN's functions; a Global Internet Governance Forum to facilitate discussion and co-ordinate policy between governments, businesses and the public; and a government-led Global Internet Policy Council to co-ordinate work on Internet-related public policy issues.<sup>244</sup>

The US government effectively rejected all four options, arguing against any shift in the regulatory approach towards governmental, top-down control, and stating that the United States continued to support 'private sector led technical coordination and management' of the naming and addressing systems in the form of ICANN. It did, however, recognise that 'governments have legitimate public policy and sovereignty concerns with respect to the management of their country code top level domains'.<sup>245</sup>

The main summit (WSIS II) took place from 16-18 November 2005 in Tunis, Tunisia. 174 state entities (including the EU) were represented, together with 92 IGOs, 606 NGOs and civil society organisations, 226 business entities and 642 media organisations.<sup>246</sup> None of the issues pertaining to US control of the root or political oversight of ICANN were effectively resolved. Two official agreements were produced, the 'Tunis Commitment'<sup>247</sup> and the 'Tunis Agenda for the Information

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<sup>244</sup> WGIG (2005). Report of the Working Group on Internet Governance. Retrieved 27 August, 2010, from <http://www.wgig.org/docs/WGIGREPORT.pdf>.

<sup>245</sup> WSIS (2005). Document WSIS-II/PC-3/CONTR/035-E. United States of America: Comments on the Report of the WGIG. 17 August 2005. Retrieved 25 August 2010, from <http://www.itu.int/wsis/docs2/pc3/contributions/co35.pdf>

<sup>246</sup> ITU (2005). Summit Newsroom: Tunis Phase. 18 November 2005. Retrieved 27 August, 2010, from <http://www.itu.int/wsis/tunis/newsroom/index.html>

<sup>247</sup> WSIS (2005). Tunis Commitment. Document WSIS-05/TUNIS/DOC/7-E. 18 November 2005. Retrieved August 20, 2010, from <http://www.itu.int/wsis/docs2/tunis/off/7.html>

Society'.<sup>248</sup> Neither addressed the issue of DNS and IP addressing oversight in specific terms. There were, however, a number of clauses that referred to the need for a multilateral approach to Internet governance issues.<sup>Note 2\_6</sup>

The main outcome of the Summit was the creation of an Internet Governance Forum (IGF) to continue discussions.<sup>249</sup> Like WSIS, the IGF is a multistakeholder body comprised of representatives of governments, business and civil society. Its Secretariat, established in March 2006, was effectively a continuation of the WSIS Secretariat, retaining the same staff.<sup>250</sup> In May 2006, UN Secretary-General Kofi Annan established an Advisory Group to assist in convening the IGF, chaired by Nitin Desai and including 47 members from governments, the private sector and civil society.<sup>251</sup> The Advisory Group, now known as the Multistakeholder Advisory Group (MAG), continues to exist and meets three times annually, between meetings of the IGF.<sup>252</sup> Its status is that of a UN advisory committee.<sup>253</sup>

The main IGF meets annually. Initially it was to meet for a period of five years; however in May 2010 the UN Secretary-General recommended that this be extended.<sup>254</sup> There have so far been six meetings: Athens, Greece (2006), Rio de Janeiro, Brazil (2007), Hyderabad, India (2008), Sharm El Sheikh, Egypt (2009),

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<sup>248</sup> WSIS (2005). Tunis Agenda for the Information Society. Document: WSIS-05/TUNIS/DOC/6(Rev. 1)-E. 18 November 2005 Retrieved August 27, 2010, from

<http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

<sup>Note 2\_6</sup> For example, Paragraph 29 of the Agenda asserted that "The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations." Paragraph 31 contained a commitment to "ensuring the requisite legitimacy of (Internet) governance, based on the full participation of all stakeholders, from both developed and developing countries." Paragraph 35 reaffirmed that "...the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations." Paragraph 68 recognised that "...all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet."

<sup>249</sup> Ibid, Paragraph 72.

<sup>250</sup> Mathiason, J. (2009). Internet Governance: The new frontier of global institutions. New York, Routledge. P227

<sup>251</sup> United Nations (2006). United Nations Department of Public Information, News and Media Division, New York. "Secretary-General establishes advisory group to assist him in convening Internet Governance Forum." 17 May 2006. Retrieved August 20, 2010, from

<http://www.un.org/News/Press/docs//2006/sga1006.doc.htm>

<sup>252</sup> IGF (2010). "About the MAG," Retrieved August 26, 2010, from

<http://www.intgovforum.org/cms/magabout>

<sup>253</sup> IGF (2010). Multistakeholder Advisory Group Meeting, Geneva, 12 May 2010: Summary Report. Retrieved August 26, 2010, from

[http://www.intgovforum.org/cms/2010/MAG\\_email\\_Digests/IGF.12.May.MAG.summary.record.pdf](http://www.intgovforum.org/cms/2010/MAG_email_Digests/IGF.12.May.MAG.summary.record.pdf)

<sup>254</sup> United Nations (2010). Continuation of the Internet Governance Forum: Note of the Secretary-General. May 2010. Retrieved August 26, 2010, from

<http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan039074.pdf>

Vilnius, Lithuania (2010) and Nairobi (2011).<sup>255</sup> IGF meetings are based around workshops, forums and meetings of the ‘Dynamic Coalitions’ (effectively, working groups tasked to examine a specific issue). All of these activities are open to participants from governments, business and civil society. There are also a number of Main Sessions, which discuss issues from an agenda prepared in advance by the MAG.<sup>256</sup>

The IGF has so far produced little to address the issue of naming and numbering resource governance. The topic of Critical Internet Resources was discussed in Main Sessions at Rio de Janeiro,<sup>257</sup> Hyderabad,<sup>258</sup> Sharm el Sheikh<sup>260</sup>, Lithuania,<sup>261</sup> and Nairobi<sup>262</sup> but these discussions have produced little consensus with regards to future oversight arrangements.

## **Conclusion to Chapter 2**

In summary, ICANN began as an attempt by the Clinton administration to ‘privatise’ governance of the Internet’s core systems. The new organisation was to be run on ‘multistakeholder’ lines, incorporating representatives of both the private sector and civil society, with an ‘advisory’ role only for governments. It was to be essentially a globalised non-governmental governance organisation, based on principles of free-market competition but also representation of, and accountability to, a global Internet-

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<sup>255</sup>IGF (2010). “The Internet Governance Forum.” Retrieved August 26, 2010, from <http://www.intgovforum.org/cms/>

<sup>256</sup> Mathiason, J. (2009). Internet Governance: The new frontier of global institutions. New York, Routledge. P130

<sup>257</sup> IGF (2007). Internet Governance Forum - Rio de Janeiro, Brazil. 12 November 2007. Session topic: “Critical Internet Resources.” Retrieved August 26, 2010, from [http://www.intgovforum.org/cms/Rio\\_Meeting/IGF2-Critical%20Internet%20Resources-12NOV07.txt](http://www.intgovforum.org/cms/Rio_Meeting/IGF2-Critical%20Internet%20Resources-12NOV07.txt)

<sup>258</sup> IGF (2008). Internet Governance Forum - Hyderabad, India. Session title: “Arrangements for Internet Governance, Global and National/Regional.” 5 December 2008. Retrieved August 26, 2010, from [http://www.intgovforum.org/cms/hyderabad\\_prog/AfIGGN.html](http://www.intgovforum.org/cms/hyderabad_prog/AfIGGN.html)

<sup>259</sup> IGF (2008). Internet Governance Forum - Hyderabad, India. Session title: “Managing Critical Internet Resources: Open Dialogue.” 5 December 2008. Retrieved August 26, 2010, from [http://www.intgovforum.org/cms/hyderabad\\_prog/OD\\_CIR.html](http://www.intgovforum.org/cms/hyderabad_prog/OD_CIR.html)

<sup>260</sup> IGF (2009). Internet Governance Forum - Sharm El Sheikh, Egypt. Session title: “Managing Critical Resources.” 16 November 2009. Retrieved August 26, 2010, from [http://www.intgovforum.org/cms/2009/sharm\\_el\\_Sheikh/Transcripts/Sharm%20El%20Sheikh%2016%20November%202009%20Managing%20Critical%20Internet%20Resources.pdf](http://www.intgovforum.org/cms/2009/sharm_el_Sheikh/Transcripts/Sharm%20El%20Sheikh%2016%20November%202009%20Managing%20Critical%20Internet%20Resources.pdf)

<sup>261</sup> IGF (2010). Internet Governance Forum - Vilnius, Lithuania. 15 September 2010. Session title: “Managing Critical Resources.” Retrieved March 13 2011, from <http://www.intgovforum.org/cms/component/content/article/102-transcripts2010/643-resources>

<sup>262</sup> IGF (2011). “2011 Main Sessions Panellists.” Retrieved December 8 2011, from <http://www.intgovforum.org/cms/w2011/main-sessions-panellists-2011>

using public. Though the United States would retain an oversight role for a ‘transition’ period, ICANN was to be released into full independence within two years.

Since that time, the regime has undergone some major changes, particularly in the 2002-03 reforms. The emphasis on representation of and accountability to the global Internet-using public has been severely curtailed, particularly with the scrapping of the ‘At Large’ election system for Directors. At the same time there has been increased emphasis on the role of governments through the GAC, which has seen its effective powers markedly increased. In other ways, there has been a more subtle and gradual evolution of the regime. These have included the extension of ICANN’s effective authority over both registries and registrars, which did not come without significant resistance, including the contests with NSI / VeriSign, and the RegisterFly affair and its consequences.

Throughout the years of the Bush administration, there was a marked unwillingness on the part of the US government to give up its oversight role, as evidenced by the repeated renewal of the MoU / JPA. The Obama administration, however, has moved ICANN closer to full independence, with the termination of the JPA and its replacement with the AoC. Nonetheless, the US still has not completely removed itself from the oversight role. Not only do DoC officials continue to play a (reduced, but still significant) role in the AoC review committees, but the US still claims ultimate legal ownership of the root. In the final analysis, therefore, ICANN continues to draw its legal authority to govern the Internet’s core systems from its contract with the DoC.

An effective intergovernmental challenge to this state of affairs has so far failed to emerge. The UN and ITU have repeatedly attempted, without success, to impose their authority on the issue-area. The first attempt, in the form of the gTLD-MoU, failed because the US government refused to co-operate. Subsequent reform proposals emerged during the UN / ITU sponsored WSIS process, but also failed to gain traction, partly because of US intransigence and partly because of a failure to reach consensus. A subsequent UN initiative, the IGF, has also so far failed to produce any significant challenge to the standing ICANN arrangements.

Nonetheless, despite the failure of the formal intergovernmental system in the shape of the UN to impose itself on this issue-area, the change in the GAC's role has been interpreted by scholars such as Kleinwächter as a significant shift towards an intergovernmental approach.<sup>263</sup> However, other scholars, such as Geoff Huston, continue to see the organisation as being largely dominated by nongovernmental actors, particularly from the domain name supply side.<sup>264</sup> The next chapter will look in more depth at these competing interpretations of the ICANN regime.

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<sup>263</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1121

<sup>264</sup> Huston, G. (2005). "ICANN, the ITU, WSIS, and Internet Governance." *The Internet Protocol Journal* 8(1): 16-28. P23

# Chapter 3

## Competing perspectives on ICANN: a literature review

### Introduction

This chapter will review some of the pertinent academic literature on ICANN. A considerable volume of material has been written about the organisation, from a range of perspectives.

A considerable proportion of the literature appears to assume that ICANN is a ‘private’ nongovernmental industry self-regulatory body. This is certainly how the organisation was envisaged when initially created under the Clinton administration, and ICANN’s core documents still maintain this claim. The concept of ICANN as an essentially nongovernmental agency wielding ‘private’ regulatory authority is consistent with a phenomenon identified by numerous IR scholars (see Chapter 8) of nonstate governance mechanisms arising to fill regulatory gaps, brought about by the diminishment of state power to regulate in a globalised world.

The notion that the Internet’s core systems are outside the control of traditional public authorities often leads to the view that ICANN is effectively a public authority in its own right, perhaps even possessing a type of ‘sovereignty’ of its own. Such views often result in concerns regarding the extent to which the organisation meets ‘liberal democratic’ standards of legitimacy. Writers such as Jonathan Weinberg,<sup>265</sup> Kathleen Fuller<sup>266</sup> and Jonathan Koppell<sup>267</sup> tend to emphasise concerns regarding ICANN’s legitimacy, accountability, and mechanisms for representation. Attempts to address such concerns are also ultimately the basis for the ‘multistakeholder’ model of governance. Proponents of multistakeholderism, such as John Mathiason,<sup>268</sup> argue that ICANN can be legitimised on the basis of fair representation for all affected interests

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<sup>265</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260.

<sup>266</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html>

<sup>267</sup> Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder.”" *Public Administration Review* 65(1): 94-108.

<sup>268</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge. PP82-88

within the ICANN structure. However, these writers also often tend to see multistakeholderism as an ideal that is not necessarily well implemented in the current ICANN system. They tend to see the solution as reform of ICANN rather than abandonment of the multistakeholder model.

Some other analysts, such as Daniel Drezner,<sup>269</sup> take a more traditional International Relations approach to the organisation, interpreting ICANN as a regime underpinned by states. They identify a strong hegemonic role for the United States government in creating the regime, as well as contributions from other state actors. They also identify a strong continued influence from governmental authorities in shaping ICANN policymaking.

The remainder of this chapter will attempt to categorise and explore in more detail some of the various perspectives on ICANN offered in the literature. It will not, at this stage, attempt to evaluate the relative merits of these perspectives, which will be dealt with in Chapter 7 following more in-depth empirical investigation into the organisation and its operations in practice.

### **Technical caretaker model**

Lawrence B. Solum interprets ICANN as primarily a technical agency, best understood as ‘an attempt to institutionalise and preserve the autonomy of an engineering-based approach to Internet governance in face of pressures to cede control to either national governments or market mechanisms.’<sup>270</sup> He points to ICANN’s statement of core values and its emphasis on ensuring the ‘operational stability, reliability, security and interoperability of the Internet’, which he sees as ‘technical imperatives that reflect the corporation’s origins in the community of network engineers’.<sup>271</sup> He also highlights the emphasis on making ‘well-informed decisions based on expert advice’.<sup>272</sup> The hypothesis of ICANN as an ‘engineering based’ approach to governance is confirmed, Solum argues, by the ‘facts’ of ICANN’s continuing existence as a ‘nongovernmental’ organisation, and its

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<sup>269</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. PP113-117

<sup>270</sup> Solum, L. B. (2009). ‘Models of Internet governance.’ *Internet Governance: Infrastructure and Institutions*. L. A. Bygrave and J. Bing. Oxford, Oxford University Press: 48-91. PP60-61

<sup>271</sup> *Ibid*, P60

<sup>272</sup> *Ibid*

resistance to ‘market approaches.’<sup>273</sup> However, both of these ‘facts’ may be disputed, as this thesis will go on to show.

Maeng Joo Lee also identifies a strong role for the technical community, to the extent that he talks about ‘technical capture’. He points out that IETF technical standards effectively limit ICANN’s freedom of action in important areas.<sup>274</sup>

Other scholars such as Mueller are, however, sceptical of such claims. Mueller argues that governance of the DNS involves not neutral ‘technical co-ordination’ but economic regulation together with some broader issues of public policy.<sup>275</sup> He argues that, while the RIRs retain strong ties to the technical community and its norms, ICANN has lost many of these moorings. ICANN, he asserts, thinks of itself as a private corporation first and foremost.<sup>276</sup>

### **‘Liberal democratic’ approach**

An alternative perspective, based on a view of ICANN as a public policymaker rather than a mere technical co-ordinator, asks questions revolving around the extent to which ICANN does or should meet ‘liberal democratic’ standards of legitimacy. This approach, taken by analysts such as Hans Klein<sup>277</sup>, Jonathan Weinberg,<sup>278</sup> Kathleen Fuller<sup>279</sup> and Jonathan GS Koppell<sup>280</sup>, starts from the assumption that, as a public policymaking body, ICANN should be based upon those principles of liberal democracy that have underpinned notions of legitimate public authority in Western political culture. To the extent that ICANN does not meet such criteria, these writers see this as a problem that needs to be ‘fixed’ in order to secure ICANN’s legitimacy as a policymaking body.

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<sup>273</sup> Ibid, P61

<sup>274</sup> Lee, M. J. (2008). Linking Governance and Performance: ICANN as an Internet Hybrid. Virginia, Virginia Polytechnic Institute and State University. PhD Thesis. Retrieved 14 February 2010, from <http://scholar.lib.vt.edu/theses/available/etd-06172008-202220/> P97

<sup>275</sup> Mueller, M. L. (2010). Networks and States: The Global Politics of Internet Governance. Cambridge, Massachusetts, MIT Press. P239

<sup>276</sup> Ibid, P220

<sup>277</sup> Klein, H. (2002). "ICANN and Internet Governance: Leveraging Technical Coordination to Realize Global Public Policy." Information Society 18(3): 193-207.

<sup>278</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." Duke Law Journal 50(1): 187-260.

<sup>279</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." Duke Law and Technology Review 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html>

<sup>280</sup> Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”." Public Administration Review 65(1): 94-108.

Such concerns with ICANN's legitimacy were a significant influence on the organisation's initial design. Dan Hunter argues that the US government realised the organisation would undertake significant regulatory functions, making it look like a governmental actor of some form or another. As a result, he asserts, they recognised that ICANN could not operate just as a typical corporate animal, but needed some concession (real or imagined) to democracy.<sup>281</sup> Thus, the 1998 White Paper emphasised that 'NewCo', while 'private', should also embody principles such as accountability to, and representation of, an Internet 'community'.<sup>282</sup>

Weinberg evaluates the techniques ICANN has used in its attempts to legitimise itself, and the limitations of these. Firstly, he argues, ICANN has invoked 'techniques of administrative law', by structuring itself to resemble a classic US administrative agency, using and purportedly bound by the tools of bureaucratic rationality. Secondly, he asserts, ICANN has invoked 'techniques of representation', by adopting structures and procedures that make it resemble a representative government body. Finally, Weinberg states, ICANN has invoked 'techniques of consensus' by asserting that its structure and rules ensure it can only act in ways that reflect the consensus of the Internet community.<sup>283</sup>

However, he goes on to argue, none of these bases for legitimacy stands up to close scrutiny. He feels that ICANN could not derive legitimacy from its links with the US government because these were 'murky'.<sup>284</sup> Unlike a traditional federal agency, he observes, ICANN has no grant of power in a statute enacted by Congress or Presidential nomination of its top administrators;<sup>285</sup> furthermore, unlike a conventional US government agency, ICANN's actions are not subject to significant judicial review.<sup>286</sup> ICANN's appeal to the principles of representation also fails, Weinberg argues, because, in his view, ICANN does not actually represent the

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<sup>281</sup> Hunter, D. (2003). "ICANN and the Concept of Democratic Deficit." *Loyola of Los Angeles Law Review* 36 (3): 1152-1181. P1155

<sup>282</sup> United States Department of Commerce, National Telecommunications and Information Administration (1998). Statement of Policy (White Paper): "Management of Internet Names and Addresses." 5<sup>th</sup> June 1998. Docket Number: 980212036-8146-02. Retrieved 14 February 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>283</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260. P188

<sup>284</sup> *Ibid*, P213

<sup>285</sup> *Ibid*, P218

<sup>286</sup> *Ibid*, P233

Internet community in any meaningful way.<sup>287</sup> Finally, he argues, appeal to the principle of consensus as a basis for legitimacy does not work because genuine consensus is impossible to achieve in the domain name context; and furthermore, ICANN does not, in any case, have procedures that would enable it to recognise consensus (or the lack of consensus) surrounding any given issue.<sup>288</sup>

Some analysts have approached the legitimacy issue from the perspective that ICANN is indeed a US governmental agency. According to this view, the solution to the organisation's lack of accountability is to make ICANN more closely accountable to the Department of Commerce. This was the position in taken by Michael Fromkin following the initial creation of the organisation; he argued that ICANN's relationship with the DoC was illegal, in violation of either the Constitution or federal statutes. If ICANN was engaged in public policymaking, he argued, it was either doing so as a private party, which is illegal under the private non-delegation doctrine, or it was doing so on behalf of the DoC, also illegal because ICANN did not comply with the Administrative Procedure Act.<sup>289</sup> He felt that some of these problems could be addressed by turning ICANN into a full-fledged US administrative agency<sup>290</sup>; however, Kathleen Fuller disagreed with this, arguing that a government agency necessarily operates at a slower pace, and that in the rapidly changing world of the Internet, this could be a fatal flaw.<sup>291</sup>

Like Weinberg, Jonathan G.S. Koppell argues that ICANN is unclear about what its legitimacy is based upon, and appeals to not just one basis but several, a phenomenon he terms 'multiple accountabilities disorder'.<sup>292</sup> He identifies conflicting expectations derived from three substantive notions of accountability, which he defines as 'controllability', 'responsiveness', and 'responsibility'. He sees 'controllability' as 'vexing' because, he asserts, it has never been clear who or what ought to control ICANN. 'Responsibility', he argues, is made difficult by ambiguities within the documents upon which ICANN is based, and the malleability of ICANN's rules and

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<sup>287</sup> Ibid, PP 241-244

<sup>288</sup> Ibid, P252

<sup>289</sup> Fromkin, A. M. (2000). "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution." *Duke Law Journal* 50(1): 17-184. PP93-140

<sup>290</sup> Ibid, PP171-182

<sup>291</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from

<http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html> P39

<sup>292</sup> Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"." *Public Administration Review* 65(1): 94-108. P99

regulations compounds the lack of any precedent to guide behaviour. 'Responsiveness' is equally difficult because ICANN's constituency is divided and the boundaries of its responsibilities are ambiguous; while even 'liability' and 'transparency' are challenging, as it is unclear whether ICANN should be judged by standards applicable to public or private organisations.<sup>293</sup>

Mueller argues that ICANN's failure to create accountability and trust has made it difficult even for proponents of a nonstate governance model to embrace its independence. The problem, he feels, lies in the way ICANN is constituted, with lack of a defined membership to which the Board and staff can be held accountable. As a substitute for real accountability, Mueller maintains, ICANN has created 'a chaotic mélange of participatory mechanisms, none of which have any real power and all of which can be played against each other by the corporation.'<sup>294</sup> He goes on to argue that the new oversight model set out in the Affirmation of Commitments fails to resolve ICANN's accountability problems, because the members of the review panels are 'hand-picked by the leaders of ICANN' largely from among ICANN's own internal subunits. No new perspectives or checks and balances, Mueller maintains, will result from such a process.<sup>295</sup>

An alternative view on accountability is expressed by C. N. J. De Vey Mestdagh and R. W. Rijgersberg, who claim there is no need for ICANN to have accountability mechanisms, because the ICANN root has competitors from alternative DNS roots, and users can therefore 'vote with their feet'. Accountability to the public is '...simply constituted by the organisation's capacity to attract customers and its ability to maintain to serve them according to their needs.'<sup>296</sup> This argument might have strong merit if the alternative roots represented genuine competition to ICANN; however, this is highly questionable at best.

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<sup>293</sup> Ibid, PP101-104

<sup>294</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P247-248

<sup>295</sup> Ibid, P250

<sup>296</sup> Rijgersberg, R. W. and C. N. J. de vey Mestdagh (2007). "Rethinking Accountability in Cyberspace: A New Perspective on ICANN." *International Review of Law, Computers & Technology*, 21(1): 27-38.

## ICANN as a democracy

The 2000 At-Large elections for a proportion of ICANN directors were, at the time, widely seen as the key to ICANN's quest for legitimacy. Proponents believed that the elections would transform the organisation into the first global democracy and perhaps set a precedent that future global governance organisations would follow. Hans Klein, writing in 2001, took this view.<sup>297</sup> Although he acknowledged that the ideal of global democracy was not fully achieved in the ICANN election, he thought that the election process would continue to evolve and that it could light the way for further developments in global democracy in other sectors.<sup>298</sup>

However, such enthusiasm was premature. Numerous problems were encountered with the election, including difficulties in defining an appropriate voter constituency, agreeing on criteria for registering as a voter and creating reliable mechanisms to prevent electoral fraud. In 2002, the Board scrapped the At-Large election mechanism as too complex, expensive and unpredictable.<sup>299</sup> The failure of the At-Large elections has arguably made it all the more important that ICANN finds alternative means of ensuring accountability and legitimising itself.

Susan P. Crawford, a former ICANN director, argues that a 'democratic' model does not work for ICANN because democratic theory does not fit in with the organisation's necessary framework.<sup>300</sup> One key problem, she reasons, is that its 'citizenry' cannot be properly specified; it could include, for example, anyone who had considered registering a domain name but decided not to because of some element of the ICANN-required registration scheme, or anyone who had ever used WHOIS information, or indeed anyone who had ever gone online. Without a clearly defined electorate, Crawford argues, no-one could claim to be 'representative' of that citizenry, and there is no way to determine what a 'majority' position is.<sup>301</sup> Weinberg likewise questions what it means to 'represent' any community as ill-defined as the Internet community. Both Weinberg and Dan Hunter also identify a fundamental

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<sup>297</sup> Klein, H. (2001). "The feasibility of global democracy: understanding ICANN's at-large election." *Info* 3(4): 333-345.

<sup>298</sup> *Ibid*, P344

<sup>299</sup> ICANN (2002). Minutes of regular meeting of the Board. 14 March 2002. Retrieved 2 August 2009, from <http://www.icann.org/en/minutes/minutes-14mar02.htm>

<sup>300</sup> Crawford, S. P. (2004). "The ICANN experiment." *Cardozo Journal of International & Comparative Law* 12 (2): 409-447. P701

<sup>301</sup> *Ibid*, P710

ambivalence about what sort of organisation ICANN is (technical agency, private corporation or public policymaker) that leads to alternative views of the kinds of political commitments we should expect.<sup>302 303</sup>

### Multistakeholder approach

Some writers have found a basis for ICANN's legitimacy in the multistakeholder representation model. This has been said to confer a form of accountability by means of interest representation, whereby interest groups affected by ICANN's activities are represented within the organisation and given a voice in its policymaking processes. As McDowell and Steinberg explain, in this approach, governance is depicted as coordination among actors, not as a way in which those actors can be constituted as 'citizens'.<sup>304</sup> The concept is based on the idea of a pluralist political process reproduced within the agency itself. The reasoning is that, since agency decisionmakers must consider the wishes of all relevant groups, their decisions will resemble those that would be made by the people themselves.

Crawford sees this concept of building consensus between interest groups as the real basis for ICANN's legitimacy.<sup>305</sup> She asserts that ICANN's authority to make rules is 'based on contracts that require compliance with future rules only when those rules are based on the demonstrated consensus of those who have chosen to participate in its forums and are affected by its policies.'<sup>306</sup> With this contractual framework in place, she argues, ICANN can legitimately claim that those bound by its rules are mostly the same groups whose welfare was considered when making them.<sup>307</sup> However, other writers, including Weinberg, are sceptical of this model, questioning the extent to which the vastly heterogenous 'Internet community' can be meaningfully

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<sup>302</sup> Hunter, D. (2003). "ICANN and the Concept of Democratic Deficit." *Loyola of Los Angeles Law Review* 36(3): 1152-1181. P1174

<sup>303</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-259. P248

<sup>304</sup> McDowell, S. D. and P. E. Steinberg (2001). "Non-state governance and the Internet: civil society and the ICANN." *info: the journal of policy, regulation and strategy for telecommunications information and media* 3(4): 279-298. P294

<sup>305</sup> Crawford, S. P. (2004). "The ICANN experiment." *Cardozo Journal of International & Comparative Law* 12 (2): 409-447. PP724-728

<sup>306</sup> *Ibid*, P702

<sup>307</sup> *Ibid*, P730

represented within the ICANN structure and arguing that the concept of policymaking by consensus is unworkable in the ICANN context.<sup>308</sup>

Weinberg, writing about the makeup of the DNSO constituencies in 2000, pointed out that, while many interested parties could not find a home in any of the approved constituencies, other parties found themselves eligible to participate in multiple constituencies, with considerable overlap between commercial entities and trademark interests, while individual domain name holders and ordinary Internet end-users were not represented on the Names Council at all.<sup>309</sup> Though Weinberg was writing about the old DNSO, today's GNSO constituencies follow a similar pattern. There is still considerable overlap between the commercial constituencies, with many companies eligible to join more than one, while only the NCUC offers representation to (some) civil society participants. Ordinary Internet users and domain name owners still have no direct representation on the GNSO Council. John Mathiason identifies the three major groups of stakeholders within ICANN as governments, the private sector and the 'netizens'.<sup>310</sup> These are broad categories covering many interests that, in reality, are very diverse and not always in harmony. For example, prospective domain name registrars and intellectual property organisations both belong to the private sector, but the one would have an interest in expansion of the gTLD space while the other would tend to oppose it. Nonetheless, using Mathiason's categories, it is clear that private sector interests dominate ICANN. As far as the GNSO is concerned, five of the six constituencies fall into the private sector category and only the NCUC can be said to represent 'netizens', or at least a proportion of them.

Weinberg also suggested that the issues within ICANN's remit were not capable of resolution by consensus, regardless of the mechanisms employed. He argued that matters such as selection of registrars or resolution of domain name disputes involve competing claims of right, and many of the interested parties have strong economic interests in particular outcomes. Such matters are thus not suited to resolution by consensus. Ultimately, Weinberg argued, someone must make the hard choices.<sup>311</sup> He concluded that 'It would be undesirable for ICANN truly to seek consensus before

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<sup>308</sup> Ibid, P188

<sup>309</sup> Ibid, P239

<sup>310</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. Oxford: Routledge. PP88-90

<sup>311</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50 (1):187-260. P252

acting, for that would mean that it could do nothing at all.<sup>312</sup> Weinberg contrasted ICANN to other Internet governance organisations, such as the IETF, that have traditionally and successfully operated on a consensus model. He argued that ‘rough consensus’ has proved a workable model for these organisations, firstly because the community of engineers and system administrators making them up has been a relatively small and homogeneous one, bound together by shared values and professional norms; and secondly because the issues they address have been technical ones, with questions as to whether a proposed solution works being capable of resolution via a relatively neutral performance metric.<sup>313</sup> Hunter similarly argues that there is a serious question to be answered as to how any significant political institution could ever meet the claim that it governs by consensus, since political decisions, by definition, involve deciding to privilege one set of values or one party’s interests over another.<sup>314</sup>

In announcing the ICANN reform programme in 2002, then ICANN President Stuart Lynn agreed that the consensus model was unworkable for ICANN:

I have come to the conclusion that the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical . . . In hindsight, the notion of truly ‘bottom-up’ consensus decision-making simply has not proven workable...To be effective, the ICANN Board of Trustees has to be clearly empowered to make decisions even if there is no clear consensus, to the extent they see it necessary to carry out the ICANN mission.<sup>315</sup>

### **Corporate / free market approach**

An alternative perspective interprets ICANN as essentially a corporate animal or even as a cartel of influential commercial actors. Such approaches focus on the highly influential, arguably dominant, role played by corporate actors in ICANN’s policymaking processes.

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<sup>312</sup> Ibid

<sup>313</sup> Ibid

<sup>314</sup> Hunter, D. (2003). "ICANN and the concept of democratic deficit". Loyola of Los Angeles Law Review 36(3):1149-1183. P1181

<sup>315</sup> Lynn, S. (2002). President’s Report: "ICANN: The Case for Reform." 24 February 2002. Retrieved 15 August, 2009, from <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>

The doctrine of a private, commercially driven Internet was undoubtedly a strong element in ICANN's original design and reflects the 'reflexive government', neo-liberal ideology of the Clinton administration,<sup>316</sup> a doctrine that places a high normative value on the 'free market' and minimum governance.<sup>317</sup> Jack Goldsmith and Tim Wu argue that the emphasis on private investment, perhaps somewhat paradoxically, ultimately underpinned the Clinton administration's decision to retain ultimate US authority over the DNS. While the DoC wanted to avoid governmental micromanagement, they also recognised the need for a stable base to persuade companies to invest in the Internet and to ensure security. The gTLD-MoU was thought to be too uncertain, while it was thought that the ITU might over-regulate; thus a 'private' regulator remaining under the ultimate authority of the US government was felt to be the best compromise.<sup>318</sup>

Despite the 2002 reforms, which have seen more influence handed to governmental actors through the GAC, many analysts still identify a corporate dominance of ICANN, and some writers argue that the organisation is in effect a 'captured agency'. Geoff Huston, for instance, argues that 'ICANN has been largely captured by the names industry'.<sup>319</sup> Hunter similarly argues that the ICANN constituencies 'in practice have displayed all the worst features of regulatory capture.'<sup>320</sup> The language of 'regulatory capture' used by these writers is drawn from concepts in public choice theory. Regulatory capture refers to a situation in which a state regulatory agency created to act in the public interest instead becomes a 'captured agency' acting in favour of dominant commercial or special interests. According to public choice theorists such as George Stigler, regulatory capture occurs because groups or individuals with high stakes interests in the outcome of policy or regulatory decisions focus their resources in attempting to gain the outcomes they prefer, while members

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<sup>316</sup> Antonova, S. (2002). "Collaborating in the Internet Domain Name Space Governance: The Emergence of a New Govern-mentality in the Global Communication Policy." 2001 BUGS. Globalism and Pluralism International Conference. Montreal. Retrieved 14 February 2010, from <http://www.er.uqam.ca/nobel/gricis/actes/bogues/Antonova.pdf> P2

<sup>317</sup> McDowell, S. D. and P. E. Steinberg (2001). "Non-state governance and the Internet: civil society and the ICANN." *info: the journal of policy, regulation and strategy for telecommunications information and media* 3(4):279-298. P286.

<sup>318</sup> Goldsmith, J. L. and T. Wu (2006). *Who Controls the Internet? : Illusions of a Borderless World*. New York, Oxford University Press. P41

<sup>319</sup> Huston, G. (2005). "ICANN, the ITU, WSIS, and Internet Governance." *The Internet Protocol Journal* 8(1): 16-28. P23.

<sup>320</sup> Hunter, D. (2003). "ICANN and the Concept of Democratic Deficit." *Loyola of Los Angeles Law Review* 36(3): 1149-1183. P1153.

of the public, each with only a tiny individual stake in the outcome, do not possess the will, resources or organisational capability to effectively influence policy. The cost to a group of attempting to influence regulatory decisions is high; thus, the groups that are willing and able to do this are inevitably large corporations, because the benefits to them are high and because, as a relatively small and homogeneous group, they are able to take collective action.<sup>321</sup> Small companies, by contrast, would gain lower potential benefits and find it more difficult to collectively organise; consumers do not organise because the costs would far outweigh the potential benefits to each individual.<sup>322</sup> Thus, in Stigler's view, regulatory agencies inevitably come to serve large corporate interests.

Like Huston, Hans Klein argues that ICANN suffers from regulatory capture, mostly to the benefit of US-based corporations.<sup>323</sup> He cites six key episodes to support this argument. The first is what he describes as the capture of the IFWP process in 1998 by powerful industry and technical stakeholders (IANA and NSI). Secondly, Klein asserts, the ICANN Board was captured by industry and technical interests following the elimination of user representation in 2002. Klein also identifies corporate capture of ISOC since 2002, which, he argues, led to two derivative acts of capture: the capture of the .org registry, which is managed by ISOC; and capture of the ALAC, since the majority of certified user-related organisations in ICANN are chapters of ISOC. Finally, Klein describes NSI / VeriSign's control of the dominant .com registry as an act of capture.<sup>324</sup>

Whereas scholars such as Klein see ICANN as a regulatory agency that has been captured by corporate interests, Fromkin and Mark Lemley see the whole regime as an effective monopoly in its own right. They identify four potential antitrust challenges against ICANN: that the DNS and top level domains such as .com are essential facilities to which ICANN must give open access; that ICANN's refusal to accredit registrars affiliated with alternative roots is an act of monopolisation; that ICANN's requirement for registrars to adhere to the UDRP is an illegal cartel, and

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<sup>321</sup> Stigler, G. J. (1971). "The theory of economic regulation." *Bell Journal of Economics and Management Science* 2(1): 3-21. P10

<sup>322</sup> *Ibid*, P12

<sup>323</sup> Klein, H. (2005). "ICANN Reform: Establishing the Rule of Law. A policy analysis prepared for The World Summit on the Information Society (WSIS)." Tunis. 16-18 November 2005. Retrieved 10 January 2010, from <http://www.internetgovernance.org/pdf/ICANN-Reform-Establishing-the-Rule-of-Law.pdf> P4

<sup>324</sup> *Ibid*, P4

that VeriSign's 'Waiting List Service'<sup>Note 3.1</sup> approved by ICANN, is an exclusive dealing arrangement with anticompetitive consequences.<sup>325</sup> Other writers have also seen ICANN as a commercial monopoly or as a cartel. Mueller agrees that ICANN's refusal to recognise alternate roots is a consequence of vested interests within ICANN. He argues that, as a corporatist 'industry self-regulatory' body, ICANN represents a coalition of the Internet technical community, intellectual property interests, incumbent registries, and a few major telecommunication and ecommerce firms. He believes that ICANN policy tends to reflect the interests of these groups.<sup>326</sup> Konstantinos Komaitis likewise accuses ICANN of 'anti-competitive' practices, citing as evidence examples such as ICANN's refusal to accredit registrars affiliated with alternative roots. Furthermore, like Froomkin and Lemley, Komaitis points to the UDRP as another example of ICANN's 'anti-competitive' status, arguing that the requirement for all registrars to impose a mandatory dispute resolution policy on their registrants represents a vertical agreement restricting non-price competition.<sup>327</sup>

### **Statist model**

A quite different approach to ICANN challenges the notion that the organisation is fundamentally a globalised institution beyond the control of states, instead emphasising the role of states and intergovernmentalism as the basis for the regime. This approach, taken by writers such as Daniel Drezner,<sup>328</sup> Jack Goldsmith and Tim Wu,<sup>329</sup> tends to identify a strong hegemonic role for the United States government in setting up and underpinning the regime, as well as a strong continued influence from governmental authorities in shaping ICANN policy.

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Note 3.1 VeriSign's 'Waiting List Service', approved by ICANN in 2004, allows customers to join a waiting list for an already registered domain name, on payment of a fee. If the domain name is allowed to expire by the incumbent registrant, the person on the 'waiting list' is offered first refusal. See ICANN (2004). Transcript of regular meeting of the Board. Saturday, 6 March 2004. Retrieved 20 March 2011, from <http://www.icann.org/en/meetings/rome/captioning-board-06mar04.htm>

<sup>325</sup> Froomkin, A. M. and M. A. Lemley (2003). "ICANN and Antitrust." University of Illinois Law Review 2003(1): 101-200. P101

<sup>326</sup> Mueller, M. L. (2002). "Competing DNS Roots: Creative Destruction or Just Plain Destruction?" Journal of Network Industries 3(3): 313-334. P16

<sup>327</sup> Komaitis, K. (2003). "ICANN: Guilty as Charged?" The Journal of Information, Law and Technology 2003(1). Electronic journal. Retrieved 16 February 2010, from <http://strathprints.strath.ac.uk/3376/1/strathprints003376.pdf> P13

<sup>328</sup> Drezner, D. W. (2007). All Politics Is Global: Explaining International Regulatory Regimes. Princeton, Princeton University Press. PP113-117

<sup>329</sup> Goldsmith, J. L. and T. Wu (2006). Who Controls the Internet? : Illusions of a Borderless World. New York, Oxford University Press. PP168-171

Drezner's perspective on ICANN reflects his wider theoretical approach to globalisation in general. Drezner claims that globalisation is 'responsible for a lot of bad international relations theory'.<sup>330</sup> He takes issue with the notion that states are at the mercy of systemic forces, forcing policy convergence. Drezner claims that, while theoretical approaches based on this notion are conceptually elegant, they share the 'twin flaws of dubious theoretical presumption and meagre empirical support'.<sup>331</sup>

### Statism in ICANN norm setting

Drezner identifies the key actors in setting up the ICANN regime as 'great power' states. (In this context, he regards the EU as a single actor and as a 'great power' alongside the United States). He emphasises the leading role of the US government in rejecting the IAHC process and setting up a 'private' regime,<sup>332</sup> but also asserts that the EU, acting in concert with the Japanese and Australian governments, successfully ensured the final regime would not be dominated by the United States.<sup>333</sup> Drezner also points out that key governments 'vetted' the initial roster of ICANN's governing Board, and asserts that elements of civil society were 'largely shut out of the process'. Had this 'great power' intervention not occurred, he argues, the outcome would have been quite different; the gTLD-MoU would have been carried out, and oversight of the system would have been housed in the ITU.<sup>334</sup> Drezner feels that that the US and EU's conscious delegation of the domain name system to ICANN deliberately locked in a regime that favoured the 'great powers'.<sup>335</sup>

Drezner further identifies a consistent trend since 1998 whereby, in his view, nonstate and civil society actors continued to be shut out from real influence, while key governments have been consistent in ensuring their influence.<sup>336</sup> ICANN's adoption of the UDRP, he argues, reflected US and EU preferences on the matter; and he sees the Board as having been eager to cater to government preferences. Drezner concedes that nonstate actors have some 'agenda-setting' powers within the regime, and some influence through their technical expertise, but argues that, once an issue comes to the

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<sup>330</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. P3

<sup>331</sup> *Ibid*, P3-14

<sup>332</sup> *Ibid*, P113-114

<sup>333</sup> *Ibid*, P114

<sup>334</sup> *Ibid*, P117

<sup>335</sup> *Ibid*

<sup>336</sup> *Ibid*, P115

attention of states, the outcome will ultimately reflect great-power preferences; and that they will set the conditions under which non-state actors may exercise their influence.<sup>337</sup> He believes that governments deliberately acted to prevent NGOs and IGOs from acquiring too much influence.<sup>338</sup> Furthermore, he argues, WSIS saw efforts by smaller states to gain more influence over DNS management blocked by the 'great powers'. He describes the setup of the IGF as a 'face saving compromise' in light of the US refusal to budge over ICANN.<sup>339</sup>

Other writers have similarly seen ICANN's creation as an essentially statist affair, dominated by major powers and particularly the US. George Christou and Seamus Simpson suggest that ICANN's formation was essentially a 'rationalist affair', where the organisational structure of ICANN reflected the relative power positions of the major state players in the process, and the EU accepted a less than first-best outcome due to the ultimate control of the root servers by the US government.<sup>340</sup> Christou and Simpson identify a conflict between the EU's co-regulatory public-private tradition and the US approach of industry self-regulation.<sup>341</sup> The US government, they argue, fulfilled the broad outlines of its vision, with ICANN being incorporated as a private, not-for-profit corporation based in the US; at the same time, the EU did have enough influence to secure the presence of three Europeans on ICANN's initial Board.<sup>342</sup>

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<sup>337</sup> Drezner, D. W. (2004). "The Global Governance of the Internet: Bringing the State Back In." *Political Science Quarterly* 119(3): 477-498. P498

<sup>338</sup> *Ibid*, P490

<sup>339</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press. P116

<sup>340</sup> Christou, G. and S. Simpson (2007). "Gaining a Stake in Global Internet Governance: The EU, ICANN and Strategic Norm Manipulation." *European Journal of Communication* 22(2): 147-164. P147

<sup>341</sup> *Ibid*, PP154-155

<sup>342</sup> *Ibid*, P154

Volker Leib likewise explains the differing positions of the US and EU with regard to ICANN's initial form as stemming from their different regulatory traditions. Whereas the US government advocated a market-oriented solution and private sector self-regulation of the Internet, the EU favoured a mixed public-private regime with a well established role for state authorities. In the end, Leib asserts, the EU was forced to accept American leadership in the process, and the establishment of a private regime, but was nonetheless able to achieve the inclusion of public actors in the new organisation, as well what Leib describes as an 'adequate representation' of Europeans in its relevant bodies. However, Leib also believes that continued US authority over the 'A' root server remains an outstanding issue that the EU is not willing to tolerate in the long run.<sup>343</sup>

Christou and Simpson go on to argue that, while the EU accepted ICANN's key norms initially because of its relatively weak position at ICANN's inception, it then sought to modify them from within the system by a process of 'rhetorical action'. They suggest that the EU pursued two main aims: firstly, a stronger role for the GAC; and secondly, a .eu name to establish the EU's online identity. They further argue that the EU might also have aimed to tip the balance of power away from the US in the GAC and ultimately ICANN as a whole through weight of numbers from outside the American continent.<sup>344</sup> They see the EU as having successfully exerted some influence through a 'rationalist process' of interstate negotiation, resulting in the creation of the GAC and the securing of three European seats on the initial ICANN Board. Furthermore, they argue, over time, the EU was able to use 'rhetorical action' to further modify the norms pertaining to the GAC. They point to the influence of the European Commission in establishing the draft operating principles adopted by the GAC at its inaugural meeting; and they identify a continued EU push for the GAC's role to be shifted towards a 'public-private partnership', which, to a considerable extent, was successful during the 2002-2003 ICANN reform process.<sup>345</sup> Christou and Simpson identify this as 'a clear normative change from a clear hands-off to a more hands-on role for states'. However, they also argue that the change was a product of

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<sup>343</sup> Leib, V. (2002). "ICANN – EU can't: Internet governance and Europe's role in the formation of the Internet Corporation for Assigned Names and Numbers." *Telematics and Informatics* 19(2): 159-171. PP168-170

<sup>344</sup> Christou, G. and S. Simpson (2007). "Gaining a Stake in Global Internet Governance: The EU, ICANN and Strategic Norm Manipulation." *European Journal of Communication* 22(2): 147-164. PP154-155

<sup>345</sup> *Ibid*, PP160-161

‘norm manipulation’ rather than ‘norm replacement.’<sup>346</sup> The second area where they identify a modification of an ICANN norm through EU ‘rhetorical action’ concerns the creation of the .eu TLD. Since ccTLDs are traditionally only assigned to ‘countries’, and the EU is not a country per se, Christou and Simpson see the successful creation of .eu as effectively involving a norm manipulation. They attribute this success to the .eu TLD not being considered an ‘affront to ICANN’s standards of legitimacy’ and its creation being viewed as a concession that might serve to lock in a powerful political actor at this early stage of the regime’s development.<sup>347</sup>

A view of the regime as being essentially underpinned by interstate politics, but having developed via a process of negotiation and bargaining, is similar to the neoliberal institutionalist position on regime theory. However, other writers have taken a position closer to realist hegemonic stability theory, laying much emphasis on ICANN as a tool of US hegemony. Nico Krisch, for instance, sees ICANN as a ‘particularly powerful example’ of a tendency on the part of the US to use ‘private’ regulatory regimes to spread Western standards and conceptions without the limits imposed by conventional international law.<sup>348</sup> Kim H. Veltman similarly sees ICANN as an aspect of US political and cultural hegemony<sup>349</sup>

Milton Mueller notes the increasing importance of state power within the ICANN regime, although he also argues that strong elements of multistakeholderism survive. He sees a strong hegemonic role played by the US in developing ICANN’s initial norms, made possible by the status of the IANA as US government contractors, giving the US the ability to ‘...exercise a kind of unilateral globalism’ in the construction of the ICANN regime.<sup>350</sup> At the same time, he notes a ‘fightback’ by other states against US unilateralism in the DNS sphere. Mueller identifies WSIS as a key moment in the assertion of governmental authority over the DNS, citing the Tunis Agenda, which proclaimed governments’ ‘sovereign right’ to set public policy for the Internet.<sup>351</sup> However, he also goes on to question whether the principle of state sovereignty over

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<sup>346</sup> Ibid, P156

<sup>347</sup> Ibid, P159

<sup>348</sup> Krisch, N. (2005). "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order." *The European Journal of International Law* 16(3): 369-408. P406

<sup>349</sup> Ibid

<sup>350</sup> Mueller, M. (2007). "The New Global Politics of Internet Governance." *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment*. W. Kleinwächter. Berlin, Marketing für Deutschland GmbH: 215-219. Retrieved 20 February 2010, from <http://medienservice.land-der-ideen.de/MEDIA/65534.0.pdf> P216

<sup>351</sup> Ibid, P217

public policy will in practice prove compatible with the non-territorial nature of the Internet.<sup>352</sup>

Mueller sees ICANN as a 'nascent international regime'.<sup>353</sup> He acknowledges that ICANN's origins as 'the product of an informal political agreement among national governments', and the extensive role for private sector actors, make ICANN different from many other regimes,<sup>354</sup> but still believes it more accurate to classify ICANN as a variant of a standard international regime rather than as a unique new form of global policymaking.<sup>355</sup>

### Statism and ccTLDs

A number of analysts have focused on the question of national control over ccTLDs. Gregory R. Hagen and Kim von Arx feel this should be seen as a natural extension of national sovereignty, one that has been usurped by the ICANN regime. ICANN's power to redelegate domains, they assert, represents an effective extension of US governmental power over areas that should be reserved to national sovereigns.<sup>356</sup> They argue that the power of ICANN to threaten a ccTLD with potential re delegation or annihilation provides ICANN with a coercive mechanism to ensure ccTLD compliance with ICANN policies, something that diminishes the sovereignty of nations to adopt laws independently of ICANN.<sup>357</sup> They go on to list some specific examples, such as the possibility that ICANN may in the future extend the UDRP to ccTLDs, bypassing national trademark law,<sup>358</sup> or ICANN's ability to enforce WHOIS policy, which may conflict with national privacy, surveillance, and anonymity policies and legislation.<sup>359</sup> They even identify a national security dimension, arguing that control over the 'A' root is a strategic asset, carrying with it the power to severely disrupt a state's critical information infrastructure.<sup>360</sup>

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<sup>352</sup> Ibid, P219

<sup>353</sup> Mueller, M. L. (2002). *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge, Massachusetts, MIT Press. P212

<sup>354</sup> Ibid, P217

<sup>355</sup> Ibid, P218

<sup>356</sup> Hagen, G. R. and K. G. von Arx (2002). "Sovereign Domains A Declaration of Independence of ccTLDs from Foreign Control." *Richmond Journal of Law & Technology* 9(1). Electronic journal. Retrieved 22 February 2010, from <http://jolt.richmond.edu/v9i1/article4.pdf>. P3

<sup>357</sup> Ibid, P22-23

<sup>358</sup> Ibid, P24

<sup>359</sup> Ibid, PP24-26

<sup>360</sup> Ibid, PP26-28

As a solution to these issues, Hagen and von Arx propose that the root server system should be replaced with national DNS roots and the introduction of a peer-to-peer protocol into the DNS. Such collaboration, they argue, would ensure that any international DNS policy organisation or framework would be accountable to sovereign nations, and ‘sovereign domains’ would ensure that the power over national policy and law is retained by the sovereign state.<sup>361 362</sup> They recognise, however, that this would require rewriting the DNS technical protocols, something that would be not only a major shift towards interstate governance of the DNS, but also a major technical change in the organisation of the network.<sup>363</sup>

Y.J. Park sees the key issue as being less about ICANN as an extension of US hegemony, and more as a contest between state actors and nonstate actors for political authority over ccTLDs. Park identifies WSIS as the moment when states were recognised as holding final political authority over ccTLDs, a principle she believes has been recognised both by the ccTLD registries and by ICANN itself. Park believes this to be the key reason for the increasing power of the GAC in the ICANN decision-making process.<sup>364</sup> To illustrate this, she points to the Board’s acceptance of the GAC’s principles for delegation and administration of ccTLDs.<sup>365</sup>

However, others have contested the notion that authority over ccTLDs should constitute an aspect of state sovereignty. Mueller argues that the claim ‘is based on the flimsiest of grounds: an arbitrary semantic relationship, the notion that the ccTLD string “stands for” or “represents” the country, and that that semantic relationship is somehow exclusive and privileged.’<sup>366</sup> He points out that there could in fact be many different TLDs referring to a specific country (e.g., .us, .usa, .america, and so on).<sup>367</sup>

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<sup>361</sup> Ibid, P39

<sup>362</sup> Ibid

<sup>363</sup> Ibid

<sup>364</sup> Park, Y. (2009). “The National ccTLD Disputes: Between State Actors and Nonstate Actors.” *International Journal of Communications Law and Policy* 13(Winter 2008-09): 185-206. P192

<sup>365</sup> Ibid

<sup>366</sup> Mueller, M. L. (2002). *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge, Massachusetts, MIT Press. P244

<sup>367</sup> Ibid

## **Public-private model**

An intermediate position between those who see ICANN as a nongovernmental authority, and those who emphasise the role of states, is taken by scholars such as Wolfgang Kleinwächter<sup>368</sup> and Slavka Antonova<sup>369</sup>. These writers describe ICANN as a 'public-private partnership' utilising important governance contributions from both states and nonstate actors. Jeffery Roy interprets ICANN as a unique form of transnational governance body, which acts as a bridge between governmental and corporate actors.<sup>370</sup> Karin Geiselhart argues that ICANN, neither a government nor a for-profit corporation, is a hybrid that interacts with both.<sup>371</sup>

The concept of the 'public-private partnership', associated with scholars such as Wolfgang Reinicke, is based around a 'global public policy' approach that differentiates between governance and government, and uncouples governance from the nation-state. It involves governance through delegation of tasks to nonstate actors and institutions, including not only public sector agencies like the World Bank and the IMF, but also business, labour, and NGOs.<sup>372</sup> This concept echoes models put forward by writers such as Karsten Ronit and Volker Schneider, and Cristoph Knill and Dirk Lehmukl. Knill and Lehmukl believe that the emergence of transnational information and communication networks challenge the autonomy and effectiveness of national governments in defining and providing public goods. The solution, they feel, lies in delegation of governance and regulatory functions to private actors.<sup>373</sup> They cite ICANN as an example of an organisation that '...oversees an area that can neither be completely left to the market nor be exclusively governed by national public authorities.' Since domain names have become an important type of property, one that

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<sup>368</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36 (3): 1103-1126.

<sup>369</sup> Antonova, S. (2007). "Global Internet Governance: Negotiating Power in ICANN." *Communications, Civics, Industry – ANZCA2007*, Melbourne, Australian New Zealand Communications Association. Retrieved 12 January 2010, from <http://www.latrobe.edu.au/ANZCA2007/proceedings/Antonova.pdf> PP7-8

<sup>370</sup> Roy, J. (2005). "E-governance and international relations: A consideration of newly emerging capacities in a multi-level world." *Journal of Electronic Commerce Research* 6(1): 44-55. P48.

<sup>371</sup> Geiselhart, K. (2004). 'Digital Government and Citizen Participation in International Context.' *Digital Government: Principles and Best Practices*. A. Pavlichev and G. Garson. Hershey, PA, IGI Publishing: 307-320. P334

<sup>372</sup> Reinicke, W. H. (1997). "Global Public Policy " *Foreign Affairs* 76(6): 127-138. P132

<sup>373</sup> Knill, C. and A. D. Lehmukl (2002). "Private Actors and the State: Internationalization and Changing Patterns of Governance." *Governance. An International Journal of Policy, Administration and Institutions* 15(1): 41-63. PP41-43.

represents 'position, location, path, and identity', the service of administering the Internet address system has, they argue, become a global public good. They see ICANN's creation as representing a 'shift from a hierarchical to a cooperative mode of public-private interactions' in the provision of this public good. In their view, public actors have not only significantly contributed to the emergence of the organisation, but also still have significant influence over ICANN; they provide the framework for the organisational conditions that must be met in order for ICANN to obtain the authority to control and administer the registration and allocation of domain names.<sup>374</sup>

Like Mueller, Antonova sees ICANN in its original form as both an experiment in creating an alternative multistakeholder regime for public policy-making, but also a potential avenue for its regulator, the US government, to exert 'soft power' in the international arena.<sup>375</sup> However, he argues, the 'lack of understanding of the political aspects of the technological issues undermined the attempts to implement the multistakeholder consensus model.' As a result, he asserts, ICANN was redefined as a public-private corporation with an empowered Board and management, and relying on public consultations instead of the bottom-up consensus process.<sup>376</sup> Like Mueller, Antonova identifies WSIS as a key point where other states asserted their rights with regard to the DNS regime.<sup>377</sup>

Kleinwächter agrees that ICANN has moved towards a public-private model and away from the original plan of self-governance since 2001-02. He reminds us that the original Articles of Incorporation do not specify any governmental role in the corporation, and that the GAC was originally intended to have a very limited advisory role only.<sup>378</sup> Christou and Simpson similarly see ICANN as having moved closer to

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<sup>374</sup> Ibid

<sup>375</sup> Antonova, S. (2007). "Global Internet Governance: Negotiating Power in ICANN." Communications, Civics, Industry – ANZCA2007, Melbourne, Australian New Zealand Communications Association. Retrieved 13 January 2010, from <http://www.latrobe.edu.au/ANZCA2007/proceedings/Antonova.pdf> P2

<sup>376</sup> Ibid, PP7-8

<sup>377</sup> Ibid, P8

<sup>378</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. P1104

the EU's preferred model of a 'subcontracting partnership' where governments have a shared role with private interests in creating public policy.<sup>379</sup>

Kleinwaechter explains these initial norms as stemming from an 'unwritten consensus' of the main governmental players in favour of private leadership and low governmental involvement in DNS management, based on a desire to avoid a lengthy UN-based codification process involving all sovereign states, with a ratification process by governments, which would have blocked further development of the DNS for years. The establishment of the GAC, he asserts, was a convenient way to avoid such a formal process.<sup>380</sup>

Kleinwächter believes that the move away from this initial approach and towards a 'public-private' model stems mainly from changed perceptions of the Internet and security since the 9/11 attacks. He believes that these changed security priorities were recognised by the then ICANN President, Stuart Lynn, when initiating the ICANN reform process from 2002, and that this was an important element in the shift towards greater governmental involvement<sup>381</sup>, which has resulted in the GAC evolving into something that resembles a de facto intergovernmental organisation.<sup>382</sup> Kleinwächter goes on to assert that, with the changes to the ICANN bylaws in 2002-2003, 'governments got something akin to veto power'<sup>383</sup> in reference to the new requirement that, if the Board rejects a GAC recommendation, it must inform the GAC and state the reasons why it decided not to follow that advice.<sup>384</sup>

Nonetheless, Kleinwaechter sees the revised ICANN model very much as a governance partnership between governments and private actors, intended to avoid two extremes of a general governmental take-over or a totally private ICANN.<sup>385</sup> He concludes that ICANN is part of a broader pattern of transition, where 'the old governance system, rooted in the concept of the sovereign nation-state, is increasingly complemented by an emerging new governance system'.<sup>386</sup> This new governance

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<sup>379</sup> Christou, G. and S. Simpson (2011). "The European Union, multilateralism and Internet governance." *Journal of European Public Policy* 18(2): 241-257. P253

<sup>380</sup> *Ibid*, P1116

<sup>381</sup> *Ibid*, PP1120-1121

<sup>382</sup> *Ibid*, PP1116

<sup>383</sup> *Ibid*, PP1121-1122

<sup>384</sup> *Ibid*, PP1116

<sup>385</sup> *Ibid*, P1120

<sup>386</sup> *Ibid*, PP1124-1125.

system, he asserts, will be global in nature, based on a ‘trilateralism’ that includes actors beyond states and IGOs; issue-specific co-regulatory frameworks will be created in an attempt to combine the stability of governmental regulation with the flexibility needed to deal with issues at the global level.<sup>387</sup>

Rather than a ‘public private partnership’ per se, Mueller, in his latest work, describes ICANN as being on the front lines of a contest between two alternative models of governance, state-based and nonstate. He sees ICANN, together with the RIRs, ISOC, and the IETF, as forming a network of internet governance actors independent of and competitive to the nation-state system. He terms these actors ‘organically developed internet institutions’ and refers to them collectively as the ‘ODii network’.<sup>388</sup> Mueller sees the development of this actor network as representing ‘...an important change in the manner and substance of policy and governance; a movement away from state actors to nonstate actors, to more open and participatory processes, and a shift to new kinds of technical expertise.’<sup>389</sup> Mueller argues that the controversy around ICANN is ‘ground zero for the conflict between global governance and the nation-state system.’<sup>390</sup>

### **Conclusion to Chapter 3**

This chapter has attempted to categorise some of the extensive literature on ICANN into a number of groupings, including ‘technical caretaker’ models, ‘liberal democratic’ perspectives, corporatist perspectives, statist approaches and ‘public-private partnership’ models. These competing perspectives on what sort of governance system ICANN represents reflect some of the ontological questions about ICANN’s nature that will be explored by this project. The thesis will examine the merits of these various perspectives on ICANN, by examination of ICANN’s history and policymaking procedures, and by reference to case study data pertaining to ICANN policymaking in practice. It will identify and explore the roles played by the key actors and interests that decided the parameters of the regime, and investigate the relative importance of various interests in shaping policy within the regime on an

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<sup>387</sup> Ibid, PP1124-1125.

<sup>388</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P217

<sup>389</sup> Ibid

<sup>390</sup> Ibid, P216

ongoing basis, in an effort to address these ontological debates. It will then go on to link the findings with the governance models described by international regime theories.

The next stage of the thesis will examine case study data pertaining to ICANN policymaking in practice. It will identify and explore the roles played by the key actors and interests and assess their relative influence on ICANN policymaking. The findings of these investigations will be used to evaluate the relative merits of the various perspectives on ICANN discussed in this chapter.

# **Chapter 4**

## **Policy Development Case Study One:**

### **New Generic Top-Level Domains**

#### **Introduction**

##### Overview

This chapter looks primarily at the policy development process (PDP) for New gTLDs Policy in the period 2005-2011. The aim is to explore the range of actors involved in the PDP and the roles they played, leading to some assessment of the relative degree of influence held by each actor (or actor type) over the final policy outcomes. From this, the aim will be to draw some wider inferences regarding the relative influence exerted by various actors and interest groups within the ICANN regime, the ultimate purpose being to determine which of the organisational models explored in Chapter 3 best describe how ICANN policy is actually made in practice. For example, evidence of strong influence over ICANN policymaking by governments would help to support a statist interpretation of the organisation, while evidence of influence being shared among a broad range of stakeholders would lend weight to the multistakeholder model. As will be shown, the contests of interests that have played out over the course of this PDP refutes any notion that ICANN's activities are apolitical or that ICANN policymaking is based upon 'consensus'. The struggle for influence between various competing interest groups and actor types makes this policy area an ideal case study for the purposes of this investigation.

Although the main focus of this chapter will be on the most recent New gTLDs PDP, it is important to put this into context by mentioning the previous history of the policy area. Addition of new generic top-level domains to the DNS root has been a recurring issue throughout ICANN's existence; indeed, it predates the organisation's founding. The original gTLDs (.com, .edu, .gov, .mil, .org and .net) were created in the 1980s, prior to the commercialisation and rapid expansion of the Internet. By the late 1990s, there was a general feeling in many quarters that additional gTLDs were required. In

1997, the gTLD-MoU had proposed to add seven new gTLDs;<sup>391</sup> the failure of the initiative meant this did not come about. The question of new gTLDs was, however, mentioned in the 1998 White Paper<sup>392</sup>; and the initial Memorandum of Understanding between ICANN and the US DoC set as one of ICANN's policy goals to 'Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs.'<sup>393</sup> As a result, there was an expectation that creation of new gTLDs would be one of ICANN's first tasks. However, this was not unopposed.

From a technical perspective, experts agree that the DNS is capable of supporting hundreds or indeed thousands of TLDs,<sup>394</sup> and there is therefore no real technical argument against expansion. For non-technical reasons, though, the matter is a contentious one. Proponents of new gTLDs cite a requirement both to increase registry competition and to offer more choice to users.<sup>395</sup> The nature of the DNS means that there can only be one registry per TLD; the only way to increase competition among registries, therefore, is to increase the number of TLDs. This argument carries significant weight, since promotion of competition is one of ICANN's Core Values. Additional gTLDs are also held to be necessary since most of the desirable names in existing gTLDs have already been assigned. Opponents of expansion, however, argue that the existing gTLDs remain adequate since (with the possible exception of .com) they are by no means 'full' and could support many millions of additional second-level domain names. Namespace expansion has tended to be opposed particularly by intellectual property interests, who fear that increasing the number of TLDs will also increase opportunities for cybersquatting, forcing trademark owners to make many more defensive registrations and resulting in higher

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<sup>391</sup> IAHC (1997). Memorandum of Understanding on the generic top level domain space of the Internet Domain Name System (gTLD-MoU). February 28, 1997. Retrieved March 25, 2009, from <http://www.gtld-mou.org/gTLD-MoU.html>.

<sup>392</sup> Referenced in: United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses." ('White Paper'). 5<sup>th</sup> June 2007. Docket Number: 980212036-8146-02. Retrieved 5 October 2008, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>393</sup> ICANN / US Department of Commerce (1998). Memorandum of Understanding between the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. 25<sup>th</sup> November 1998. Retrieved 10 January 2011, from <http://www.icann.org/en/general/icann-mou-25nov98.htm>

<sup>394</sup> ICANN (2008). DNS Stability Draft Paper: "The Effect of New Generic Top Level Domains on the Internet Domain Name System." Retrieved 26th November 2008, from <http://www.icann.org/en/topics/dns-stability-draft-paper-06feb08.pdf>

<sup>395</sup> See, for example, ICANN (2006). gTLD Registry Constituency Comments regarding terms of reference for new gTLDs. 30 January 2006. Retrieved 15 September 2011, from <http://gnso.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P2

costs.<sup>396</sup> Other arguments against expansion include increased opportunities for malicious and / or criminal use such as ‘phishing’; likelihood of user confusion; and the difficulties for ICANN to police and enforce a larger number of registry contracts.<sup>397</sup> These debates have been revisited each time that ICANN has examined proposals to expand the gTLD space.

Following a policy development process lasting just over a year, ICANN introduced seven new gTLDs in 2000, ostensibly as a ‘proof of concept’ experimental exercise.<sup>398</sup> A further PDP in 2002-03 led to an additional six new TLDs of a special restricted type known as ‘sponsored’ TLDs (sTLDs).<sup>399</sup> The latest policy process on new gTLDs ran from 2005 to 2011 and resulted in a policy that will see expansion of the namespace on a much larger scale, from the current 21 gTLDs to hundreds or perhaps thousands. This policy will allow corporations as well as communities of many different types to apply for and operate a TLD, for example .microsoft or .bank, and represents a very significant shift in the way the namespace is organised. However, the policy process has generated considerable controversy and consequently has dragged out over an extended period. Besides the inevitable strong opposition from the trademark community, many issues have emerged around questions such as legal rights protection and the potential political ramifications of allowing geographical or language-based identifiers to be used as TLD strings. Nonetheless, the process

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<sup>396</sup> See, for example, arguments against new TLDs submitted to ICANN Public Comments forum by representatives of intellectual property interests including: David Fares, News Corporation; Olive Gretchen, Corporation Service Company (CSC); Heidi C. Salow, Internet Commerce Coalition; Autumn Lotze, Retail Industry Leaders Association; Paul Tattersfield, Grange Project Management Group; Jolene A Neby, Ameriprise Financial; Mark Bohannon, Software & Information Industry Association (SIIA); Christian Merida, US Chamber of Commerce; Philip Lodico, Fairwinds Partners; Margie Milam, MarkMonitor Inc.; Kevin Rupy, USTelecom; Gretchen Lohmann, National Cable & Telecommunications Association; Natasha, Lipkina, HP.com; Dan Jaffe, Association of National Advertisers; Nick Wood, MARQUES (European Association of Trade Mark Owners); Aimee Nolan, W.W. Grainger, Inc; Thomas M. Blasey, ITT Corporation; Tom Watson, Bank of America Corporation; Michael H. Berkens, Worldwide Media, Inc.; Denise Yee (Kuwabara), Visa Inc.; Ryan Foster, Securities Industry and Financial Markets Association; Furrer Urs, economiesuisse; Enoch Kim, contessa.com; and Ray Robertson, Tyndall Federal Credit Union. Retrieved 15 July 2011, from <http://forum.icann.org/lists/gtld-guide/> There are many additional examples.

<sup>397</sup> See, for example, comments submitted to ICANN Public Comments forum on New gTLDs by David Fares, News Corporation; Fabricio Vayra, Time Warner; Heidi C. Salow, Internet Commerce Coalition; Jolene A Neby, Ameriprise Financial; Christian Merida, US Chamber of Commerce; Kevin Rupy, USTelecom; Margie Milam, MarkMonitor Inc.; Dan Jaffe, Association of National Advertisers; Tom Watson, Bank of America Corporation; Dan Poliak, Adobe Systems; Jim Bikoff, International Olympic Committee; Ray Robertson, Tyndall Federal Credit Union; and George Kirikos, Leap of Faith Financial Services. Retrieved 15 July 2011, from <http://forum.icann.org/lists/gtld-guide/> There are many additional examples.

<sup>398</sup> ICANN (2005). “New TLDs — Past Decisions and Documents.” 31 August 2005. Retrieved 14 June 2011, from <http://gns0.icann.org/issues/new-gtlds/new-tlds-31aug05.htm>

<sup>399</sup> Ibid

appears to have reached a conclusion, with final Board approval for the programme being given in June 2011.<sup>400</sup> It is currently expected that the first round of applications for new gTLDs will begin in early 2012.<sup>401</sup>

## **Summary of events**

### 1999-2000 New gTLDs round

In May 1999, the Board instructed the DNSO to formulate recommendations on the question of adding new generic top-level domains.<sup>402</sup> The DNSO in turn passed the matter to a working group, known as Working Group C.<sup>403</sup> There was considerable debate on the issue, with trademark interests continuing to oppose expansion, or arguing that, at the least, a well-established and thoroughly tested UDRP needed to be in place before addition of any new TLDs. Two members of Working Group C took this position.<sup>404</sup> Conversely, some participants in the working group advocated adding many new TLDs immediately to maximise consumer choice, create opportunities for entities that had been shut out under the current name structure, and create competition among registries.<sup>405</sup>

Ultimately, Working Group C achieved a two-thirds vote of its members in support of a compromise position, under which ICANN would begin by adding six to ten new gTLDs, followed by an evaluation period. However, the Working Group produced no recommendations on selection criteria or allocation methods.<sup>406</sup> As a result, it was largely left to ICANN staff to fill in these gaps.<sup>407</sup> A discussion report in June 2000

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<sup>400</sup> ICANN (2011). Approved Board Resolutions, Singapore. 20 June 2011. Retrieved 14 September 2011, from <http://www.icann.org/en/minutes/resolutions-20jun11-en.htm>

<sup>401</sup> ICANN (2011). Announcement: 'ICANN Approves Historic Change to Internet's Domain Name System. Board Votes to Launch New Generic Top-Level Domains.' 20 June 2011. Retrieved 14 September 2011, from <http://www.icann.org/en/announcements/announcement-20jun11-en.htm>

<sup>402</sup> ICANN (1999). Minutes of meeting of the initial Board. May 27, 1999. Retrieved 14 September 2011, from <http://www.icann.org/en/minutes/minutes-27may99.htm>

<sup>403</sup> ICANN (2000). Report from Working Group C (New gTLDs). 21 March 2000. Retrieved 14 September 2011, from [www.icann.org/dns/wgc-report-21mar00.htm](http://www.icann.org/dns/wgc-report-21mar00.htm)

<sup>404</sup> ICANN (1999). Interim Report of Working Group C of the Domain Name Supporting Organization, Internet Corporation for Assigned Names and Numbers. 23 October 2003. Retrieved 14 September 2011, from [www.dns.org/dns/notes/19991023.NCwgc-report.html](http://www.dns.org/dns/notes/19991023.NCwgc-report.html)

<sup>405</sup> Ibid

<sup>406</sup> ICANN (2000). Report from Working Group C (New gTLDs). 21 March 2000. Retrieved 14 September 2011, from [www.icann.org/dns/wgc-report-21mar00.htm](http://www.icann.org/dns/wgc-report-21mar00.htm)

<sup>407</sup> Weinberg, J. (2001). 'ICANN as Regulator.' E-paper, Cornell University Library, Computers and Society. Retrieved 20 October 2001, from <http://arxiv.org/abs/cs.CY/0109099> P16

set out an application procedure for organisations seeking to operate a new gTLD.<sup>408</sup> Applicants would be required to submit a business and financial plan and show evidence of technical competence. A competitive evaluation between the submitted proposals would lead to the selection of a small number of applicants to operate new TLDs in this first, ‘experimental’ round. The Board approved this plan in July 2000.<sup>409</sup> Forty-seven applications were received,<sup>410</sup> three of which were withdrawn prior to completion of evaluation. In November, applicants were invited to present their cases directly to the Board.<sup>411</sup> Following discussion among the Directors, the Board approved a resolution selecting seven of the applications for contractual negotiations (.aero, .biz, .coop, .info, .museum, .name, and .pro).

### *Analysis of the 2000 round*

The 2000 round was subsequently criticised for being disorganised, rushed and subjective in nature. The Council of Registrars (CORE), for example, noted that applicants had only a couple of weeks to prepare their proposals (yet had to try to put an application together, because nobody knew when ICANN would offer another opportunity to apply for a TLD); and that applicants were pushed into ‘pointless contention’ between each other, even when their submissions did not compete. Commentators from the academic community were equally critical. Jonathan Weinberg, for example, criticised the subjectivity and lack of predictability inherent in this kind of selection process.<sup>412</sup>

Weinberg also stated a belief that ICANN was deliberately maintaining an artificial scarcity of TLDs in order to enhance its own control.<sup>413</sup> Milton Mueller made similar arguments,<sup>414</sup> and reasoned that most of the interests represented within ICANN,

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<sup>408</sup> ICANN (2000). “Yokohama Meeting Topic: Introduction of New Top-Level Domains.” Posted 13 June 2000. Retrieved 14 September 2011, from <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm>

<sup>409</sup> ICANN (2000). Minutes of regular meeting of the Board, 16 July 2000. Retrieved 14 September 2011, from <http://www.icann.org/en/minutes/minutes-16jul00.htm>

<sup>410</sup> ICANN (2000). “List of Applications for the New gTLD Proof-of-Concept Round (2 October 2000) (corrected through 10 October 2000).” Retrieved 14 September 2011, from <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>

<sup>411</sup> Weinberg, J. (2001). ‘ICANN as Regulator.’ E-paper, Cornell University Library, Computers and Society. Retrieved 20 October 2001, from <http://arxiv.org/abs/cs.CY/0109099> P23

<sup>412</sup> Ibid, P1

<sup>413</sup> Ibid, P1

<sup>414</sup> Mueller, M. L. (2002). “Competing DNS Roots: Creative Destruction or Just Plain Destruction?” *Journal of Network Industries* 3(3): 313-334

including the Internet technical community, intellectual property interests, incumbent registries, and a few major telecommunication and e-commerce firms, had little to gain from adding new TLDs, while many had a direct economic or political interest in preventing such a move. These assertions have since been arguably undermined, however, by subsequent policy developments.

However, many of the other criticisms of the 2000 round still seem valid. The policy development process was lightweight, rushed, not well thought out and subjective. Compared to the more sophisticated and in-depth PDPs that took place in later years, this suggests that ICANN policymaking mechanisms at that time were not yet mature; at that time no detailed procedure for a DNSO PDP was laid out in the ICANN Bylaws. The recommendations produced by the DNSO were vague and lacking in detail on important policy elements, including selection criteria, allocation criteria, contractual conditions, application procedure and a timetable for implementation. Instead of being the product of any ‘bottom-up’ policy development process, all of these details were simply supplied by ICANN staff and signed off by the Board.

#### 2002-03 New gTLDs round

In 2002, then ICANN President Stuart Lynn presented the ICANN community with an Action Plan for proposed further new TLDs.<sup>415</sup> This was posted for public comment in November 2002 and also discussed at ICANN’s Public Forum in Amsterdam on 14<sup>th</sup> December 2002.<sup>416</sup> Responses from the floor at this meeting demonstrated the demand for more TLDs.<sup>417</sup> At the Board meeting the following day, the Board directed the President to develop a draft Request for Proposals for the Board's consideration for the purpose of soliciting proposals for a limited number of additional new sponsored gTLDs.<sup>418</sup> This draft Request for Proposals was published on 24<sup>th</sup> June 2003. Further input was solicited and received by the GNSO, including expert papers, input from the GNSO Constituencies, public comment and discussion

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<sup>415</sup> Lynn, S (2002). “A Plan for Action Regarding New gTLDs.” Posted 8th November 2002. Retrieved 15 September 2011, from <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>

<sup>416</sup> Mueller, M (2002). “Lynn’s sTLD Limit (3), DNS Taxonomy Bashed in Amsterdam.” December 16 2002. Retrieved November 6 2011, from <http://www.icannwatch.org/article.pl?sid=02/12/16/173415&mode=thread>,

<sup>417</sup> Ibid

<sup>418</sup> ICANN (2002). Minutes of annual meeting of the Board. 15<sup>th</sup> November 2002. Retrieved 25 September 2011, from <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm>

through the ALAC. The GNSO Council formed a Committee of the Whole to deal with the issue, which included representatives from the ALAC and the GAC, and carried out monthly teleconferences between February and May 2003. The Committee produced more detailed recommendations than the DNSO had done in 2000, including a set of criteria with which future TLD registries should have to comply.<sup>419</sup> Following this, on 29 October 2003, the GNSO advised the Board to proceed with the process for an interim round of sponsored TLDs. On 31 October 2003, the Board agreed to open an application process in December 2003 for a limited number of new sponsored TLDs.<sup>420</sup> Ten applications were submitted.<sup>421</sup> Four of these were from unsuccessful applicants at the previous round. Seven of the ten applications were accepted for further negotiations; .asia .cat .jobs .mobi .travel .tel and .xxx.<sup>422</sup> Six of these TLDs were subsequently introduced. The seventh application, for an .xxx TLD for adult material, submitted by ICM Registry, provoked significant controversy.

After protracted deliberations, the Board accepted ICM's application in principle on 1 June 2005, authorising the President and General Counsel to enter into negotiations with ICM relating to proposed commercial and technical terms.<sup>423</sup> This announcement brought opposition from several governmental actors, most significantly the US Department of Commerce. In August 2005, the DoC urged ICANN to delay final approval of the contract with ICM to allow for an extensive global consultation, citing 6,000 complaints over the proposed .xxx TLD that had been received by the Department.<sup>424</sup> This was followed by a statement from the GAC advising that the ICM application was flawed, and also that several member governments were

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<sup>419</sup> ICANN (2003). GNSO Council gTLDs committee - new gTLDs, conclusions v7. 12 June 2003. Retrieved 25 October 2011, from <http://www.dnso.org/dns/notes/20030612.gTLDs-committee-conclusions-v7.html>

<sup>420</sup> ICANN (2003). Minutes of regular meeting of the Board. 31<sup>st</sup> October 2003. Retrieved 17 September 2011, from <http://www.icann.org/en/announcements/advisory-31oct03.htm>

<sup>421</sup> ICANN (2004). Announcement: 'Progress in Process for Introducing New Sponsored Top-Level Domains.' 19 March 2004. Retrieved 25 February 2010, from <http://www.icann.org/en/announcements/announcement-19mar04.htm>

<sup>422</sup> ICANN (2005). Announcement: 'sTLD Update: ICANN Moves Forward in First Phase Commercial & Technical Negotiations with an Additional sTLD Applicant.' Retrieved 4 July 2011, from <http://www.icann.org/en/news/announcements/announcement-01jun05-en.htm>

<sup>423</sup> ICANN (2005). Minutes of Special Meeting of the Board. 1 June 2005. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/minutes-01jun05.htm>

<sup>424</sup> Gallagher, M.D. (2005). Letter from Michael D. Gallagher, Assistant Secretary for Communications and Information, US Department of Commerce, to Vint Cerf, Chair of ICANN Board, 15 August 2005. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>

‘emphatically opposed’ to a .xxx domain on public policy grounds<sup>425</sup> (it did not state which governments took this line, but reported comments by ICANN CEO Paul Twomey suggest they included the US, UK, Denmark, Sweden, Brazil and Australia<sup>426</sup>). The governments of Sweden<sup>427</sup> and Australia<sup>428</sup> later went on to state their opposition to .xxx in formal correspondence with ICANN, while the UK government urged careful safeguards and compliance monitoring in the agreement with ICM.<sup>429</sup> The .xxx proposal also generated an unprecedented amount of public comment, with over 1300 separate comments received in the public comment forums, including 946 comments against the establishment of .xxx<sup>430</sup> (though there were also comments in favour.)<sup>431</sup> In addition, some 200,000 emails were received by ICANN regarding the matter.<sup>432</sup>

On May 10 2006, the Board voted 9 to 5 to reject ICM’s proposed version of the .xxx Registry Agreement.<sup>433</sup> On March 30, 2007, a revised application was rejected by the Board by nine votes to five with one abstention. The resolution stated that ICM’s application and the revised agreement had failed to meet, among other things, the sponsored community criteria of the RFP specification. However, it also stated that approval of the ICM application was not appropriate in the light of the GAC’s public policy concerns.<sup>434</sup> The Board’s decision to reverse its previous approval for .xxx raised questions over the extent to which the US government continued to exert

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<sup>425</sup> ICANN (2006). GAC Communiqué XXVIII - Wellington, New Zealand, 28 March 2006. Retrieved 10 September 2010, from <http://www.icann.org/en/committees/gac/communique-28mar06.pdf>

<sup>426</sup> Waters, R. (2006). “Dispute over porn domain name veto.” Financial Times, May 12, 2006. Retrieved 10 September 2010, from <http://www.ft.com/cms/s/2/91eab4dc-e13e-11da-90ad-0000779e2340.html>

<sup>427</sup> Bjelfvenstam, J. (2005). Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Paul Twomey, ICANN CEO, 23 November 2005. Retrieved 11 September 2010, from <http://www.icann.org/en/correspondence/bjelfvenstam-to-twomey-23nov05.htm>

<sup>428</sup> Coonan, H. (2007). Letter from Helen Coonan, Australian Minister for Communications, Information Technology and the Arts, to Vint Cerf, Chair of the ICANN Board, 28 February 2007. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/coonan-to-cerf-28feb2007.pdf>

<sup>429</sup> Boyle, M. (2006). Letter from Martin Boyle, UK Representative to GAC, to Vint Cerf, Chair of the ICANN Board, 9 May 2006. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>

<sup>430</sup> ICANN (2007). Quoted by John Jeffrey and Kurt Pritz at meeting of the ICANN Board. Minutes of special meeting of the Board, 13<sup>th</sup> March 2007. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/minutes-13mar07.htm>

<sup>431</sup> Ibid

<sup>432</sup> Ibid

<sup>433</sup> ICANN (2006). Minutes of special meeting of the Board. 10 May 2006.

<http://www.icann.org/en/minutes/minutes-10may06.htm>

<sup>434</sup> ICANN (2007). Transcript of special meeting of the Board. 30 March 2007.

<http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>

influence over ICANN policy from behind the scenes; though the US government was far from the only actor applying pressure on ICANN over the issue.

However, ICM Registry exercised its right under the ICANN Bylaws<sup>435</sup> to request arbitration of the decision by an Independent Review Process. The International Center for Dispute Resolution acted as arbiter, with the case being considered by a panel consisting of three retired judges. The panel delivered its verdict in February 2010, ruling in favour of ICM, on the grounds that their application for the .XXX sTLD met the required sponsorship criteria, and that the Board's reconsideration of that finding was 'not consistent with the application of neutral, objective and fair documented policy'.<sup>436</sup> In June 2010, the Board passed a resolution accepting the review panel's verdict and directing ICANN staff to proceed into draft contract negotiations with ICM for a revised .xxx Registry Agreement.<sup>437</sup> On 5 August 2010, the Board directed staff, upon receipt of ICM's application documentation, to post ICM's supporting documents and proposed registry agreement for public comment.<sup>438</sup> Despite further controversy in the public comments, and a GAC letter stating that there was no active GAC support for the ICM application and that some GAC members opposed it on public policy grounds<sup>439</sup>, the Board approved the execution of the registry agreement with ICM for the .xxx sponsored top level domain. The resolution was passed by nine votes to four, with three abstentions.<sup>440</sup> As the Board and GAC had not reached agreement on all aspects of the application, the Board also set forth a rationale providing reasons why the GAC advice was not followed, pursuant to ICANN Bylaws.<sup>441</sup>

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<sup>435</sup> Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 20 March 2009. Retrieved 10 September 2010, from <http://www.icann.org/en/general/archive-bylaws/bylaws-20mar09.htm>

<sup>436</sup> IDCR (2010). Panel Declaration, ICDR Case No. 50 117 T 00224 08. "In the Matter of an Independent Review Process: ICM REGISTRY, LLC, Claimant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN")." 19 February 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>

<sup>437</sup> ICANN (2010). Adopted Board Resolutions. 25 June 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#5>

<sup>438</sup> ICANN (2010). Adopted Board Resolutions, 5 August 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/resolutions-05aug10-en.htm#9>.

<sup>439</sup> Dryden, H. (2011). Letter from Heather Dryden, Chair, GAC, to Peter Dengate Thrush, Chair, ICANN Board of Directors. 16 March 2011. Retrieved August 5 2011, from <https://gacweb.icann.org/download/attachments/1540116/20110316+GAC+Advice+on+.xxx.pdf?version=2&modificationDate=1312469527000>

<sup>440</sup> ICANN (2011). Minutes of Regular Meeting of the Board. 18 March 2011. Retrieved August 5 2011, from <http://www.icann.org/en/minutes/minutes-18mar11-en.htm>

<sup>441</sup> Ibid

(See Appendix 4.1 for a more complete coverage of the .xxx affair.)

### *Analysis of 2003 round*

This PDP was more comprehensive and arguably better planned than its predecessor. Following the ICANN reform process of 2002, the GNSO had replaced the DNSO as the Supporting Organisation with remit for this policy area, and had more detailed and formalised procedures for a policy development process (as laid out in Annex A to the new Bylaws<sup>442</sup>). In accordance with these new procedures, the GNSO solicited a wider range of inputs than had been the case in 2000, including expert papers as well as public comments and input from the ALAC. The GNSO supplied substantially more detailed policy advice than the DNSO had done in 2000, leaving fewer gaps to be filled in by ICANN staff. However, examination of the GNSO's final policy report suggests that most of its recommendations were ultimately agreed among the GNSO Constituency representatives themselves.<sup>443</sup> The annex to the report included the statements made by the Constituencies and also by the ALAC, but mentioned nothing of the inputs received from public comments, expert papers or the GAC. It therefore remains questionable just how far the policy represented 'consensus' or was the product of a truly broad-based, 'bottom-up' policy development process.<sup>444</sup>

The .xxx affair, in its own right, proved an interesting case study of various aspects of the ICANN regime. It raised questions over the extent of US governmental influence in ICANN policymaking; it saw the appeals process invoked under Article IV, Section 3 of the ICANN Bylaws; and it ultimately resulted in one of the rare occasions where the Board has been prepared to reject GAC advice.

### 2005 – 2011 New gTLDs PDP

By contrast with the earlier rounds, the most recent new gTLDs round has seen a much more protracted and complex policy development process.

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<sup>442</sup> ICANN (2002). Bylaws for Internet Corporation for Assigned Names and Numbers: As adopted effective 15 December 2002 (the "New Bylaws"). Retrieved 10 September 2010, from <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>

<sup>443</sup> ICANN (2003). GNSO Council gTLDs Committee Report – "New gTLDs, Conclusions v7." 12 June 2003. Retrieved 10 September 2010, from <http://www.dns0.org/dns0/notes/20030612.gTLDs-committee-conclusions-v7.html>

<sup>444</sup> Ibid

The PDP was initiated in September 2005, when the GNSO Council requested ICANN staff to prepare an Issues Report setting out the main issue areas for discussion relating to the possible introduction of new TLDs.<sup>445</sup> The Issues Report, released on 5<sup>th</sup> December 2005, set out four issue areas for study:

- 1 Whether to introduce new TLDs
- 2 Selection criteria for any new TLDs (e.g. sponsored or unsponsored, purposes, which strings)
- 3 Allocation criteria for new TLDs (criteria for deciding which entities will operate them)
- 4 Contractual conditions for new TLD operators.<sup>446</sup>

These four terms of reference formed the framework for the GNSO's subsequent work on the PDP.

Following release of the Issues Report, a Public Comments period was opened on 6<sup>th</sup> December 2005 to solicit responses to the four areas set out in the Report.<sup>447</sup> Responses were also submitted from the GNSO Constituencies, and a call for 'Expert Papers' was made on 3 January 2006. 38 Public Comments<sup>448</sup>, 7 Expert Papers<sup>449</sup> and 7 Constituency Statements<sup>450</sup> were submitted.

On 19<sup>th</sup> February 2006, a Draft Initial Report<sup>451</sup> was released, authored by ICANN staff (as prescribed in Annex A of the Bylaws).<sup>452</sup> It stated that a consensus on further

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<sup>445</sup> ICANN (2005). GNSO Issues Report: "Introduction of New TopLevel Domains." 5 December 2005. Retrieved 4 February 2009, from <http://gns0.icann.org/issues/new-gtlds/gns0-issues-rpt-gtlds-05dec05.pdf> P3

<sup>446</sup> Ibid, P7

<sup>447</sup> ICANN (2005). Announcement: 'Public Comment Forum for Terms of Reference for New gTLDs.' 06 December 2005. Retrieved 14 August 2009, from <http://www.icann.org/en/announcements/announcement-06dec05.htm>

<sup>448</sup> ICANN Public Comments Forum for Public Comments Period on GNSO Issues Report: Introduction of New TopLevel Domains (6 December 2005-31 January 2006.) Retrieved 6 February 2009, from <http://forum.icann.org/lists/new-gtlds-pdp-comments/>

<sup>449</sup> ICANN (2006). "Input received on the policy development process on new gTLDs." Retrieved 6 February 2009, from <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

<sup>450</sup> Ibid

<sup>451</sup> ICANN (2006). GNSO Initial Report: "Introduction of New Generic TopLevel Domains." 19th February 2006. Retrieved 4 February 2009, from <http://www.icann.org/en/topics/gns0-initial-rpt-new-gtlds-19feb06.pdf>

introduction of new gTLDs appeared to be at hand, but with diverging views on conditions, orientations and limits for such an introduction. It did not make any specific recommendations on the issues under discussion, but advised that the next step was to develop the discussions on these issues, within the GNSO itself and in consultation with other ICANN Supporting Organisations and Advisory Committees and the wider Internet community.<sup>453</sup>

A second Public Comments period was opened between 20<sup>th</sup> February and 13<sup>th</sup> March 2006 to solicit comments on the Initial Report, to which only seven responses were submitted.<sup>454</sup> Also in February 2006, a New TLDs Committee was set up by the GNSO Council, tasked with producing detailed policy recommendations on the issue. Its membership included representation from the Constituencies as well as members from the GAC, the ALAC and the Nominating Committee (see Appendix 4.2 for list of members). It was chaired by Bruce Tonkin, also the GNSO Council chair.

A second Draft Initial Report was released on 15 June 2006, authored by the New TLDs Committee.<sup>455</sup> Unlike the first version, this document included outline policy recommendations on all four terms of reference, as well as summarising some of the issues discussed in the public comments, Expert Papers and Constituency Statements. Another PCP was held between 9<sup>th</sup> and 29<sup>th</sup> August. Response was again very limited, with a mere 14 comments submitted.<sup>456</sup> Following this, the New TLDs Committee conducted another set of face-to-face consultations in Amsterdam between 29<sup>th</sup> and 31<sup>st</sup> August to further refine the Committee's findings and to develop a set of draft Recommendations.<sup>457</sup> These were initially released on 14<sup>th</sup> September.<sup>458</sup> An updated

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<sup>452</sup> ICANN (2002). Bylaws for Internet Corporation for Assigned Names and Numbers. As adopted effective 15 December 2002 (the "New Bylaws"). Retrieved 4 February 2009, from <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>

<sup>453</sup> Ibid

<sup>454</sup> ICANN Public Comments Forum for Public Comments Period on First Draft Initial Report: Introduction of New Generic Top-Level Domains (20th February-13th March 2006). Retrieved 6 February 2009, from <http://forum.icann.org/lists/new-gtlds-pdp-initial-report/>

<sup>455</sup> ICANN (2006). GNSO Initial Report: "Introduction of New Generic Top-Level Domains." 15 June 2006. Retrieved 4 February 2009, from <http://gnso.icann.org/issues/new-gtlds/issues-report-15jun06.pdf>

<sup>456</sup> ICANN Public Comments Forum for Public Comments Period on Second Draft Initial Report: Introduction of New Generic Top-Level Domains (9th-29th August 2006). Retrieved 6 February 2009, from <http://forum.icann.org/lists/newgtlds-comments>

<sup>457</sup> ICANN (2007). "New gTLDs Committee: Policy Development Process." Retrieved 14 March 2009, from <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm>

<sup>458</sup> ICANN (2006). Working Document: Draft GNSO Recommendation Summary, 14th September 2006. Retrieved 5 February 2009, from <http://gnso.icann.org/issues/new-gtlds/recom-summary-14sep06.htm>

version was released on 18<sup>th</sup> October following a further two-hour teleconference among the Committee's members.<sup>459</sup> The Committee met again at ICANN's Sao Paulo meeting in December 2006 to produce a draft of the Final Report, released on 5<sup>th</sup> December.<sup>460</sup> Following release of the December draft, small sub-groups of the TLDs Committee continued to meet to iron out various points.<sup>461</sup>

At this point, the GAC began to become more involved in the issue. A finalised set of 'GAC Principles Regarding New TLDs' was agreed by the GAC at its meeting in Lisbon and presented to the ICANN community in March 2007.<sup>462</sup> The GAC Principles are listed in Appendix 4.3. These were not at odds with the GNSO draft recommendations for the most part, but differed mainly on the question of approving geographical identifiers (such as city or territory names) as TLD strings (Principles 2.2 and 2.7 ). The Principles asserted that the introduction of any new gTLDs using geographic identifiers should require the explicit approval of the relevant government(s).<sup>463</sup>

The Final Report was submitted for Committee comment between 30<sup>th</sup> July and 6<sup>th</sup> August 2007, and a full meeting of the Committee was held on 6<sup>th</sup> August.<sup>464</sup> A public comments period on the Final Report was held between 9<sup>th</sup> and 29<sup>th</sup> August, which attracted 65 comments.<sup>465</sup> On 6<sup>th</sup> September, the GNSO Council voted on the recommendations and approved<sup>466</sup> the Final Report on the Introduction of New Top-Level Domains.<sup>467</sup> On 2<sup>nd</sup> November 2007, the Council submitted the Report to the Board, and on 26<sup>th</sup> June 2008, the Board approved in principle the GNSO

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<sup>459</sup> ICANN (2007). "New gTLDs Committee: Policy Development Process." Retrieved 14 March 2009, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm>

<sup>460</sup> Ibid

<sup>461</sup> Ibid

<sup>462</sup> ICANN (2007). GAC Principles regarding New gTLDs. Presented by the Governmental Advisory Committee March 28 2007. Retrieved 5 February 2009, from [http://gac.icann.org/web/home/gTLD\\_principles.pdf](http://gac.icann.org/web/home/gTLD_principles.pdf)

<sup>463</sup> Ibid

<sup>464</sup> ICANN (2007). New gTLDs Committee Final Report Part B. "Policy Development Process." Retrieved 14 March 2009, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm>

<sup>465</sup> ICANN Public Comments Forum for Public Comments Period on GNSO Final Report: Introduction of New Generic Top Level Domains. (10th-30th August 2007). Retrieved 6 February 2009, from <http://forum.icann.org/lists/gtldfinalreport-2007/mail2.html>

<sup>466</sup> ICANN (2007). GNSO Board Report: "Introduction of New Generic Top-Level Domains." 11 September 2007. Retrieved 14 February 2009, from <http://gns0.icann.org/issues/new-gtlds/council-report-to-board-pdp-new-gtlds-11sep07.pdf>

<sup>467</sup> ICANN (2007). GNSO Final Report: "Introduction of New Generic Top-Level Domains." 8 August 2007. Retrieved 14 July 2010, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

recommendations contained in the Final Report.<sup>468</sup> The Board further instructed the GNSO to move forward with developing a detailed set of implementation guidelines.<sup>469</sup>

The GNSO published a consolidated set of Principles, Recommendations and Implementation Guidelines in time for the Cairo meeting in October-November 2008.<sup>470</sup> These were in fact identical to those in the Final Report (despite the intervening PCP on the Final Report held from the 10th to the 30th August 2007).<sup>471</sup> A Draft Applicant Guidebook based on these Principles, Recommendations and Implementation Guidelines was also posted on the 24<sup>th</sup> October 2008.<sup>472</sup> This Applicant Guidebook, authored by ICANN staff, was intended to set out the details of the process for applying to run a new top-level domain. These are summarised and briefly explained in Appendix 4.4.

As it was to turn out, however, subsequent revisions of the DAG would amount to significant changes to the New gTLDs policy itself. A significant amount of controversy over the first version of the DAG was evident in the public comments period held between October 24 and December 15; in fact, this PCP generated far more comments than any of the previous PCPs.<sup>473</sup> A significant number of these public commentators attempted to re-open the debate about whether new TLDs were required at all; these mostly represented trademark interests. As will be shown later in this chapter, a number of other aspects of the DAG also proved contentious, both in the public comments and to the GAC.

Following the public comments period, four ‘overarching issues’ requiring further study were identified by ICANN staff. These included: trademark protection; security

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<sup>468</sup> ICANN (2008). Adopted Board Resolutions, Paris. 26 June 2008. Retrieved 16 February 2009, from [http://www.icann.org/en/minutes/resolutions-26jun08.htm#\\_Toc76113171](http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171)

<sup>469</sup> Ibid

<sup>470</sup> ICANN (2008). GNSO New gTLDs Committee. Summary, Principles, Recommendations and Implementation Guidelines. 22 October 2008. Retrieved 16 February 2009, from <http://gns0.icann.org/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>

<sup>471</sup> ICANN (2007). Announcement: ‘ICANN Launches Latest Consultation on New Top-Level Domains. Public, stakeholder comments sought on proposals for new top-level domain process.’ 10 August 2007. Retrieved 16 February 2009, from <http://www.icann.org/announcements/announcement-10aug07.htm>

<sup>472</sup> ICANN (2008). New gTLD Program: Draft Applicant Guidebook (Draft RFP). 24 October 2008. Retrieved 16 February 2009, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>

<sup>473</sup> See public comments forum on Draft Applicant Guidebook v.1, available at <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf> Accessed 13 July 2011.

and stability; malicious conduct; and demand and economic analysis.<sup>474</sup> A number of study groups were set up to address these issues, including an Implementation Recommendation Team (IRT) together with various workgroups including the Special Trademark Issues (STI) group; the Vertical Integration (VI) group (working on registry/registrar separation issues)<sup>475</sup>; the Zone File Access (ZFA) group<sup>476</sup>; the Temporary Drafting Group (TDG) (working on a draft registry contract)<sup>477</sup>; and the High Security Top - Level Domain (HSTLD) group (working on technical stability and security issues).<sup>478</sup> The IRT and the working groups consisted of ‘experts’ in the relevant areas; public comment on their work was also invited.<sup>479</sup>

A number of iterations of the DAG followed between 2009 and 2011, each one being subject to a public comments period. The IRT made recommendations prior to the publication of into DAGv3.<sup>480</sup> The most significant of these represented attempts to strengthen trademark protection, including a Uniform Rapid Suspension system (a mechanism to quickly suspend infringing domains); a Trademark Clearinghouse (a database of information pertaining to trademark authentication); a Globally Protected Marks List (a list of globally recognised trademarks that would be made unavailable as TLD strings); a Post-Delegation Dispute Resolution Process (a mechanism to allow trademark holders to proceed against registry operators accused of acting in bad faith after the TLD has been delegated) and a ‘thick WHOIS’ model.<sup>481</sup>

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<sup>474</sup> ICANN (2009). Announcement: ‘Draft Applicant Guidebook: What You Told Us.’ 18 February 2009. Retrieved 18 August 2010, from <http://www.icann.org/en/announcements/announcement-3-18feb09-en.htm>

<sup>475</sup> ICANN (2010). “Chartered objectives for the Working Group on Vertical Integration.” 10 March 2010. Retrieved 19 August 2010, from <http://gnso.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf>

<sup>476</sup> ICANN (2010). “Zone File Access Advisory Group.” Retrieved 19 August 2010, from <http://www.icann.org/en/topics/new-gtlds/zone-file-access-en.htm>

<sup>477</sup> ICANN (2010). Board briefing materials: “New gTLD Workshop Information – Trondheim, Norway, 24-25 September 2010.” Retrieved 5 August 2011, from ICANN (2010). <http://www.icann.org/en/minutes/board-briefing-materials-1-25sep10-en.pdf>

<sup>478</sup> ICANN (2011). “High Security Top Level Domain Verification Program Advisory Group: Information.” Retrieved 5 August 2011, from <http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm>

<sup>479</sup> ICANN (2009). “New gTLDs: Overarching Issues.” Retrieved 20 July 2011, from [https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark\\_protection:20091006223945-0-1602/original/irt-list-23mar09-en.pdf](https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20091006223945-0-1602/original/irt-list-23mar09-en.pdf)

<sup>480</sup> ICANN (2009). New gTLDs Draft Applicant Guidebook, Version 3. Retrieved 8 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf>

<sup>481</sup> ICANN (2009). “IRT Recommendations on RPMs in the new gTLDs: A Summary.” 24 June 2009. Retrieved 17 July 2011, from <http://syd.icann.org/files/meetings/sydney2009/presentation-irt-recommendations-24jun09-en.pdf>

DAG v3, however, did not incorporate all of these. The Trademark Clearinghouse proposal was passed to the GNSO for consideration; the URS system was included as a ‘best practice’ for new registries but not as a requirement; the Globally Protected Marks list was not included; while the ‘thick WHOIS’ proposals were adopted. The PDDRP was also adopted in DAG v3.<sup>482</sup> The PDDRP differed in principle from the UDRP in that it allowed trademark owners to seek redress from the registry that allowed the infringement, not just from the domain name registrant.

Meanwhile, a number of economic studies pertaining to the potential costs and benefits of new TLDs were commissioned by ICANN. This may to some extent have been prompted by a letter from the DoC in December 2008, reminding ICANN on behalf of the US government that they should not move forward with new gTLDs until appropriate research had been carried out, including completion of the economic/market study and cost-benefit analysis.<sup>483</sup> In March 2009 ICANN released two studies by Dennis Carlton, an economist at the University of Chicago.<sup>484</sup> Carlton concluded that ICANN’s proposed framework for introducing new TLDs was ‘likely to improve consumer welfare by facilitating entry and creating new competition to the major gTLDs’.<sup>485</sup> He also advised against registry price caps, which he considered unnecessary to ensure competitive benefits and potentially inhibiting to the development of new registries.<sup>486</sup> In June 2009, ICANN commissioned Carlton to write two further papers on the economic impact of new gTLDs. The first combined and updated his two earlier studies and reiterated their conclusions.<sup>487</sup> The second responded to a study commissioned by AT&T, authored by Michael Kende, which had concluded that restricting the number of new gTLDs was the best solution to trademark holders’ concerns.<sup>488</sup> In response, Carlton argued that the proposed trademark protection mechanisms would be sufficient to protect trademark holders’

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<sup>482</sup> ICANN (2011). New gTLD Draft Applicant Guidebook: Version 3 (redline version.) Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/intro-redline-04oct09-en.pdf> P152

<sup>483</sup> Baker, M.A. (2008). Letter from Meredith A. Baker to Peter Dengate Thrush, 18 December 2008. Retrieved 17 July 2011, from <http://www.icann.org/en/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>

<sup>484</sup> ICANN (2009). Announcement: ‘New gTLDs – Preliminary Reports on Competition and Pricing’. 4 March 2009. Retrieved 18 July 2011, from <http://www.icann.org/en/announcements/announcement-04mar09-en.htm>

<sup>485</sup> Carlton, D. (2009). “Preliminary report of Dennis Carlton regarding impact of new gTLDs on consumer welfare. 4 March 2009.” Retrieved 18 July 2011, from <http://www.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>

<sup>486</sup> Ibid

<sup>487</sup> Ibid

<sup>488</sup> Kende, M. (2009). “Assessment of ICANN Preliminary Reports on Competition and Pricing. April 17 2009.” Retrieved 18 July 2011, from <http://forum.icann.org/lists/competition-pricing-prelim/pdf5P4JR5zYe1.pdf>

interests; in addition, he argued that data presented by Kende was flawed and appeared to exaggerate the need for defensive registrations.<sup>489</sup> Carlton also disputed Kende's suggestion that the absence of price caps for new gTLDs would require elimination of price caps for existing TLDs.<sup>490</sup>

These studies did not, however, prove satisfactory to all interested parties. In September 2009, leaders from the U.S. Congressional House Committee on the Judiciary wrote to ICANN expressing concerns that new TLDs would likely result in serious negative consequences for U.S. businesses and consumers and again asking whether ICANN planned to carry out a 'credible' economic study on the launch of new gTLDs.<sup>491</sup> ICANN subsequently commissioned another group of economists (Michael L. Katz, Gregory L. Rosston and Theresa Sullivan) to produce a further economic study, which was published in June 2010.<sup>Note 4\_1</sup> The authors of this study came to two conclusions: firstly, that it may be wise to continue ICANN's practice of introducing new gTLDs in discrete, limited rounds in order to minimise any adverse impact; and secondly that, in order to derive the 'greatest informational benefits' from the next round of gTLD introductions, ICANN should 'adopt practices that will facilitate the assessment of the net benefits from the initial rollout of additional gTLDs.'<sup>492</sup>

However, this study still did not prove satisfactory to the DoC, which issued another letter in December 2010 warning ICANN not to proceed with new gTLDs until

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<sup>489</sup> Carlton, D. (2009). "Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing." June 5 2009. Retrieved 18 July 2011, from <http://www.icann.org/en/topics/new-gtlds/carlton-re-kende-assessment-05jun09-en.pdf>

<sup>490</sup> Ibid

<sup>491</sup> Smith, L. and H. Coble (2009). Letter from Lamar Smith and Howard Coble to Rod Beckstrom, 15 September 2009. Retrieved 18 July 2011, from <http://www.icann.org/en/correspondence/smith-coble-to-beckstrom-15sep09-en.pdf>

<sup>Note 4\_1</sup> This examined a number of relevant issues, including projected benefits (identified as competition for existing gTLDs; introduction of new business models; relief of scarcity in domain names; possible reduction of search costs) and projected costs (identified as costs of setting up a new TLD; costs to competing registries; possible increase in search costs; trademark infringement and adverse investment effects of potential free riding). It found that the likely costs and benefits of introducing a new gTLD would be heavily dependent upon the TLD itself and on the policies of the registry operator. Secondly, it was argued, the costs and benefits of a new gTLD may accrue not only to the new gTLD operator, but also to third parties.

<sup>492</sup> Katz, M.L., Rosston, G.L, and Sullivan, T. (2010). "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names, prepared for ICANN." June 2010. Retrieved 18 July 2011, from <http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>

adequate economic studies had been undertaken.<sup>493</sup> Shortly afterwards, a follow-up to the July study was published, by the same authors, which attempted to provide more specific estimates of the costs and benefits of new TLDs using empirical data. It concluded that, while the exact incremental benefits and incremental costs of introducing a given TLD would very likely be uncertain and would vary by application, a range of processes and policies could be implemented to reduce potential costs, particularly trademark and intellectual property protection mechanisms such as sunrise periods, a reserved marks list, and post-registration enforcement mechanisms.<sup>494</sup>

Meanwhile, further iterations of the DAG were produced. DAG v4 (May 2010)<sup>495</sup> incorporated the Trademark Clearinghouse mechanism and made the URS mandatory; it also made changes to rules for geographic TLDs, including a prohibition on country names as gTLDs. DAG v5 (November 2010)<sup>496</sup> saw a reversal of policy on registry / registrar separation, with unrestricted cross-ownership now being permitted.<sup>497</sup> This decision to allow cross-ownership was taken by the Board on 5 November 2010<sup>498</sup>, following the inability of the GNSO's Vertical Integration Group to reach agreement on the issue<sup>499</sup>.

Following release of DAG v5, and on subsequent revisions, the GAC provided further advice on the issue of geographic names and other issues. However, the Board did not accept all of the GAC's recommendations, leading to the GAC suggesting that it might invoke the Bylaw provisions providing for resolution of a Board-GAC dispute<sup>500</sup>, which would have been the first occasion that this had occurred in

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<sup>493</sup> Strickling, L.E. (2010). Letter from Lawrence E. Strickling to Rod Beckstrom, 2 December 2010. Retrieved 18 July 2011, from <http://forum.icann.org/lists/5gtld-guide/pdf3Ep9MhQVGO.pdf>

<sup>494</sup> Katz, M.L., Rosston, G.L., and Sullivan, T (2010). "Economic Considerations in the Expansion of Generic Top-Level Domain Names, Phase II." 3 December 2010. Retrieved 18 July 2011, from <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>

<sup>495</sup> ICANN (2010). New gTLDs Draft Applicant Guidebook, Version 4. 28 May 2010. Retrieved 19 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>

<sup>496</sup> ICANN (2010). gTLD Applicant Guidebook Proposed Final Version. 12 November 2010. Retrieved 19 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>

<sup>497</sup> Ibid, P24

<sup>498</sup> ICANN (2010). Minutes of special meeting of the Board. 5 November 2010. Retrieved 19 July 2011, from <http://www.icann.org/en/minutes/minutes-05nov10-en.htm>

<sup>499</sup> Gomez, C. (2010). Email from Chuck Gomez to Peter Dengate Thrush, 7 October 2010. "RE: Vertical Integration Recommendations for the New gTLD Program." Retrieved 19 July 2011, from <http://gnso.icann.org/mailling-lists/archives/council/msg09754.html>

<sup>500</sup> ICANN (2010). GAC Communiqué – IXL – Cartagena, 10 December 2010. Retrieved 9 July 2011, from [https://gacweb.icann.org/download/attachments/1540144/GAC\\_39\\_Cartagena\\_Communique.pdf?version=1&modificationDate=1312225168000](https://gacweb.icann.org/download/attachments/1540144/GAC_39_Cartagena_Communique.pdf?version=1&modificationDate=1312225168000)

ICANN's history. In the event, the Bylaw provisions were not formally invoked, but discussions proceeded between the Board and GAC.

A final discussion draft of the DAG was released in April 2011.<sup>501</sup> Some of the key changes included: increased governmental authority over geographical names; allocation of funds to the ALAC to pay for some Objection Fees; the Sunrise mechanism and Trademark Claims Service both becoming mandatory (previously registries had to provide one or the other); and a 'loser pays' mechanism being included in the Uniform Rapid Suspension process. A final PCP was held on this document; following this, a finalised seventh iteration of the Applicant Guidebook was issued. No public comment was invited on the finalised Guidebook, which the Board approved on 20 June 2011.<sup>502</sup>

Commenting upon the final version of the Guidebook, the GAC recognised that some of its outstanding concerns had been addressed, but noted that several substantive issues remained unresolved.<sup>503</sup> In the following Communiqué, the GAC appeared to effectively concede on the remaining points, acknowledging that the Board had provided a rationale for not following certain elements of GAC advice, as required by the Bylaws.<sup>504</sup>

Following Board approval, the New gTLDs PDP is now considered to be complete. The first application round is scheduled to begin in January 2012.<sup>505</sup> However, discussions continue on some aspects of policy; for example, a decision on whether the relaxation of cross-ownership rules would be extended to existing gTLDs was deferred, pending further discussions including with competition authorities.<sup>506</sup>

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<sup>501</sup> ICANN (2011). New gTLD Applicant Guidebook, April 2011 Discussion draft (redline version). Retrieved 19 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

<sup>502</sup> ICANN (2011). Minutes of regular meeting of the Board, 20 June 2011. Retrieved 19 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>503</sup> Dryden, H. (2011). Letter from Heather Dryden to Peter Dengate Thrush, 18 June 2011. RE: GAC communication on new gTLDs and Applicant Guidebook. Retrieved 14 September 2011, from <http://www.icann.org/en/topics/new-gtlds/gac-communication-new-gtlds-applicant-guidebook-18jun11-en.pdf>

<sup>504</sup> ICANN (2011). GAC Communiqué XLI- Singapore. 23 June 2011. Retrieved 14 September 2011, from [https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011\\_2.pdf?version=1&modificationDate=1312392506000](https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011_2.pdf?version=1&modificationDate=1312392506000)

<sup>505</sup> ICANN (2011). "New gTLD Program Timeline. 20 June 2011." Retrieved 14 September 2011, from <http://www.icann.org/en/minutes/timeline-new-gtld-program-20jun11.pdf>

<sup>506</sup> ICANN (2011). Minutes of regular meeting of the Board, 20 June 2011. Retrieved 19 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

## **Analysis of PDP: Actors and Interests**

### **Role of the GNSO Constituencies**

#### *GNSO Policy Development Process 2005-2007*

The initial stages of policy development were in the hands of the GNSO New TLDs committee, which was dominated by the Constituency representatives. The initial positions of the Constituencies were set out in the Constituency Statements submitted in early 2006, at the start of the PDP. None of the Constituencies opposed outright the principle of adding further gTLDs to the root. However, the BC<sup>507</sup> and IPC<sup>508</sup> stated a preference that new gTLDs be limited to sponsored and IDN TLDs, while the ISPCP also advocated that any new gTLDs should be sponsored.<sup>509</sup>

Some Constituencies showed a certain amount of caution about the programme at this point. The BC advocated further analysis on the need and demand for new TLDs, including evaluation of the previous rounds of gTLD introduction<sup>510</sup>, while the IPC claimed there was no evidence to substantiate a pressing need for new gTLDs and pointed to statistics suggesting 80% of registrations in the previously introduced new open gTLDs were defensive registrations.<sup>511</sup> The IPC<sup>512</sup> further recommended that any new gTLD programme be carried out in a slow and controlled manner, while the Registrars<sup>513</sup> advocated an upper limit on the total number of TLDs to be introduced (though they still envisaged a programme that might result in hundreds or possibly thousands of new TLDs, but not tens of thousands or millions). The Registries were strongly in favour of new gTLDs, arguing that the previous application rounds had

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<sup>507</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P1

<sup>508</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> PP 2-4

<sup>509</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>510</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P2

<sup>511</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P1

<sup>512</sup> Ibid, P2

<sup>513</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> PP2-3

adequately validated that there was ample demand to operate a TLD.<sup>514</sup> The NCUC was also strongly in favour of new gTLDs.<sup>515</sup>

Overall, then, there was clearly a degree of consensus among the Constituencies that a new TLDs programme should be pursued (or at least, in the case of the IPC, a qualified acceptance of the principle), but an initial lack of consensus on some significant issues, particularly the question of whether further gTLDs other than sponsored and IDN TLDs ought to be introduced. There were also some significant disagreements among the Constituencies regarding some of the specifics of selection criteria, allocation methods and contractual conditions (see Appendix 4.5 for more details).

Despite these differences, the New gTLDs Committee was able to produce a fairly comprehensive set of recommendations on how the process could be moved forward. It is difficult to get a clear picture of precisely how this process unfolded, since not all of the Committee's discussions are publicly documented. However, in email correspondence with the author, Bruce Tonkin, who chaired the committee, recalled that the meetings mostly took the form of constructive discussion rather than adversarial hard bargaining.<sup>516</sup> This was confirmed by Phillip Sheppard, who was also a member of the Committee, in a telephone interview.<sup>517</sup> In addition, a few of the teleconference meetings of the Committee were recorded and are available as audio files from ICANN.<sup>518</sup> These support the picture of agreement being gradually forged through constructive discussion.

The extent to which the recommendations of the Final Report matched up with the initial proposals put forward by the GNSO Constituencies is demonstrated in Appendix 4.6, which compares the Report to the initial Constituency Statements on New gTLDs submitted at the beginning of the policymaking process in early 2006. The first and most fundamental Principle, that new gTLDs should be introduced, was

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<sup>514</sup> ICANN (2006). gTLD Registry Constituency Comments regarding terms of reference for new gTLDs. 30 January 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P3

<sup>515</sup> ICANN (2006). Noncommercial Constituency comments submitted to the GNSO in response to the call for comments on the terms of reference for new gTLDs. January 31 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ncuc-01feb06.pdf>

<sup>516</sup> Email from Bruce Tonkin to Paul White, 16 February 2009.

<sup>517</sup> Telephone interview between Phillip Sheppard and Paul White, 20<sup>th</sup> February 2009.

<sup>518</sup> See, for example, audio files available at <http://audio.icann.org/gns0/new-gtld-20070726.mp3> and <http://audio.icann.org/gns0/new-tlds-06aug07.mp3> Accessed 2 March 2009.

basically compatible with all of the initial Constituency papers; however the recommendations by BC, IPC and ISPCP that new gTLDs should be limited to sTLD and IDN types did not make it into the Final Report. The remaining Principles were fairly uncontentious. Likewise, most of the Recommendations were not fundamentally at odds with any of the initial Constituency statements, although the decision that applications would be initially assessed in rounds ‘until the scale of demand is clear’ (Recommendation 13) could be seen as a compromise between the ISPCP and registrars’ advocacy of a rounds-based model and the RyC’s desire for an ongoing application process. With regards to the Implementation Guidelines, these were again mostly uncontentious. The level of application fees was a point of contention in the Constituency statements, with the BC advocating fees be set as low as possible and the registrars advocating large fees to ensure applicants were financially capable of running a registry; however, Guideline IG B, which states that application fees will be set to ensure cost recovery for the new gTLD process, avoids mentioning any specific figures.

One area of disagreement among the Constituencies was the issue of methods for resolving contention over strings, with the BC & IPC favouring comparative evaluations; the NCUC advocating ballots; the Registrars favouring a mixture of ballots, auctions and lotteries; the ISPCP proposing that domain names for single companies should be auctioned, while those involving general and/or noncommercial communities should be distributed by lottery; and the Registries specifying no clear preference, except to say that the use of comparative evaluations should be limited. Guideline IG F appears to have left this question rather open-ended, stating that, in the event of contention for strings, the parties should be given the opportunity to resolve their differences between themselves; in the absence of agreement, community applications should be given priority over non-community applications; and in the event of there being no such agreement and no such claim to community support by one of the applicants, ‘a process will be put in place to enable efficient resolution of contention’, with the Board having the ability to make a final decision. The nature of this contention resolution process is not specified and could, presumably, take the form of auctions, ballots, lotteries or comparative evaluation.

It is important to note that certain points of contention among the Constituencies remained after the finalisation of the recommendations in the Final Report. The major

outstanding disagreements are summarised in Appendix 4.7. However, it would appear that, in something of an echo of the 2000 and 2003 PDPs, those issues that the Constituencies could not agree on were simply left for ICANN staff to work out in creating the DAG.

### *Post-Final Report*

To a very great extent, policymaking up to the release of the Final Report could be said to be mostly the work of the GNSO Constituencies. However, the more recent stages of the process, including the various iterations of the DAG, have been removed from the direct control of the GNSO, and in some areas, subsequent evolution of New gTLDs policy has resulted in recommendations substantially different from, or even in opposition to, the policy proposals agreed by the GNSO in 2007. As a result, some of the Constituencies have been critical of various provisions in the DAGs.

Appendix 4.8 shows criticisms of the DAGs made by various Constituencies. As the table shows, some of these were resolved in subsequent versions of the DAG, but the majority were not. The Registrars and the BC appear to have had a greater proportion of their concerns addressed than other Constituencies, however, at the same time these two Constituencies made fewer comments than the Registries, the NCUC and the IPC.

Some of the comments from the GNSO and GNSO Constituencies directly accused the Board of ignoring GNSO advice. For example, Avri Doria submitted comments on behalf of the GNSO to the PCP on DAG v3 criticising the work of the IRT on rights protection mechanisms (RPMS). Doria argued that, in defining a required RPM, the IRT went against the policy decisions of the GNSO Council as approved by the Board, since the GNSO New gTLDs Committee had previously concluded that there was no set of RPMs that fitted all circumstances and had consequently recommended that there would not be a required RPM. Doria argued that a decision to ignore this recommendation would be making an ‘end run’ around the principle of bottom-up policymaking.<sup>519</sup> Comments submitted to the PCP on DAGv5 by the BC<sup>520</sup> and IPC<sup>521</sup>

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<sup>519</sup> Doria, A. (2009). 'The Requirement of Rights Protections Mechanisms'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.3. 9 November 2009. Retrieved 8 July 2011, from <http://forum.icann.org/lists/3gtld-guide/msg00008.html>

<sup>520</sup> ICANN (2010). ‘Comments and Recommendations of Business Constituency (BC)’. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 6 December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00025.html>

similarly expressed a feeling that their concerns were not being taken into account. The BC's comments on DAG v6, while acknowledging the acceptance of many BC recommendations, also claimed that many others had been 'disregarded without explanation',<sup>522 Note 4\_2</sup>

In summary, while the GNSO Constituencies were highly influential in deciding the broad strokes of policy up to and including the Final Report, their influence over the final specifics of policy as set out in the Applicant Guidebook was much more limited.

### Role of public comments

Between December 2006 and May 2011, more than a thousand public comments were posted to ICANN's public comments forums on the matter of new gTLDs. These addressed a very broad range of points and expressed a wide variety of views, reflecting the hugely complex nature of the issue-area. The majority of the comments were posted during the comments periods on various iterations of the DAG; by

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<sup>521</sup> ICANN (2010). 'Comments of the Intellectual Property Constituency'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 9 December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00061.html>

<sup>522</sup> ICANN (2011). 'Business Constituency Comments on April-2011 Guidebook for new gTLDs'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.6. 15 May 2011. Retrieved 8 July 2011, from <http://forum.icann.org/lists/6gtld-guide/msg00055.html>

Note 4\_2 These were listed as follows:

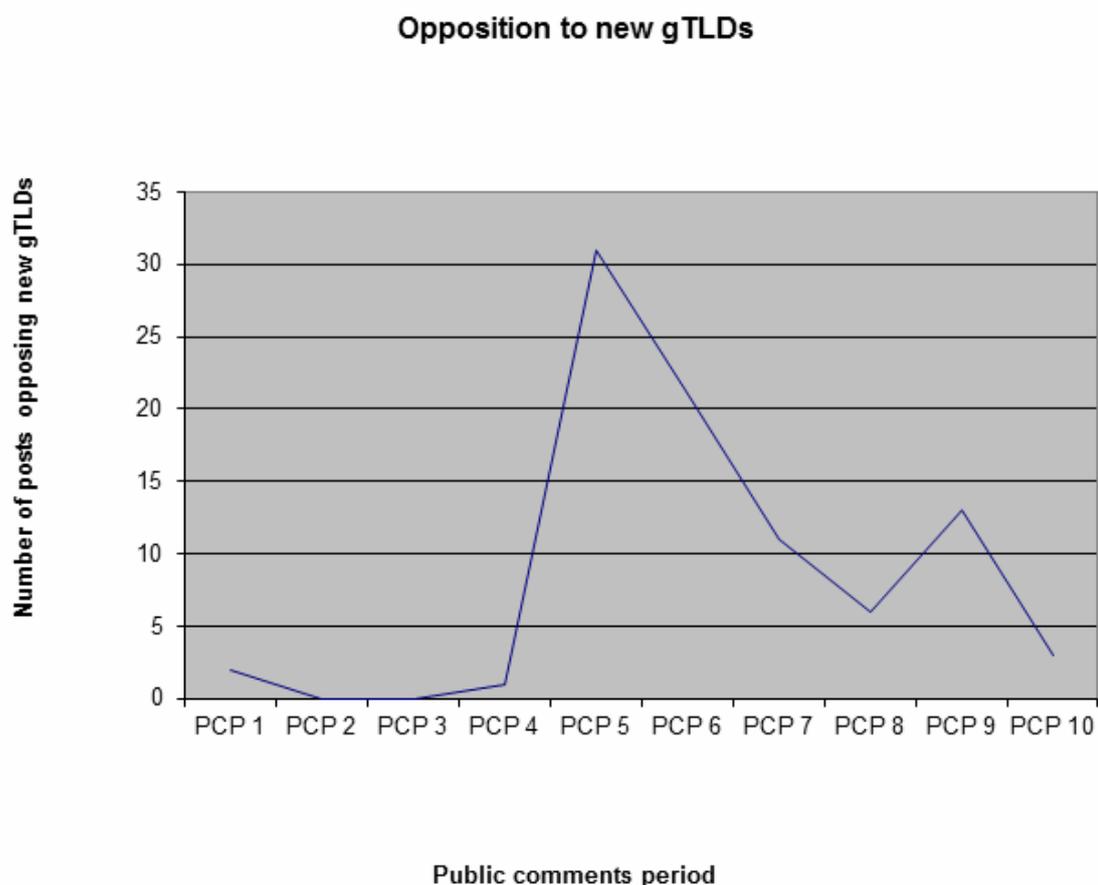
- The Guidebook calls for processing new applications in batches, with the first batch being 500 applications. The BC believes this first batch should be significantly fewer than 500 applications, in order to test the operational readiness of newly designed application processing and objection / contention systems.
- Applicants should be granted fee reductions for additional versions of the applied-for string in IDN scripts and other languages.
- String Similarity contention sets should not include similar strings requested by a applicant seeking linguistic variations of the applicant's other applied-for string.
- Applicants should be required to pay an objection Response Filing Fee in order to defend the rationale already included in their original application.
- Community priority should be given to applicants scoring at least 13 points, not 14.
- RPMs are still substantially weaker than those recommended by the IRT. Consumers and businesses will inevitably be harmed by cybersquatting and other fraud likely to occur in hundreds of new gTLDs, especially at the second level. Picking-up on discussions during a US Congressional Hearing on 4-May-2011, the BC reiterates its Business Constituency Comments on April-2011 Applicant Guidebook v3 support for Globally Protected Marks List (GPML). Absent a GPML, trademark holders must pay for unwanted defensive registrations.
- While not part of the Guidebook, effective Communications and Outreach activities are essential to the success of this gTLD expansion.

Source: ICANN (2011). 'Business Constituency Comments on April-2011 Guidebook for new gTLDs'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.6. 15 May 2011. Retrieved 8 July 2011, from <http://forum.icann.org/lists/6gtld-guide/msg00055.html>

contrast, relatively few comments were received during the public comments periods on the earlier GNSO policy development process.

As shown in Appendix 4.10, an analysis of the comments received over ten public comments periods suggests that the two most controversial issues overall were the basic question of whether to introduce new gTLDs at all, and trademark protection. Overall, 11.9% of posters declared themselves opposed outright to new gTLDs. The level of opposition peaked around the time of the PCPs on DAGs version 1 and 2, but later declined, as illustrated by the following graph:

**Figure 4.1: Opposition to new gTLDs in Public Comments Periods**



By the final public comments period, expressions of outright opposition to new gTLDs had declined to just 3 posts out of 69. Opposition to new gTLDs had never amounted to more than a substantial minority of posters (around 21% in PCPs 5 and 6), despite claims from George Kirikos that the public had decisively rejected the new gTLDs programme.<sup>523</sup> Nevertheless, clearly there was never a consensus on the issue among the wider Internet community, and so the programme could not truly be described as ‘consensus policy’. The majority of those opposing new gTLDs appear to have been made up largely of trademark holders, trademark lawyers and organisations representing trademark interests. Over the course of the policy development programme, 19.1% of all posts criticised the proposed trademark protection mechanisms as inadequate. Again, the vast majority of these posters were trademark holders, trademark lawyers and organisations representing trademark interests, such as INTA and MARQUES.

<sup>523</sup> Kirikos, G. (2011). 'ICANN continues to ignore the public that overwhelmingly disapproves of new gTLDs (comments of Leap of Faith Financial Services Inc.)' Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.6. 15 May 2011. Retrieved 8 July 2011, from <http://forum.icann.org/lists/6gtld-guide/msg00027.html>

The PCP on the 2007 GNSO Final Report saw neither overwhelming support for, nor strong opposition to, most of the policy recommendations; however, the morality and public order (MAPO) provisions were opposed by 51 individuals (41 of whom appear to have submitted an identical or near-identical copy-and-paste text from the website [keep-the-net-neutral.org](http://keep-the-net-neutral.org)).<sup>524</sup> The issue of intellectual property rights protections also aroused significant discussion in this PCP, with six commentators (including IPC and BC representatives) arguing in favour of stronger trademark protections and four others (three of whom represented online free speech organisations) opposing this.<sup>525</sup>

Opposition from trademark interests grew markedly stronger during the public comments periods on the Draft Applicant Guidebooks. Successive iterations of the DAG appear to have responded to such criticism, as increasingly robust trademark protection mechanisms were introduced. Despite this, in the final PCP (April-May 2011), 19 out of 65 (27.5%) of posts remained critical of the proposed trademark protection mechanisms.<sup>526</sup> Again, this underlines the fact that the Applicant Guidebook in its final form could not truly be described as ‘consensus policy’, if this is taken to mean broad consensus among the wider stakeholder community.

The high percentage of posts from the trademark lobby highlights the fact that these ‘public’ comments periods were in fact dominated by certain (mostly commercial) interest groups rather than the Internet-using general public. The great majority of ‘public commentators’ represented businesses of various sizes and types, together with a few individuals with a direct interest in the topic. The extent to which public comment affected the outcomes of policy development is, however, more difficult to quantify. The broad range of viewpoints expressed on many different points of policy underlines the fact that ICANN cannot possibly hope to ‘please all of the people all of the time’ when dealing with such complex and nuanced policy areas. Nonetheless, on a number of specific points of policy, some of the proposals put forward by some of the public commentators appear to have been addressed in subsequent policy drafts. This is illustrated by Appendix 4.11, which summarises key issues and points from

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<sup>524</sup> Public Comments Period on the GNSO new TLDs Committee Final Report: "Introduction of New Top-Level Domains" (10th - 30th August 2007). Retrieved 10 March 2011, from <http://forum.icann.org/lists/gtldfinalreport-2007/mail2.html>

<sup>525</sup> Ibid

<sup>526</sup> Public Comments Period PCP on New gTLDs Draft Applicant Guidebook v6 (15 April 2011-15 May 2011). Retrieved 18 July 2011, from <http://forum.icann.org/lists/6gtld-guide/>

each PCP that attracted significant discussion (defined as having been raised by three or more individual posters in a given public comments period), together with a summary of whether these issues were addressed in the subsequent policy draft.

A second approach in attempting to gauge the overall influence of public comments was to directly question some ICANN policymakers, such as members of the New TLDs Committee, about how they had taken public comment into account in formulating policy. Philip Sheppard, who sat on the New TLDs Committee, stated in a telephone interview that the Committee had attempted to incorporate the public inputs ‘as much as possible’ but also pointed out that full consensus on these issues was impossible and that some ideas would inevitably win out over others.<sup>527</sup> Similarly, Bruce Tonkin, who chaired the Committee, affirmed that the points raised from these sources were discussed and considered by the Committee.<sup>528</sup> Sheppard added that all participants in the TLDs Committee had at least read the syntheses of comments prepared by ICANN staff and that ‘some’ had taken the time to read the original comments in detail.

In the later stages of policy development, after each public comments period on successive iterations of the DAG, ICANN produced a summary and analysis of public comments that attempted to show how public input was being addressed in the subsequent Guidebook draft.<sup>529</sup> However, on numerous points these documents simply offered a justification as to why a particular public comment or proposal would not be implemented. These documents therefore merely confirm what has been evidenced by the data in Appendices 4.9 and 4.11; i.e., that some of the suggestions and issues raised in public comments were in fact addressed in subsequent versions of the DAG, while others were not. Nonetheless, the existence of these documents and their attempts to justify why certain comments were rejected does at least demonstrate that public comments are noted and acknowledged, if not necessarily acted upon (and, as discussed, it would have obviously been impossible to satisfy everyone as there were conflicting views on numerous points).

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<sup>527</sup> Telephone interview between Phillip Sheppard and Paul White, 20<sup>th</sup> February 2009.

<sup>528</sup> Email from Bruce Tonkin to Paul White, 16 February 2009.

<sup>529</sup> These files are available from the Applicant Guidebook archive page at <http://www.icann.org/en/topics/new-gtlds/dag-en.htm> Retrieved 25 September 2011.

Some of the public commentators themselves, however, were sceptical as to how far their views were being taken into account. One notable critic, already mentioned, was George Kirikos (Leap of Faith Financial Services), who argued in almost every PCP that ICANN was pressing ahead with the new gTLDs programme against the wishes of public commentators. There were others who made similar claims; for example, over the course of the final two public comments periods, a number of commentators accused ICANN of ignoring public comment on aspects of the proposed policy. These included Janet O' Callaghan (News Corporation)<sup>530</sup>; Yvette Wojciechowski (CADNA)<sup>531</sup>; Paul Tattersfield (GPMGroup)<sup>532</sup>; Elizabeth Cummings (CADNA)<sup>533</sup>; Søren Ingemann Larsen (H.Lundbeck A/S)<sup>534</sup>; and even the ALAC.<sup>535</sup>

Appendix 4.9 contains a more in-depth summary and analysis of ten Public Comments periods on new gTLDs held in the period between December 2006 and May 2011. Appendix 4.10 draws together some statistics for all ten of these public comments periods over the course of the entire policy development process.

### Role of the GAC

The GAC supplied one member to the New TLDs Committee, Suzanne Sene. However, she appears to have attended only one meeting of the Committee.<sup>536</sup>

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<sup>530</sup> News Corporation (2010). 'News Corp Comments on the Proposed Final Applicant Guidebook'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v. 5. 9 December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00064.html>

<sup>531</sup> CADNA (2010). 'CADNA Comments on version 5 of the New gTLD Draft Applicant Guidebook'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 10 December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00088.html>

<sup>532</sup> Tattersfield, P. (2010). 'Serious failings of both process and design which need to be remedied prior to implementation'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 10 December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00079.html>

<sup>533</sup> CADNA (2011). 'ICANN's New gTLD Applicant Guidebook: April 2011 Discussion Draft – Public Comment'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.6. 13 May 2011. Retrieved 8 July 2011, from <http://forum.icann.org/lists/6gtld-guide/pdfexNsFhMzT.pdf>

<sup>534</sup> Larsen, S.I. (2011). 'The program of new TLDs should be STOPPED due to lack of interest from the internet society'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.6. 4 May 2011. Retrieved 8 July 2011, from <http://forum.icann.org/lists/6gtld-guide/msg00002.html>

<sup>535</sup> ICANN (2010). 'ALAC Statement on Draft Final Guidebook'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 8<sup>th</sup> December 2010. Retrieved 8 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00038.html>

<sup>536</sup> ICANN (2007). GNSO new TLDs Committee Final Report Part B: "Introduction of New Top-Level Domains." 18 June 2007. Retrieved 20 July 2011, from <http://gns0.icann.org/drafts/pdp-dec05-fr-b-18jun07.pdf> P9

In October 2006, TLDs Committee Chairman and GNSO Council Chair, Bruce Tonkin, sent formal correspondence to the Chair of the GAC requesting the GAC's assistance with the public policy impacts of the introduction of new TLDs. The GAC addressed this at its next meeting on 2<sup>nd</sup> – 8<sup>th</sup> December 2006 in Sao Paulo, where it discussed the development of GAC public policy principles applicable to the introduction, selection process and operation of new gTLDs. The first set of draft GAC principles were submitted to the GNSO Council in December 2006.<sup>537</sup> A finalised set of 'GAC Principles Regarding New TLDs' was agreed by the GAC at its meeting in Lisbon and presented to the ICANN community on March 28<sup>th</sup>, 2007.<sup>538</sup>

The preamble to this document invoked the WSIS declaration of 2005, which recognised '...the need for further development of, and strengthened cooperation among, stakeholders for public policies for generic top-level domains'. Paragraph 1.2 of the preamble also cited the WSIS Declaration of 2003, which recognised that '...policy authority for Internet-related public policy issues is the sovereign right of States' and that states '...have rights and responsibilities for international Internet-related public policy issues.'<sup>539</sup> The invocation of the WSIS Declarations is interesting and gives the impression that the GAC is attempting to reinforce and assert its authority over public policy aspects of ICANN's work by drawing on the authority of the United Nations.

On 16 April 2007, the New TLDs Committee held a teleconference with GAC members aimed at 'clarification' of the GAC Principles.<sup>540</sup> The discussion focused upon finding more precise definitions of some of the terms used in the Principles (for example, what constituted 'geographical names' or ways in which a proposed TLD string could be said to violate human rights standards), as well as discussion regarding what mechanisms could be put in place to evaluate proposed strings against such criteria. The transcript of the teleconference suggests that it took the

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<sup>537</sup> ICANN (2006). GAC Communiqué XXVI – Sao Paulo, 6th December 2006. Retrieved 8 February 2011, from <http://gac.icann.org/web/communiques/gac26com.pdf>

<sup>538</sup> ICANN (2006). GAC Principles regarding New gTLDs. March 28 2007. Retrieved 8 February 2011, from [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf)

<sup>539</sup> ICANN (2006). GAC Principles regarding New gTLDs. March 28 2007. Retrieved 8 February 2011, from [https://gacweb.icann.org/download/attachments/4817665/gTLD\\_principles\\_0.pdf?version=1&modificationDate=1323820021837](https://gacweb.icann.org/download/attachments/4817665/gTLD_principles_0.pdf?version=1&modificationDate=1323820021837)

<sup>540</sup> ICANN (2007). Transcript of GAC-GNSO New gTLD Committee Teleconference. 16 April 2007. Retrieved 12 September 2011, from <http://gnso.icann.org/meetings/transcript-gac-gnso-new-gtlds-16apr07.pdf>

form of constructive discussion on these issues.<sup>541</sup> One interesting comment made in this discussion suggested that some GAC members (it was not specified which) were particularly sensitive about geographic names, while others were less so.<sup>542</sup> However, the GAC was insistent that a mechanism should be put in place that would allow governments to challenge proposed names with national geographic significance.

Appendix 4.12 compares the GAC Principles on Public Policy Aspects of new gTLDs to the GNSO policy recommendations as drafted in the Final Report. Eight of the fourteen GAC Principles (2.1, 2.3, 2.4, 2.5, 2.6, 2.8, 2.9 and 2.10) were in harmony with the GNSO Final Report, while four (2.11, 2.12, 2.13 and 2.14) more were not covered by the Report but represented established ICANN practice or were addressed in other documents (2.11 was addressed by the gTLD Registry Failover Plan in 2008).<sup>543</sup> The main point of contention concerned the issue of geographical identifiers (place names) as TLD strings. GAC Principles 2.2 and 2.7 recommended that geographical identifiers should be permissible only with the explicit agreement of governmental authorities. The Final Report, however, incorporated the recommendations of the Reserved Names Working Group (RN-WG), which noted that the proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge, and stated that no additional protection mechanisms were needed regarding geographical names.<sup>544</sup> Under such a system there would not only be no automatic requirement for governmental approval for a geographical TLD, but any challenge by governments would not be guaranteed to succeed.

Dialogue continued before and after the release of the GNSO Final Report. GAC Communiqué 28 (San Juan, June 2007)<sup>545</sup> noted the GAC's appreciation of 'the work undertaken to reflect elements of the GAC Principles on new gTLDs in the latest report.' Following release of the Final Report, however, GAC Communiqué 29 (Los

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<sup>541</sup> Ibid

<sup>542</sup> Ibid, P13

<sup>543</sup> ICANN (2008). ICANN gTLD Registry Failover Plan. 15 July 2008. Retrieved 11 November 2011, from <http://www.icann.org/registries/failover/icann-registry-failover-plan-15jul08.pdf>

<sup>544</sup> ICANN (2007). GNSO Final Report – "Introduction of New Generic Top-Level Domains." 8 Aug 2007. Retrieved 18 February 2011, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>

<sup>545</sup> ICANN (2007). GAC Communiqué XXVIII –Lisbon, 28 March 2007. Retrieved 8 October 2010, from [https://gacweb.icann.org/download/attachments/1540189/GAC\\_28\\_Lisbon\\_Communique.pdf?version=1&modificationDate=1312228620000](https://gacweb.icann.org/download/attachments/1540189/GAC_28_Lisbon_Communique.pdf?version=1&modificationDate=1312228620000)

Angeles, October 2007)<sup>546</sup> drew attention to the failure of the Report to take GAC Principle 2.2. ‘fully into account’, and argued that in practice some countries would not be in a position to avail themselves of the proposed objection mechanism.<sup>547</sup> At the ICANN meeting in Paris, June 2008, the GAC conducted further face-to-face meetings with the GNSO Council. GAC Communiqué 32 (June 2008) again expressed concern that the GNSO proposals did not reflect ‘important elements of the GAC principles’<sup>548</sup>, in particular sections 2.2 and 2.7 but also section 2.6 (which deals with the need to ensure that new gTLDs do not negatively affect the security, stability and global interoperability of the Internet and promotes competition, consumer choice, geographical and service-provider diversity). The communiqué further stated that ‘ICANN needs to adopt an implementation procedure that further facilitates new entrants to the registry, registry-services and registrar markets and avoids unduly favouring those existing registries and registrars involved directly in the Policy Development Process.’<sup>549</sup> The GAC also held a joint meeting with the Board in Paris in which the GAC again raised the conflict between their own recommendations and those of the Final Report. The representative of Brazil believed this was a result of the lack of interaction between the GAC and the GNSO until a late stage of the PDP, and proposed closer interaction between the two bodies in the future.<sup>550</sup>

The first release of the DAG appeared to incorporate GAC Principles 2.2 and 2.7, by specifying that applicants for a gTLD string that is a geographical term would be required to submit a statement of support or non-objection for its application from the relevant government(s) or public authorities.<sup>551</sup> GAC Communiqué 33 (Cairo, November 2008) welcomed this, stating that the GAC ‘appreciates the level of engagement inter-sessionally with ICANN staff which lead to better reflection of the GAC principles on New gTLDs in the Draft Applicant Guidebook, particularly

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<sup>546</sup> ICANN (2007). GAC Communiqué XXIX. San Juan, 28 June 2007. Retrieved 8 October 2010, from [https://gacweb.icann.org/download/attachments/1540188/GAC\\_29\\_San\\_Juan.pdf?version=1&modificationDate=1312228402000](https://gacweb.icann.org/download/attachments/1540188/GAC_29_San_Juan.pdf?version=1&modificationDate=1312228402000)

<sup>547</sup> ICANN (2007). GAC Communiqué XXX – Los Angeles, October 2007. Retrieved 8 October 2010, from <http://gac.icann.org/web/communiques/gac29com.pdf>

<sup>548</sup> ICANN (2008). GAC Communiqué XXXII – Paris, 26 June 2008. Retrieved 8 October 2010, from [https://gacweb.icann.org/download/attachments/1540187/GAC\\_32\\_Paris\\_Communique.pdf?version=1&modificationDate=1312228254000](https://gacweb.icann.org/download/attachments/1540187/GAC_32_Paris_Communique.pdf?version=1&modificationDate=1312228254000)

<sup>549</sup> Ibid

<sup>550</sup> ICANN (2008). Transcript of GAC Meeting with the ICANN Board (Open session), Paris, 24th June 2008. Retrieved 8 October 2010, from [https://par.icann.org/files/paris/GAC-ICANNBoard-Open\\_24June08.txt](https://par.icann.org/files/paris/GAC-ICANNBoard-Open_24June08.txt)

<sup>551</sup> ICANN (2008). New gTLD Program: Draft Applicant Guidebook (Draft RFP). 24 October 2008. Retrieved 16 February 2009, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf> PP 1.14-1.15 and 2.8 to 2.10

principles 2.2 and 2.6.’.<sup>552</sup> However, it went on to note that, as a result of this exchange and subsequent meeting with the CCNSO, the GAC had become ‘more sensitive to the potential blurring of the existing distinction between the ccTLD and gTLD namespace’ and that questions related to the consideration of country and territory names needed to be addressed further.<sup>553</sup>

An annex to GAC Communique 34 (Mexico) incorporated the GAC’s detailed comments on DAG version 1. (Annex B) This document touched on a much wider range of issues than the GAC had previously concerned itself with. It began with an observation that the study requested by the Board in October 2006 on economic questions relating to the domain registration market had not yet been carried out. The GAC urged completion of this study as soon as possible. The proposed single fee structure was criticised as likely to have a ‘deterrent effect’ on prospective proposals for new domains emanating from SMEs, developing countries and non-commercial entities. The GAC proposed that consideration be given to the introduction of a new type of TLD, a non-commercial ‘social and cultural’ TLD (scTLD) designed to ‘address the needs and interests of a clearly defined social and/or cultural community’. It went on to identify a lack of transparency about cost evaluation principles applied in determining the proposed fee level, and also highlighted the issue of registry contract compliance, asserting that ICANN must show sufficient capacity to enforce registry contracts. The GAC also stated that it ‘shares the concerns of business stakeholders about a range of overarching issues relating to overall costs to business’ and emphasised the need for efforts to help limit the need for defensive registrations in the new gTLDs, including appropriate mechanisms to prevent fraudulent registrations. It went on to question whether auctions would be an appropriate mechanism for selecting new gTLD operators. The final part of the statement returned to the question of geographical names as TLD strings and reiterated the GAC’s position with respect to its gTLD Principles 2.2 and 2.7.

The following months saw ongoing exchanges between the GAC and Board as successive versions of the DAG were released. In its Sydney<sup>554</sup> and Seoul<sup>555</sup>

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<sup>552</sup> ICANN (2008). GAC Communique XXXII –Cairo, 5<sup>th</sup> November 2008. Retrieved 8 October 2010, from <http://gac.icann.org/web/communiques/gac31.com.pdf>

<sup>553</sup> Ibid

<sup>554</sup> ICANN (2009). GAC Communique XXXV – Sydney, 26 June 2009. Retrieved 9 October 2010, from

Communiqués, the GAC continued to express similar concerns to those outlined in the Mexico Communiqué. On 18 August 2009, GAC chairman Janis Karklins addressed a letter to the Board regarding the issue.<sup>556</sup> This reiterated some of the concerns expressed in previous communiqués, including the need for further studies regarding scalability, security and the economic demand for new TLDs; concerns regarding potential costs to business; the risk of user confusion; the need for ICANN to increase its administrative resources in order to manage the increased workload arising from an expansion of the TLD space; the level of awareness among businesses of the new gTLDs programme; the proposal that ICANN should consider more categories of TLD, including scTLDs; fee levels; and the potential complexity and cost of the objection and dispute resolution procedures. The issue of geographical identifiers was covered in some detail, with Karklins stating that DAG v2 ‘does not yet fully reflect the GAC position that governments and other public authorities, as representatives of citizens of a sovereign state, territory, province or city, have a legitimate interest in the use of geographical names as new TLDs.’ He proposed two amendments: firstly, that ‘strings that are a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space’; and secondly that ‘gTLDs using strings with geographic names other than country names or territories (so called geoTLDs) should follow specific rules of procedure.’ These rules would involve application of the ‘principles of subsidiarity’ after delegation. For example, an approval or non-objection from the relevant national authority could be made conditional on the registry meeting certain conditions; the national authority could be given the authority to initiate a re-delegation process for the TLD in the event of breach of this agreement or of national law.

Karklins’ proposal to block strings constituting a ‘meaningful representation’ or abbreviation of a country name or territory name from entering the gTLD space under any circumstances (rather than only in the case of government non-approval) seems to represent a different interpretation of GAC Principle 2.2 than the one taken by

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[https://gacweb.icann.org/download/attachments/1540154/GAC\\_35\\_Sydney\\_Communique.pdf?version=1&modificationDate=1312227158000](https://gacweb.icann.org/download/attachments/1540154/GAC_35_Sydney_Communique.pdf?version=1&modificationDate=1312227158000)

<sup>555</sup> ICANN (2009). GAC Communiqué XXXVI – Seoul, 30 October 2009. Retrieved 9 October 2010, from

[https://gacweb.icann.org/download/attachments/1540147/GAC\\_36\\_Seoul\\_Communique.pdf?version=1&modificationDate=1312227059000](https://gacweb.icann.org/download/attachments/1540147/GAC_36_Seoul_Communique.pdf?version=1&modificationDate=1312227059000)

<sup>556</sup> Karklins, J. (2009). Letter from Janis Karklins to Peter Dengate Thrush, 18 August 2009. Retrieved 14 July 2011, from <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>

ICANN staff. Karklins argued that such strings should be dealt with as ccTLDs, over which the principle of national sovereignty should apply. Furthermore, his second proposed amendment appears to be an attempt to establish a great deal of governmental regulatory authority over geographic TLDs beyond the ability to approve or veto the string at initial delegation. This proposal from Karklins seems to go well beyond the original GAC Principles.

In his response to Karklins' letter, Board Chairman Peter Dengate Thrush pointed out that a security and stability review was already being conducted by the RSSAC and SSAC, and that there had been 'substantial work' on the economic questions, including a number of economic studies commissioned by ICANN. He argued that 'the analytical value of further studies will be small' although he did not rule them out. Most of the other issues raised by the GAC, he asserted, were also already being examined by various study groups, including the Implementation Recommendation Team (IRT). On the question of geographic identifiers, Dengate Thrush argued the requirement for applications for country and territory names to provide evidence of support or non-objection from the relevant government or public authority was consistent with GAC principle 2.2. He also stated there was nothing to prevent a government or public authority conditioning the granting of their approval of TLD requests to the TLD operator and thus influencing policymaking 'in a manner appropriate and acceptable to the government or public authority for that TLD.'

In March 2010 Karklins addressed another letter to the Board<sup>557</sup> commenting on version 3 of the DAG. He reiterated the importance of addressing comprehensively the four 'overarching issues' of root scaling implications; safeguards against malicious conduct and abuse of the DNS; intellectual property rights; and an 'urgent need' for further economic studies to assess whether the benefits of new gTLDs were likely to outweigh any costs to users, as well as to assess whether any registry operator would be able to exercise market power before any relaxation of rules requiring vertical separation between registries and registrars. On the issue of geographical identifiers, Karklins stated that the definition of geographical strings continued to be 'insufficient' and not in accordance with GAC gTLD Principles 2.2

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<sup>557</sup> Karklins, J. (2010). Letter from Janis Karklins to Peter Dengate Thrush, 10 March 2010. <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf>

and 2.7; for example, he asserted, commonly used abbreviations or regions not listed in ISO 3166-2 should nonetheless be considered as geographical names. He reiterated the GAC's view that 'strings that are a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space', explaining that the GAC interpreted paragraph 2.2 of the GAC gTLD Principles to mean that strings which are a 'meaningful representation or abbreviation of a country or territory name' should be handled through the forthcoming ccTLD PDP, and other geographical strings should be allowed in the gTLD space only with the agreement of the relevant government or public authority. Karklins further asserted that the proposed objection mechanisms should be improved, ensuring that objection fees were cost-based and that objections to individual applications submitted by individual governments were not subject to payment of a fee. He asserted that the Bylaws gave GAC members the right to provide advice directly to the Board and that they should not be required to subject objections to an independent third party service provider. He also urged that mechanisms be established for the resolution of post-delegation deviation from conditions for government approval of or non-objection to the use of a geographical name.<sup>Note 4\_3</sup>

On 10<sup>th</sup> August Dengate Thrush responded to the GAC's March letter.<sup>558</sup> On the matter of root scaling, he pointed to the studies carried out by the RSSAC and SSAC. On the issues of malicious conduct and trademark protection, he highlighted the enhanced protection mechanisms in DAG version 4; while in response to the GAC's call for further economic studies, he pointed to the June study by Katz, Rosston and Sullivan.<sup>559</sup> On the matter of geographical names, Dengate Thrush confirmed that the GAC's 'clarification' of their interpretation of Principle 2.2 had resulted in a change of approach for DAG version 4, namely that country and territory names would not be

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<sup>Note 4\_3</sup> Karklins also made a number of other points in this letter, including expression of support for the proposal to allow two character strings for most scripts used for IDN TLDs and further analysis be undertaken of the one character issue; assertion of a need to explore further the regime applicable to single registrant TLDs; reservation over auctions as a method of resolving string competition and questioning of how those proceeds might be used by ICANN; and a reiteration of the importance of fully exploring the potential benefits of further categories of TLD (or track differentiation).

<sup>558</sup> Dengate Thrush, P (2010). Letter from Peter Dengate Thrush to Heather Dryden, 5 August 2010. Retrieved 6 July 2022, from <http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf>

<sup>559</sup> Katz, M.L., Rosston, G.L, and Sullivan, T. (2010). "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names, prepared for ICANN." June 2010. Retrieved 18 July 2011, from <http://icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>

available for delegation in the first round of new gTLD applications. He defended the decision to base the definition of country and territory names on ISO 3166-1 in order to provide clarity and to remove the ambiguity created by use of the term ‘meaningful representation.’ Dengate Thrush confirmed adoption of the GAC’s suggestion for a clause in the registry agreement requiring that, in the case of a dispute between a relevant Government and the registry operator, ICANN must comply with a legally binding decision in the relevant jurisdiction. On the question of the objections procedure for governments, he commented that it was ‘not clear that Bylaw was intended to provide an avenue for governments to provide advice on operational matters of this nature.’ He also referred the GAC to the secondary avenue of recourse available by way of the objections mechanism in the DAG.<sup>Note 4\_4</sup>

In a further letter to the Board dated August 4 2010,<sup>560</sup> the GAC strongly advised the Board to replace the MAPO objection with ‘an alternative mechanism for addressing concerns related to objectionable strings’, as there was clearly no internationally agreed definition of ‘morality and public order’.<sup>561</sup> The GAC addressed another letter to the Board on September 23, authored by new GAC chair Heather Dryden.<sup>562</sup> Again, this covered a range of issues, including: root scaling; market and economic impacts; registry-registrar separation; protection of rights owners; legal recourse for applicants; and addressing the needs of developing countries. On the matter of geographical names, Dryden expressed the GAC’s approval of provisions excluding country and territory names from the first application round; however, she argued, this exclusion should be prolonged until the completion of the new ccTLDs PDP. The GAC also remained of the view, she asserted, that the definition of geographical strings should not be limited to names in the ISO lists. On the matter of city-name TLDs, she expressed concerns that an applicant could seek to avoid the safeguards of government support or non-objection if the application simply stated that the intended use of the name is for non-community purposes, and requested removal of this ‘loophole’. On the matter of post-delegation disputes between governments and

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<sup>Note 4\_4</sup> Dengate Thrush also responded to another of Karklins’ criticisms, defending the use of auctions as an objective ‘method of last resort’ for resolving string contention and suggesting several possible uses for the funds generated.

<sup>560</sup> Dryden, H. (2010). Letter from Heather Dryden to Peter Dengate Thrush, 4 August 2010. Retrieved 16 July 2011, from <http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>

<sup>561</sup> Ibid

<sup>562</sup> Dryden, H. (2010). Letter from Heather Dryden to Peter Dengate Thrush, 23 September 2010. Retrieved 16 July 2011, from <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>

registrars, she welcomed the proposal for contractual clauses in the registry agreement to respect a legally binding decision in the relevant jurisdiction. However, she requested a response from ICANN concerning the GAC view that the operations of registry operators of ‘geo-TLDs’ should be conducted under the legal framework of the relevant country. Noting that ICANN had referred governments to the ‘secondary avenue of recourse available by way of objections’ in the Chair’s letter of 5 August 2010, she asked ICANN to ensure that the criteria for community objections were ‘implemented in a way that appropriately enables governments to use this instrument to protect their legitimate interests.’ She also reiterated that governments should not be required to pay a fee for raising objections to new gTLD applications.

The Board discussed this correspondence in its October meeting. The discussion seemed to focus on the likely consequences if the differences with the GAC could not be resolved.<sup>563</sup> Though the Bylaws called for consultation between the Board and GAC, no standing procedure was in place specifying the manner and logistics of this. Bruce Tonkin suggested that, prior to a full Board-GAC meeting, a smaller group should confer, including representatives from the Board, the GAC and the GNSO, to discuss the issues and look for further areas of compromise. Dryden, present at the meeting as an observer, stated that any consultation would likely be expected to be between the full Board and open to the full GAC, but that this would likely not preclude the ability to have a smaller working group convene earlier. Following this discussion, Dengate Thrush responded on behalf of the Board to the GAC’s most recent letter clarifying and reiterating the Board’s position on the major points of disagreement.<sup>564</sup> Note 4\_5

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<sup>563</sup> ICANN (2010). Minutes of special meeting of the Board, 28 October 2010. Retrieved 16 July 2011, from <http://www.icann.org/en/minutes/minutes-28oct10-en.htm>

<sup>564</sup> Dryden, H. (2010). Letter from Heather Dryden to Peter Dengate Thrush, 23 September 2010. Retrieved 16 July 2011, from <http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf>

<sup>Note 4\_5</sup> On the matters of root zone scaling and market and economic impacts, he referred the GAC to the latest studies that had been conducted on these issues. Regarding registry-registrar separation, he noted that the Vertical Integration Working Group had been unable to achieve consensus and that the Board had therefore taken the decision, voting to allow registries to own registrars in its 9<sup>th</sup> November meeting. On the matter of trademark protections, he reiterated that the Board had accepted the advice of the IRT. On geographic names, he stated that the current criteria for defining geographic names as reflected in version 4 of the Draft Applicant Guidebook were “considered to best meet the Board’s objectives and are also considered to address to the extent possible the GAC principles.” The matter of country and territory names, he said, would be reconsidered by the Board after the first round of new gTLD applications. He again defended the decision to base the definition of country and territory names on ISO 3166-1 and similar lists on the grounds of clarity for applicants and avoiding ambiguity over the term ‘meaningful representation’. City names, he argued, were unable to be afforded complete protection because city names may also be generic terms or brand names, and are often not unique. He

On November 22, the GAC posted some Interim Comments Related to New gTLDs, which stated that the GAC was ‘prepared for exchanges’ with the Board, and emphasised that the GAC ‘particularly wishes to discuss further the Board’s statements that the Bylaw provisions pertaining to GAC advice may not extend to “operational matters”....and that “governments pay fees for other services, enter into agreements, and pursue conflict resolution.”’<sup>565</sup> The Cartagena Communiqué (9 December 2010) suggested a growing dissatisfaction on the part of the GAC with the Board’s responses to its advice, expressed in some fairly strong terms. The GAC remained ‘very concerned’ that many of the points it had raised remained unresolved in the latest version of the DAG, and asserted that this situation had arisen ‘primarily from the fact that the Board adopted the GNSO recommendations on new gTLDs without taking due account of GAC advice at that time, thereby creating a flawed process.’ The communiqué went on to state that, in view of the Board’s position that it could not accept elements of the GAC’s advice, the GAC would assume that the Board was invoking the provisions in the ICANN Bylaws to seek a mutually acceptable resolution of these differences.<sup>566</sup>

In the event, the Bylaw provisions were not formally invoked; however, a Board-GAC Consultation took place in Brussels between 28 February and 2 March 2011.<sup>567</sup> The GAC produced a ‘scorecard’ identifying twelve outstanding issues for discussion<sup>568</sup> (see Appendix 4.13). The Board released its response a few days later, in which it conceded some points to the GAC but stood firm on others (See Appendix 4.13). In Communiqué 40 (San Francisco, 18 March 2011), the GAC’s tone appeared to have

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stated that the Board did not agree with the GAC’s position that governments should not be required to pay an objection fee, pointing out that the system will be run on a loser-pays basis so that governments will not have to bear the costs in cases where they prevail. On MAPO objections, he defened the policy as the product of GNSO consensus and extensive legal research. However, he invited the GAC to suggest an alternative solution, pointing out that an expression of dissatisfaction was not helpful unless accompanied by an alternative proposal.

<sup>565</sup> Dryden, H. (2010). Letter from Heather Dryden to Peter Dengate Thrush, 22 November 2010. Retrieved 16 July 2011, from <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-22nov10-en.pdf>

<sup>566</sup> ICANN (2010). GAC Communiqué – IXL – Cartagena, 10 December 2010. Retrieved 9 July 2011, from [https://gacweb.icann.org/download/attachments/1540144/GAC\\_39\\_Cartagena\\_Communique.pdf?version=1&modificationDate=1312225168000](https://gacweb.icann.org/download/attachments/1540144/GAC_39_Cartagena_Communique.pdf?version=1&modificationDate=1312225168000)

<sup>567</sup> ICANN (2011). “ICANN Board-GAC Consultation in Brussels 28 February and 1 March 2011.” Retrieved 14 July 2011, from <http://meetings.icann.org/board-gac-spring11>

<sup>568</sup> ICANN (2011). GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué. 23 February 2011. Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

softened somewhat, describing the inter-sessional meeting in Brussels as ‘constructive and positive’.<sup>569</sup> In response to the Board’s March reply, the GAC produced a further statement, which in turn conceded some of the Board’s arguments but provided further advice on other points.<sup>570</sup> The April discussion draft of the DAG (DAG v6) incorporated much of the GAC’s revised advice, but continued to reject some elements. Nonetheless the GAC won substantial concessions. A GAC ‘Early Warning Procedure’ was created, a mechanism by which the GAC could give notice that a particular application might be problematic.<sup>571</sup> Although the Board was not compelled to accept GAC advice under this procedure, GAC opposition to an application would normally create a ‘strong presumption’ that the application should not proceed. The definition of ‘geographical names’ was extended to include names by which a country is commonly known.<sup>572</sup> The decision on which level of government was appropriate to give support to an application was recognised as a ‘matter of national sovereignty’<sup>573</sup>; furthermore, it was stated that, if governmental support for an application was conditional on the registry meeting some criteria, and the registry subsequently failed to meet those criteria, ICANN would comply with any order from a national court to shut the registry down.<sup>574</sup> The GAC’s comments on the revised DAG acknowledged the incorporation of some of its previous advice and reiterated some of those recommendations that had not been incorporated.<sup>575</sup>

This was followed by the release of the seventh version of the Applicant Guidebook in May, which acknowledged that a GAC Early Warning could be issued for any reason.<sup>576</sup> A line was also added stating that if the Board does not act in accordance

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<sup>569</sup> ICANN (2011). GAC Communiqué XL – San Francisco, 17 March 2011. Retrieved 14 July 2011, from <http://gac.icann.org/communiques/gac-2011-communication-40>

<sup>570</sup> ICANN (2011). GAC comments on the Board response to the GAC scorecard. 12 April 2011. Retrieved 17 July 2011, from [http://gac.icann.org/system/files/20110412\\_GAC\\_comments\\_on\\_the\\_Board\\_response\\_to\\_the\\_GAC\\_scorecard\\_0.pdf](http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf)

<sup>571</sup> ICANN (2011). New gTLD Applicant Guidebook: April 2011 Discussion Draft (redline version). Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf> P11

<sup>572</sup> Ibid, P66

<sup>573</sup> ICANN (2011) New gTLD Applicant Guidebook: April 2011 Discussion Draft (redline version). Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf> P69

<sup>574</sup> Ibid, P70

<sup>575</sup> ICANN (2011). GAC comments on the new gTLDs. 26 May 2011. Retrieved 18 September 2011, from <http://gac.icann.org/system/files/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf>

<sup>576</sup> ICANN (2011) New gTLD Applicant Guidebook: Version 7 (redline version). Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/rfp-redline-30may11-en.pdf> P11

with GAC advice over an application, it must provide a rationale.<sup>577</sup> It was also clarified that the GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.<sup>578</sup> The GAC recognised that the seventh version of the AG addressed some of the GAC's outstanding concerns, but noted that several substantive issues remained unresolved.<sup>579</sup> Note 4\_6

Despite this, the Applicant Guidebook was approved by the Board without further alteration. In the following Communiqué, the GAC appeared to effectively concede on the remaining points. Though it stated its 'concern' that several elements of its advice were not followed prior to the approval of the gTLD programme, it acknowledged that other advice was followed, and that the Board had provided a draft rationale for its decision to reject GAC advice. It concluded by stating the expectation 'that the implementation of the new gTLD programme will respect applicable law in order to avoid detrimental consequences to parties involved' and expressed its willingness to 'continue to work constructively with the whole ICANN community on the new gTLD programme'.<sup>580</sup>

### *Overall analysis of GAC role*

The gTLDs policy development area provides a fascinating insight into the still-evolving relationship between the GAC and Board. It represents the first policy area where significant conflict emerged between the Board and GAC, and the resolution of that conflict required the ad-hoc creation of new procedures for negotiation between

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<sup>577</sup> Ibid, P14

<sup>578</sup> Ibid, P152

<sup>579</sup> ICANN (2011). GAC communication on new gTLDs and Applicant Guidebook. 18 June 2011. Retrieved 19 July 2011, from

<https://gacweb.icann.org/download/attachments/1540128/GAC+communication+on+new+gTLDs+and+Applicant+Guidebook+-+20110618.pdf?version=2&modificationDate=1312364027000>

Note 4\_6 These included:

- Competition concerns, in particular those resulting from changes to registry-registrar cross-ownership rules;
- The demonstration of use requirement for trademark holders wishing to avail themselves of the propose trademark protection mechanisms;and
- Removal of references in the gTLD Guidebook that attempt to specify that future GAC early warnings and advice must contain particular information or take a specified form, as these references are inconsistent with the GAC operating principles and the ICANN Bylaws.

<sup>580</sup> ICANN (2011). GAC Communiqué XLI- Singapore. 23 June 2011. Retrieved 14 September 2011, from [https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011\\_2.pdf?version=1&modificationDate=1312392506000](https://gacweb.icann.org/download/attachments/1540134/Singapore+Communique+-+23+June+2011_2.pdf?version=1&modificationDate=1312392506000)

the two bodies. As noted, though the Bylaws specify that consultation between the GAC and Board must take place in the event of a dispute, they do not specify the form such consultation should take and, prior to this episode, there were no precedents. In the event, the Bylaw provisions were not formally invoked as such; however, the threat of this was used effectively by the GAC to encourage negotiations. To a considerable extent, significant elements of the final Applicant Guidebook ended up being negotiated directly between the GAC and the Board. Although the GAC did not achieve every one of its aims in the end, it did win some extensive concessions, particularly in the area of governmental authority over geographical names.

The GAC's particular concern with this topic gives important clues regarding some of their most fundamental priorities, namely recognition of the 'sovereignty' of states over matters relating to territory and geography. An attempt was made to contact Janis Karklins to seek further explanation as to why the GAC saw this as an issue of sovereignty, but he did not respond. However, the same question was put to current GAC members Andrew Maurer (Australia) and Maria Häll (Sweden). Maurer did not answer this question, but Häll noted that different countries have different views on the issue<sup>581</sup>, which echoes what was said at the 2007 GNSO-GAC teleconference (see above). Thus, it would seem that not all GAC members necessarily regard geographic identifiers as particularly problematic, but all appear to support the principle that the matter is one for national governments to decide.

The GAC also won substantial concessions on other points and particularly on the principle that governments should have special rights to object to an application; the recognition that they are not limited to the grounds for objection set out in the public objection and dispute resolution process, and the creation of a special mechanism for GAC objections that bypasses the normal objections procedure. This could be seen as further strengthening of governmental claims to special public policy authority within the ICANN regime.

### Role of the Board

In this policy area, particularly towards the latter stages of the process, the Board has not limited its role to simply considering policy proposals developed by other ICANN

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<sup>581</sup> Email from Maria Häll to Paul White. 11 January 2012

bodies for approval. It has, at times, actively intervened and participated in the policy development process, most notably over the issue of vertical integration of registries and registrars; and to some extent, the final phases of drafting the Applicant Guidebook consisted of direct negotiations between the Board and GAC. Such active intervention by the Board is arguably not in the spirit of the supposed ‘bottom up’, consensus based policy development model and has been criticised from some quarters, including the US government<sup>582</sup> and the IPC<sup>583</sup>, as arbitrary and lacking in transparency.

The New gTLDs policy proposals have not commanded a complete consensus even at Board level. Although the GNSO Final Report was accepted unanimously by the Board in June 2008<sup>584</sup>, approval for the Final Applicant guidebook and implementation of the programme was passed on a majority vote in June 2011, with thirteen votes in favour, one opposed and two abstentions.<sup>585</sup> The opposing Director, George Sadowsky, explained his opposition on the grounds that there were ‘still some significant and strongly felt differences of opinion between the content of the resolution and the views of the GAC and some of its members’ and, while he supported the principle of introducing new gTLDs, he felt that the programme should not go ahead until such differences had been resolved. He also opposed the way in which assistance for developing-world applicants was being handled.<sup>586</sup> Similarly, Mike Silber abstained due to his belief that there were still significant outstanding unresolved issues, and argued that the policy was not being developed ‘based on facts and on a bottom-up basis’. Like Sadowsky, he also argued that providing financial assistance to a few needy applicants was not the best way to go about addressing the

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<sup>582</sup> Strickling, L.E. (2010). Letter from Lawrence E. Strickling to Rod Beckstrom, 2 December 2010. Retrieved 22 July 2011, from <http://news.dot-nxt.com/sites/news.dot-nxt.com/files/strickling-to-beckstrom-2dec10.pdf>

<sup>583</sup> ICANN (2010). 'Comments of the Intellectual Property Constituency.' Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 9 December 2010. Retrieved 23 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00061.html>

<sup>584</sup> ICANN (2008). Minutes of regular meeting of the Board. 26 June 2008. Retrieved 25 February, 2009, from [https://par.icann.org/files/paris/ParisBoardMeeting\\_26June08.txt](https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt)

<sup>585</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>586</sup> ICANN (2011). Transcript of regular meeting of the Board. 20 June 2011. Retrieved 20 March 2011, from <http://singapore41.icann.org/meetings/singapore2011/transcript-board-new-gtlds-20jun11-en.txt>

needs of communities in the least developed economies.<sup>587</sup> Bruce Tonkin abstained due to a conflict of interest.<sup>588</sup>

### Role of ICANN staff

ICANN staff have arguably held a considerable amount of influence over the policy development process through their role of creating reports and detailed policy implementation documents from the more generalised policy principles supplied by bodies such as the GNSO. ICANN staff produced the initial Issues Report in 2005, thus setting the initial parameters for discussion. Furthermore, following each Public Comments Period, it has been the role of staff to produce summaries of public comment and, in doing so, to use their own judgement and discretion to decide what to include and what to leave out. Although all of the original comments were available to policymakers, some of them would have relied heavily on the summaries to inform themselves of the input from public comments.<sup>589</sup> Finally, and perhaps most significantly, ICANN staff drafted the initial DAG and for the most part were responsible for producing the text of subsequent redrafts. This involved making decisions on certain aspects of policy that were left open by the GNSO in the Final Report. For example, it appears to have been staff that selected auctions as the contention resolution mechanism, something the GNSO had hinted at but did not make a final decision upon.

### Roles of other actors

#### *US government*

Since the US government still ultimately claims ownership of the DNS root, in the final analysis its acquiescence is required for any new TLDs to be added. While there has been no suggestion of such consent being refused, it is worth remembering that the DoC retains this theoretical power.

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<sup>587</sup> Ibid

<sup>588</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>589</sup> This was confirmed by Philip Sheppard, who stated that all participants in the TLDs Committee had at least read the syntheses of comments prepared by ICANN staff but only some had taken the time to read the original comments in detail. (Telephone interview between author and Phillip Sheppard, 20<sup>th</sup> February 2009)

The DoC has, however, provided some fairly strong comments to ICANN over certain aspects of new gTLDs policy. On December 18 2008, Meredith A. Baker (Acting Assistant Secretary for Communications and Information) wrote to ICANN<sup>590</sup> expressing concern as to whether some key questions had been properly addressed, beginning with the ‘threshold question’ of whether the potential consumer benefits of new gTLDs outweighed the potential costs. Baker also urged ICANN to: ensure that the introduction of a potentially large number of new gTLDs, including IDN TLDs, will not jeopardise the stability and security of the DNS; demonstrate that ICANN has sufficient capacity to enforce contract compliance with an as-yet-unknown number of new contracting parties; and state how ICANN will conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law, including intellectual property rights. Furthermore, Baker recommended changes to the proposed DAG including: the imposition of registration price caps; introduction of mechanisms for competitive bidding between prospective gTLD operators; and introduction of a mechanism that provides for the expansion of the gTLD reserved names for technical or infrastructure-related names. He also criticised the proposed mechanism for morality and public order objections, arguing that such matters were outside ICANN’s technical remit and more properly addressed by governments. Finally, Baker urged ICANN to articulate a clear rationale for the proposed fee structure as well as a transparent mechanism for the disposition of any excess revenues.

Baker’s recommendations do not, however, appear to have unduly influenced subsequent versions of the DAG. Price caps were not implemented and MAPO provisions remained. No rolling mechanism was introduced for the expansion of the reserved names list, although this is periodically reviewed by the GNSO. A mechanism for competitive bidding between prospective registry operators was introduced, but only as a method of last resort if comparative evaluations should fail to resolve conflict. Economic and technical studies were, however, carried out

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<sup>590</sup> Baker, M.A. (2008). Letter from Meredith A. Baker to Peter Dengate Thrush, 18 December 2008. Retrieved 23 July 2011, from <http://www.icann.org/en/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>

(although the economic studies did not prove satisfactory to the DoC) and some attempt was made to propose a rationale for the proposed fee structure.

New gTLDs were specifically mentioned in Article 9.3 of the 2009 Affirmation of Commitments between ICANN and the DoC, which commits ICANN to ensure that ‘as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.’ It further specifies that, if and when new gTLDs have been in operation for one year, ICANN will organise a review; and that further reviews will be conducted two years after the first review, and then no less frequently than every four years.<sup>591</sup>

In December 2010, a strongly worded letter was addressed to the ICANN Board by the new Assistant Secretary of Commerce for Communications and Information, Larry Strickling.<sup>592</sup> It urged that the current version of the DAG (DAG v5) not be approved, on the grounds that ICANN still had not published sufficient economic analyses; that it had not adequately explained its decision to allow vertical integration of registries and registrars; and it had not given sufficient time for the community to review the most recent version of the guidebook. Strickling suggested that on the basis of the current proposals, ICANN was failing to meet its obligations under the Affirmation of Commitments.<sup>593</sup>

Strickling again raised the issue in his keynote address to the 40<sup>th</sup> meeting of ICANN in March 2011, stating that the Board had still not explained its decision ‘to shift from no cross ownership to *de minimus* cross ownership to full cross ownership over the course of a single calendar year’ and also criticising the Board for its failure to publish a rationale for its decision on January 25 not to commission any further economic studies regarding the impact of new gTLDs. He remarked that these points demonstrated that ICANN ‘still has work to do to ensure that decisions made related

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<sup>591</sup> ICANN / US Department of Commerce (2009). Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. Signed 30 September 2009. Retrieved 20 June, 2010, from <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>592</sup> Strickling, L.E. (2010). Letter from Lawrence E. Strickling to Rod Beckstrom, 2 December 2010. Retrieved 22 July 2011, from <http://news.dot-nxt.com/sites/news.dot-nxt.com/files/strickling-to-beckstrom-2dec10.pdf>

<sup>593</sup> Ibid

to the global technical coordination of the DNS are in the public interest and are accountable and transparent.<sup>594</sup> At the same ceremony, ICANN CEO Rod Beckstrom countered by calling for full ICANN independence.<sup>595</sup>

Shortly before approval of the gTLD application process in June 2011, James J. Tierney on behalf of the US Department of Justice (DoJ) sent a communication to ICANN via the DoC, which stated that the decision to remove registry-registrar cross ownership restrictions required a ‘more thorough examination’ of the potential harm to consumers. The DoJ did, however, suggest cross-ownership was permissible with the smaller top-level domains due to their limited market power, provided that this was validated by consultations with stakeholders and independent analysts.<sup>596</sup> This development did not, however, prevent the Board from approving the new gTLDs programme, including the vertical integration provisions, although a decision on whether the relaxation of cross-ownership rules would be extended to existing gTLDs was deferred, pending further discussions including with competition authorities.<sup>597</sup>

In summary, the friction between the US government and ICANN on this issue needs to be seen in the wider context of ICANN’s push for full independence against an apparent residual reluctance on the part of the US government to loosen the final ties. To date, the Board does not appear to have been unduly swayed by DoC pressure on the new gTLDs issue.

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<sup>594</sup> NTIA (2011). Remarks by Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information. 40th Meeting of the Internet Corporation for Assigned Names and Numbers (ICANN). San Francisco, California. March 14, 2011. Retrieved 23 July 2011, from <http://www.ntia.doc.gov/speechestestimony/2011/keynote-remarks-lawrence-e-strickling-assistant-secretary-commerce-communicat>

<sup>595</sup> ICANN (2011). Transcript of Welcome Session. ICANN Meeting, San Francisco, California. 14 March 2011. Retrieved 23 July 2011, from <http://svsf40.icann.org/meetings/siliconvalley2011/transcript-welcome-14mar11-en.txt>

<sup>596</sup> Tierney, J.J. (2011). Letter from James J. Tierney to Lawrence E. Strickling, 14 June 2011. Retrieved 23 July 2011, from <http://news.dot-nxt.com/2011/06/16/ntia-icann-letter-vertical-integration>

<sup>597</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

## *European Union*

The EU has mostly contributed to the PDP via the GAC and, as of December 2008, the European Commission stated its preference for that arrangement.<sup>598</sup> Recently, however, the issue of vertical integration of registries and registrars prompted the Commission to write directly to the Board, expressing concern that the Board's decision to end registry-registrar separation may have negative implications for competition. The Commission argued that the principle of vertical separation had played a key role in ensuring a level playing field for competition at registrar level, and that a move away from this 'fundamental principle' was premature given the absence of both expert advice based on well-founded empirical analysis of the relevant market and consensus among stakeholders.<sup>599</sup> The Commission thus appears to closely echo the position of the US government on this matter; nonetheless, the intervention of these governmental actors did not prevent the Board from signing off the new gTLDs policy unaltered a few days later.

## *CCNSO*

Since generic TLDs are obviously outside the remit of the CCNSO, the role of that body in the PDP has been peripheral. Nonetheless, the CCNSO did supply some comments. Its main concern echoed one of the key concerns of the GAC; namely that the division between ccTLD and gTLD namespaces should not be allowed to become blurred and 'meaningful representations' of country and territory names should not be allowed in the gTLD namespace. CCNSO Council Resolution 24-04, adopted in October 2007<sup>600</sup>, urged ICANN to prohibit the introduction of gTLDs consisting of the name of a territory listed in ISO 3166-1 or a meaningful abbreviation of it, including representation in a non-ASCII script or any recognised language represented in that script. The CCNSO Council reiterated this call in December 2008, April 2009,

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<sup>598</sup> Paulger, G. (2008). Letter from Gregory Paulger to Paul Twomey, 4 December 2008. Retrieved 24 July 2011, from <http://www.icann.org/en/correspondence/paulger-to-twomey-04dec08.pdf>

<sup>599</sup> Graaf, G. and L. McCallum (2011). Letter from Gerard de Graaf and Linsey McCallum to Rod Beckstrom and Peter Dengate Thrush, 17 June 2011. Retrieved 24 July 2011, from <http://www.icann.org/en/correspondence/eu-to-icann-17jun11-en.pdf>

<sup>600</sup> ICANN (2007). Minutes of meeting of the CCNSO Council, 31 October 2007. Retrieved 24 July 2011, from <http://ccnso.icann.org/meetings/losangeles/CCNSO-council-minutes-31oct07.pdf>

and July 2009.<sup>601</sup> The CCNSO also submitted comments to the Public Comments Periods, particularly on DAG3, reiterating these arguments.<sup>602</sup>

The CCNSO has also taken part in discussions with the GNSO on the subject of IDN TLDs, which is relevant to the IDN aspect of the new gTLDs programme. (See Chapter 5 for further details).

### *RSSAC and SSAC*

The primary role played by the RSSAC and SSAC has been to evaluate the potential effects of scaling up the root to include thousands or tens of thousands of TLDs. In carrying out this responsibility, these two bodies, dominated by the technical community, have illustrated their primary function in the ICANN regime; that of providing the necessary technical advice to ensure ICANN's commitment to preserving the stability of the DNS is fulfilled. They have not been directly involved in the 'politics' of new gTLDs policymaking and have shown little evidence of promoting any agenda of their own. Their role has been a functional one that reflects the type of apolitical technical work some early analysts saw as being ICANN's primary function, but which very often is overshadowed by the 'political' aspect of policymaking in the present-day regime.

### *ALAC*

The ALAC supplied one member to the New TLDs Committee, Bret Fausett, who was a regular attendee.<sup>603</sup> An attempt was made to contact Mr. Fausett in order to question him about his role, however he did not respond.

The ALAC's initial position on the issue was set out in its response to the call for 'expert papers' commenting on the Terms of Reference for New gTLDs set out in the

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<sup>601</sup> Disspain, C. (2009). Letter from Chris Disspain to Peter Dengate Thrush, 21 November 2009. Retrieved 24 July 2011, from <http://www.icann.org/en/correspondence/disspain-to-dengate-thrush-21nov09-en.pdf>

<sup>602</sup> ICANN (2009). 'CCNSO comments on geographic names.' Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.3. 22 November 2009. Retrieved 24 July 2011, from <http://forum.icann.org/lists/3gtld-guide/msg00070.html>

<sup>603</sup> ICANN (2007). GNSO new TLDs Committee Part B: Final Report "Introduction of New Top-Level Domains." 18 June 2007. Retrieved 20 July 2011, from <http://gns0.icann.org/drafts/pdp-dec05-fr-b-18jun07.pdf> P9

Initial Report.<sup>604</sup> The ALAC was supportive of new TLDs and favoured an ongoing open application process as opposed to application ‘rounds’. It favoured open, as opposed to sponsored TLDs, and questioned whether trademark rights should be applicable in every TLD created. It opposed the concept of a reserved names list, citing the lack of a common set of standards on cultural, religious, legal and political reasons why a given string might not be appropriate for designation as a TLD; instead, it advocated case-by-case evaluation of each proposed string on a cost/benefit basis to the Internet community. On allocation methods, the ALAC opposed auctions and favoured a ‘first-come-first-served approach’. It also expressed a desire to keep application fees ‘affordable’ particularly to developing country and non-profit applicants. On contractual conditions, the ALAC favoured insertion of a clause into the registry contract binding the registry, as ICANN’s designated agent, to act in accordance with ICANN’s Bylaws, particularly provisions concerning transparency, openness, fairness and independent review.<sup>605</sup>

The ALAC’s role in shaping the DAGs appears to have been limited to the submission of a few comments. The ALAC submitted a statement to the PCP on DAG v2 which was overall supportive of new gTLDs. However, it stated a belief that categorisation of new gTLD applications into ‘open’ and ‘community-based’ was inadequate and that more than two categories may be necessary to adequately address the diversity of stakeholders and potential applicants. It also criticised the proposed fee schedule as a ‘clear barrier to entry of potential applicants’ and went on to argue that, because of the substantial pent-up demand for new gTLDs, it was not reasonable to initially allow string allocation to be based on ‘first come, first served’ principles. It went on to propose that ICANN should hold one gTLD application round, after which the concept of ‘rounds’ should be eliminated and subsequent gTLD applications accepted on a rolling ‘first come, first served’ basis. The ALAC further expressed concern that the proposed legal rights objection protocol ‘exceeds existing territorial and class-of-goods limitations contained in current international trademark treaties’. It also called for the complete abolition of provisions for objections based on morality and public order, and argued that being convicted of a crime, on its own, should not disqualify someone from being part of a gTLD application. Most of these recommendations

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<sup>604</sup> ICANN (2006). Draft ALAC Response Regarding New gTLD Terms of Reference. 31 January 2006. Retrieved 12 September 2011, from <http://gns0.icann.org/issues/new-gtlds/icannwiki-01feb06.pdf>

<sup>605</sup> Ibid

were not incorporated into subsequent DAGs, apart from the proposal that the initial application process should take the form of an application round of limited duration.<sup>606</sup>

The ALAC's comments on DAG v5<sup>607</sup> were heavily critical, characterising the changes as a 'deliberate step backwards in some areas, away from transparency and accountability and towards secrecy and arbitrary action.' It focused particularly on three areas: Dispute Resolution; Applicant Support; and the Independent Objector. On the matter of dispute resolution, the ALAC reiterated that morality and public order objections should be dropped. On applicant support, the ALAC maintained that the recommendations of the Joint Applicant Support (JAS) working group, a joint GNSO / ALAC initiative, should be given more consideration by the Board. On the matter of the Independent Objector, the ALAC argued that 'critical safeguards of the public interest' had either been removed or left out, and that the IO had been 're - architected as a tool to allow the introduction of anonymous, unaccountable, opaque objections.' The ALAC recommended that the role of the IO must be eliminated completely as there was too much potential for misuse.<sup>608</sup>

Again, the ALAC was not successful in achieving most of these aims, although the final Applicant Guidebook did state that ICANN will allocate funds to the ALAC to pay for some Objection Fees.

In the PCP on DAG v1, Danny Younger (an online journalist and former member of the DNSO General Assembly), criticised the ALAC as merely a 'think tank' in which just a few select individuals make statements on behalf of the worldwide user community, instead of its intended role as 'a coordination point that facilitated an upward flow of input from grassroots communities on issues within ICANN's remit that were of concern to individual Internet users.'<sup>609</sup> Responding to Younger's

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<sup>606</sup> ICANN (2009). 'ALAC Statement on the Draft Applicant Guidebook v2 for the Introduction of New gTLDs'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.2. 19 April 2009. Retrieved 25 July 2011, from <http://forum.icann.org/lists/2gtld-guide/msg00125.html>

<sup>607</sup> ICANN (2010). 'ALAC Statement on Draft Final Guidebook.' Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.5. 8 December 2010. Retrieved 25 July 2011, from <http://forum.icann.org/lists/5gtld-guide/msg00038.html>

<sup>608</sup> Ibid

<sup>609</sup> Younger, D. (2011). 'Users and the New gTLDs'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.1. 4 December 2008. Retrieved 25 July 2011, from <http://forum.icann.org/lists/gtld-guide/msg00050.html>

criticisms, Cheryl Langdon-Orr on behalf of the ALAC stated that the organisation aimed to engage with the RALOs on the issue of new gTLDs and ‘get REAL Regional input’.<sup>610</sup>

In order to further investigate the extent to which ALAC advice on new gTLDs had in fact been based on grass-roots user input, Ms. Langdon-Orr was contacted by the author. After she had responded to the initial email agreeing to assist<sup>611</sup>, she was asked directly to what extent the ALAC’s advice on this matter was based on grass-roots input and how such input was gathered. She did not respond to this question. The same question was also put to current ALAC chair Olivier Crépin-Leblond; he likewise did not respond.

Overall, the ALAC's apparent influence in this PDP appears to have been fairly limited, and the extent to which it represented the worldwide user community questionable.

## **Conclusions to Chapter 4**

### Summary and analysis of key patterns

The New gTLDs policy development process has proved controversial throughout its course. The very principle of adding new gTLDs in large numbers cannot truly be called a ‘consensus policy’ since it has met with considerable opposition, though it should be remembered that majority opinion always appears to have been in favour of expanding the gTLD space and that outright opposition appears to have largely (though not completely) melted away towards the end of the process. Many of the details of policy, however, have been more controversial. Given the range of interests involved and viewpoints expressed, it was inevitable that there would be winners and losers. No single stakeholder group has been wholly successful in achieving all of its aims, but some have had more influence than others.

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<sup>610</sup>Langdon-Orr, C. (2008). 'Re: Users and the New gTLDs'. Comment posted to ICANN public comments forum on Draft Applicant Guidebook v.1. 5 December 2008. Retrieved 25 July 2011, from <http://forum.icann.org/lists/gtld-guide/msg00051.html>

<sup>611</sup> Email from Cheryl Langdon-Orr to Paul White, 5<sup>th</sup> December 2011

The three most important groups of actors have been the GNSO constituencies, governments through the GAC, and intellectual property interests (together with ICANN staff and the Board itself). The GNSO constituencies (most of which represent commercial interests) were the most important actors in the initial stages of policy development up to and including the Final Report. The Report, which was endorsed by all six constituencies, set the broad parameters of new gTLDs policy; however, some important details of policy were later modified in the DAGs, not always to the satisfaction of all the GNSO constituencies. The extent to which policy development was taken out of the GNSO's hands after 2007-08 seems, to some extent, to undermine the model of policymaking in a given area being chiefly the responsibility of the relevant Supporting Organisation.

Governments, as represented through the GAC, have likewise had a strong influence on policy. The ability of the GAC members to come to a united position on this complex and controversial issue is notable, taking into account the nature of GAC members as representatives of a very diverse set of governments. As suggested by Andrew Maurer<sup>612</sup> and Maria Häll's<sup>613</sup> comments, there appear to have been some differences among GAC members on matters such as the importance attached to the geographic names issue, but the GAC nonetheless presented a united front in arguing that these matters should be left to sovereign governments to decide.

As shown, the GAC was successful in getting most of its concerns addressed, although there were a few areas where GAC advice was not implemented. There were some important concessions to the principle of state sovereignty, particularly with regards to geographical names, but also with the adoption of a mechanism allowing governments to object to any given application separate from the main public objections procedure, without limitation on grounds for objection and without the fees normally payable for an objection proceeding. It remains to be seen how this mechanism will operate in practice, but the effect may be to give governments something like a veto over any applications they find unacceptable, in addition to the effective veto they have been granted over geographical names. The course of events has also demonstrated the reluctance of the Board to come into open conflict with the GAC. The GAC's threat to formally invoke the Bylaw provisions regarding non-

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<sup>612</sup> Email from Andrew Maurer to Paul White, 20 January 2012

<sup>613</sup> Email from Maria Häll to Paul White. 11 January 2012

acceptance of GAC advice seems to have strengthened its negotiating position very considerably.

By contrast, the ‘global Internet using public’ has had very little real influence, and indeed participated only to a very limited extent. The public comments periods were largely dominated by interested parties, especially commercial interests. The role of the ALAC was also very limited, and in any case it is questionable just how far that body really represents the ‘public at large’.

For intellectual property interests, the final outcome was something of a mixed result. Evidence from the public comments periods, and also from the initial statements of the IPC, suggests that a substantial element of the intellectual property lobby would have preferred no new gTLDs at all, while others favoured a limited introduction only of mainly sponsored and IDN TLDs. Obviously, they failed to achieve their aims in this regard. However, there were some major concessions to trademark interests in the final iteration of the DAG. These included: the Trademark Clearinghouse; WHOIS requirements; the Post-Delegation Disputes Resolution Process ; the Uniform Rapid Suspension system; mandatory sunrise periods; legal rights objections; mandatory post-launch intellectual property claims procedure; and automatic rejection of applications from ‘habitual’ cybersquatters. Despite all of this, however, in the last two PDPs on DAGs 5 and 6, 27.5% of posters, mostly representing trademark owners, were still not satisfied with the level of trademark protection.

Prospective new registries, many of which were also commercial interests, were obviously some of the biggest winners out of the process, in that they will finally have an opportunity to move forward with their business plan. Of course, not all groups wishing to obtain a TLD are commercial interests, and some of the potential ‘community’ applicants may be priced out of the market by the level of fees. Similarly, the fees could be a major barrier to a small business startup. Groups with substantial financial resources are realistically in the best position to get a TLD, and in this sense the policy favours existing businesses. The relaxation of vertical integration rules (assuming this is not reversed) will be a major business opportunity for some of the registrars to expand their operations into the registry market.

The role played by ICANN staff should also be noted. Although, overall, staff have not been left to decide so many details of policy as was the case in the 2000 new gTLDs round, their influence has still been significant. The case study has also demonstrated that the Board's role in policymaking can extend in practice beyond the simple approval or non-approval of policy proposals developed by other ICANN bodies. The Board has intervened directly in developing some aspects of New gTLDs policy, particularly with regard to vertical integration. This undermines the notion of a wholly 'bottom-up' policy development model.

### Conclusions

The new gTLDs case study offers a convincing demonstration that ICANN deals with issues of public policy, refuting any view of the organisation as a mere apolitical technical co-ordinator. New gTLDs policy affects numerous and often competing interests. It has implications for intellectual property rights and issues of freedom of expression. It has major implications for the gTLD registry market and issues of competition. ICANN's decisions as to how many gTLDs will be added and the selection and allocation criteria for those TLDs affects how many registrars there can be in the market and who will and will not be allowed to set up business as a registrar. New gTLDs policy also impacts upon issues of identity for organisations and other entities such as cities, subnational territories and cultural groups. So far only one cultural group has its own TLD (.cat, representing the Catalan community); ICANN's new gTLDs policy affects whether other cultural groups will be allowed to follow suit, which ones will be allowed to have a TLD and which ones will be excluded. Such issues are often contentious, and in deciding between them ICANN is clearly making public policy. Where competing interests and views are involved, there will inevitably be winners and losers. The evidence from this case study strongly supports Weinberg's contention<sup>614</sup> that the issues dealt with by ICANN are not amenable to resolution by consensus.

Furthermore, the gTLDs study has demonstrated the limitations of the concept of policy development on the basis of broad-based, 'bottom up' participation by the Internet stakeholder community, particularly the claim that the general Internet-using

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<sup>614</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260. P188

public has any meaningful influence on policy. The initial phase of the policy development process was effectively in the hands of the GNSO constituencies; and despite the theory of broad-based 'bottom up' policymaking, the GNSO actually has a fairly closed policymaking procedure, where only a small elite (of dubious accountability and representing mainly commercial interests) actually make policy, though the wider public get the opportunity to voice an opinion. In the latter phase of policymaking, during the drafting of the Applicant Guidebook, a few other groups appear to have gained considerable influence over the final shape of policy, most notably governments through the GAC and – judging by the number of concessions made on trademark protection - the intellectual property lobby. Nonetheless, the range of groups that had substantial real influence was ultimately limited to a few powerful commercial and governmental interests. At best, the process could be described as policymaking through 'narrow multistakeholderism' rather than truly 'broad multistakeholderism'.

All of this tends to suggest that the initial, perhaps idealistic, vision for ICANN as a governance system based on broad-based fair representation for all affected parties and consensus-based decisionmaking, may have been overtaken by economic and political realities. The result appears to be a system where a few groups and entities, those with real leverage through political, economic or positional power, hold the real influence, and ICANN policymaking in practice is largely a matter of finding a mutually acceptable working compromise between these groups.

The strong influence held by governments in this policy development area could be used to lend some weight to a statist interpretation of ICANN, as put forward by writers such as Drezner.<sup>615</sup> However, it is clear that governments were not the only actors of significance and were not able to get their own way on every point of policy. Similarly, the evidence would not support a simplistic 'corporate capture' model, since the influence of corporate actors was balanced by that of governments; in any case, there was no single 'commercial interest'; commercial actors of various types (from both the 'supply side' and the 'consumer side' of the domain name industry) often had competing interests (for example, the desires of registries and registrars for large scale gTLD expansion versus the desires of intellectual property interests to

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<sup>615</sup> Drezner, D. W. (2007). *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press, PP113-117

limit the extent of expansion). To some degree, the evidence would support the notion of policymaking via a ‘public-private partnership’, but also suggests that governmental and private actors (as well as various different types of private actor) are to a significant extent rivals for influence in the ICANN system rather than wholly co-operative partners.

The New gTLDs case study also provides a good demonstration that some of ICANN’s norms remain in flux and are being tested and redefined through the ongoing interactions of policy development. One good example of this is the debate surrounding the proposed abolition of rules prohibiting vertical integration of registries and registrars, something that has been an ICANN ‘norm’ since the organisation’s early days. Its abolition would be of benefit to the registrars but has been opposed by some governments, including some fairly strong reaction from the US DoC and the European Commission.<sup>Note 4\_7</sup> Another example of this ongoing evolution of norms concerns the relationship between the GAC and Board; such as the dispute that developed between the two over the provisions in the Bylaws pertaining to GAC advice and whether these are applicable to ‘operational’ matters.

The next stage of the investigation is to ascertain the extent to which these patterns are mirrored in other areas of ICANN policy development. The next chapter will examine a quite different policy development area (though one with a certain degree of overlap with New gTLDs), namely policy relating to the implementation of Internationalised Domain Names, or IDNs.

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<sup>Note 4\_7</sup> The GAC does not appear to have taken a formal position for or against permitting registry-registrar cross-ownership, except to note that governments tend to support restrictions on vertical integration but also recognising some potential benefits. The GAC did, however, criticise the Board for taking an arbitrary decision on the matter in what the GAC saw as a non-transparent fashion. See ICANN (2011). ICANN Board- GAC Consultation: Registry – Registrar Separation. 21 February 2011. Retrieved 27 July 2011, from <http://www.icann.org/en/topics/new-gtlds/gac-board-registry-registrar-separation-21feb11-en.pdf>

# **Chapter 5**

## **Policy Development Case Study Two: Internationalised Domain Names**

### **Introduction**

#### Overview

Following on from the New gTLDs study, this chapter will investigate an equally topical policy development area, the deployment of Internationalised Domain Names (IDNs). The term ‘Internationalised Domain Names’ refers to technologies designed to allow representation of domain names in characters other than the Latin script (for example Cyrillic, Arabic or Chinese). Such technologies were first proposed in the 1990s, and a definitive technical standard was published by the IETF in 2003. For much of its existence, ICANN has been developing policy pertaining to the implementation of IDN technology in the live DNS environment, initially at the second level of the domain name hierarchy and later at the top level.

This chapter will explore the history and current state of ICANN’s IDN policy development process. As with the gTLDs study, the aim of the chapter is to explore the range of actors involved in the PDP, the roles they played, and the relative degree of influence held by each actor or actor type over the final policy outcomes. The answers to these questions will help to determine which of the organisational models explored in Chapter 3 are best reflected in ICANN’s actual policymaking processes.

#### IDNs-concept and history

The original architecture of the Domain Name System is based around ASCII (American Standard Code for Information Interchange) and thus utilises the Latin character set to represent domain names. This can be disadvantageous for users educated in a different script, such as Cyrillic, Chinese or Arabic, for whom Latin characters may be alien. As the Internet diffused to non-English speaking countries, many national governments and ccTLD registries began to advocate a system of

multilingual or internationalised domain names, which would allow, for example, Russian or Chinese domain names to be written in their own native scripts. Such a system would ease accessibility problems for people unfamiliar with Latin characters, thus reducing the global ‘digital divide’ and broadening the reach of the Internet.

The concept of internationalised domain names predates ICANN by some years. In the 1990s, academic research explored the technical feasibility of creating some mechanism to allow non-Latin character sets to be automatically converted to and from ASCII equivalents, allowing these character sets to be supported without having to fundamentally redesign the existing DNS. The first steps towards an IDN solution included Martin Duerst’s Internet Draft at the University of Zürich in December 1996,<sup>616</sup> which specified a method for character set conversion in the context of domain names. In March 1998, the first operational IDN testbed was created at the National University of Singapore by a team led by Tan Tin Wee and Leong Kok Yong.<sup>617</sup> Other testbeds followed, run by organisations such as the Asia Pacific Networking Group (APNG), formed in July 1998.<sup>618</sup> These experiments involved not only academic teams but also registry operators, particularly the country-code registries of Singapore, Taiwan, China, Japan and South Korea<sup>619</sup>. By 2000, there were more than ten multilingual testbeds run by groups such as iDNS (Internationalisation of the Domain Name System) and MINC (Multilingual Internet Names Consortium). All of these experiments worked with IDNs at the second-level only; that is, top-level domain labels (such as .jp or .cn) still had to be supplied in ASCII, but subdomains under these TLDs could be expressed in the relevant native script. There was still no single agreed standard for IDNs at this time. An IETF IDN Working Group was formed in January 2000, chaired by James Seng and Mark Blanchet. This group eventually produced the IDNA (Internationalising Domain

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<sup>616</sup> Duerst, M. (1996). Internet Draft: ‘Internationalisation of Domain Names.’ Retrieved 8 January, 2009, from <http://tools.ietf.org/html/draft-duerst-dns-118n-00>.

<sup>617</sup> MINC (2011). “History of MINC.” Retrieved 18 June 2011, from [http://www.minc.org/site\\_content.aspx?page\\_key=about\\_History\\_of\\_MINC&lang=en](http://www.minc.org/site_content.aspx?page_key=about_History_of_MINC&lang=en)

<sup>618</sup> Wee, T. T. (2001). “National and Regional Approaches to Multilingual Internet Names: Asia Pacific Perspective.” Multilingual Domain Names: Joint ITU / WIPO Symposium. Geneva, ITU. Retrieved 5 May 2009, from <http://www.itu.int/mlds/presentations/dayone/tan2.ppt>

<sup>619</sup> For example, in 1999 an IDN Testbed was launched under the auspices of APNG with participation from CNNIC, JPNIC, KRNIC, TWNIC, THNIC, HKNIC and SGNIC. See MINC (2011), “iDOMAIN TestBed of iDNS implementations in the Asia Pacific.” Retrieved 21 August 2011, from [http://www.minc.org/site\\_content.aspx?page\\_key=idomain\\_testBed\\_of\\_idns&lang=en](http://www.minc.org/site_content.aspx?page_key=idomain_testBed_of_idns&lang=en) See also Subbiah, S. (2007). “History of Internationalised Domain Names.” Retrieved 30 July 2011, from <http://www.domainname.com.ua/history-Internationalised-domain-names.php>.

Names in Applications) standard in 2002,<sup>620</sup> which became the basis of subsequent IDN implementations.

Meanwhile, NSI/VeriSign, the largest registry with control of the .com, .net and .org namespaces, announced a test programme in August 2000 that would allow registration of second-level IDN domain names under .com, .net and .org.<sup>621</sup> Though described as a testbed, critics saw VeriSign's action as a commercial venture in another guise. VeriSign was accused of offering commercial IDN registrations before the IETF standard was ready and trying to capture the market prematurely.<sup>622</sup>

ICANN was not deeply engaged in these early IDN developments; however, the testbed programmes proved the technical feasibility of IDNs and put the issue on the agenda. In September 2000, in an announcement regarding VeriSign's testbed, the ICANN Board made its first official recognition of the importance of IDNs for improving Internet accessibility for users of non-Latin scripts.<sup>623</sup> Following this, ICANN began to examine the issue and ultimately to develop policy for IDN implementation in the live DNS environment. Up to 2005, ICANN's work on IDNs, like the early testbeds, centred around second-level domains. However, from 2005, policy was being developed on IDN top-level domains, and this has cross-links with the New gTLDs programme.

### Technology and standards

In early discussions regarding development of a standard, there had been some debate as to whether conversions between native scripts and the ASCII DNS system should be dealt with at DNS server level, or by software residing on the user's own computer. The IETF elected to develop a client-side solution, where non-ASCII domain names would be converted to a suitable ASCII-based form by web browsers and other applications residing on the user's computer. In 2002 the IETF specified a standard

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<sup>620</sup> IETF (2011). "IDN Status Pages: Internationalized Domain Name (Concluded WG)." Retrieved 20 August 2011, from <http://tools.ietf.org/wg/idn/>

<sup>621</sup> ICANN (2000). Announcement: 'ICANN Comment on NSI Registry Multilingual Domain Name Testbed'. 25 August 2000. Retrieved 28 May, 2009, from <http://www.icann.org/en/announcements/comment-25aug00.htm>

<sup>622</sup> See issues raised at ICANN's first Public Comments Period on IDNs, available at <http://forum.icann.org/idn1> Retrieved 7 August 2011.

<sup>623</sup> ICANN (2000). Minutes of special meeting of the Board. 25 September 2000. Retrieved 4 January 2009, from <http://www.icann.org/en/minutes/minutes-25sep00.htm>

for IDNs, known as IDNA (Internationalised Domain Names in Applications), documented in RFCs 3490, 3491 and 3492.<sup>624</sup> <sup>Note\_5.1</sup> Since that time, ICANN and all other major players have recognised IDNA as the authoritative standard for the implementation of IDNs.

### Some fundamental issues

Since the beginning of the IDN development process, certain inherent problems have been repeatedly cited.

It was recognised early on that IDN technology could potentially be misused by website spoofers and cybersquatters. This is because different characters in different scripts can look the same, depending on the font used. For example, Unicode character 0430, Cyrillic lowercase letter a, can look identical to Unicode character 0061, Latin lowercase letter a. Thus, an internationalised domain name utilising a mixture of Latin and Cyrillic characters could be made to appear to the user visually identical to an existing ASCII domain name, but pointing to a different website. This phenomenon potentially opens users up to phishing attacks and also has implications for trademark rights. Finding some means to deal with this issue has been one of the key policy concerns surrounding IDNs from the start of the process.

Other difficulties, technical, linguistic and political, arise from the task of defining and codifying a language or script. For example, if a language is spoken across more than one state, there may be no agreement on how to define that language. This

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<sup>624</sup> ISOC (2003). Request For Comments: 3490, 3491 and 3492. March 2003, Retrieved 12 August 2011, from <http://www.ietf.org/rfc/rfc3490.txt>; <http://www.ietf.org/rfc/rfc3491.txt>; <http://www.ietf.org/rfc/rfc3492.txt>

<sup>Note\_5.1</sup> An IDNA-enabled application is able to convert between the ASCII and non-ASCII representations of a domain, using the ASCII form ‘behind the scenes’ for DNS lookup but being able to present the non-ASCII form to users. The conversions between ASCII and non-ASCII forms of a domain name are carried out by algorithms called ToASCII and ToUnicode. These algorithms are applied separately to each ‘label’ in the domain name, a label being one element of the domain name (excluding dots); for example the domain name [www.microsoft.com](http://www.microsoft.com) contains the labels www, microsoft, and com. When presented with a label containing at least one non-ASCII character, ToASCII will translate the label to ASCII using Punycode (an encoding syntax by which a Unicode string of characters can be translated into ASCII, specified in RFC 3492). After translation of the label to ASCII, ToUnicode prepends the label with the 4-character string "xn--", known as the ACE (ASCII Compatible Encoding) prefix, which is used to distinguish Punycode-encoded labels from ordinary ASCII labels. ToUnicode reverses the action of ToASCII, stripping off the ACE prefix and applying the Punycode decode algorithm. (See RFCs 3490, 3491 and 3492, retrieved 20 August 2011, from <http://tools.ietf.org/html/rfc3490> <http://tools.ietf.org/html/rfc3491> <http://tools.ietf.org/html/rfc3492>)

problem is particularly difficult with regard to gTLDs, as ccTLD operators could use their own codification within their own namespace, but a French (for example) IDN gTLD would be aimed at French speakers throughout the world, which may become a problem if, for example, French and French Canadian authorities could not agree on how to define the French language. With regard to minority languages, there may in some cases be political sensitivities regarding their recognition. Such issues have been among the public policy challenges to be overcome in the development of IDNs policy.

### **ICANN and IDN policy development: summary of events**

#### Second-level IDNs

The first ICANN Board discussions on IDNs took place on September 25<sup>th</sup>, 2000, prompted by the VeriSign testbed.<sup>625</sup> Following discussion, the Board passed a series of resolutions recognising a need for the DNS to evolve to be more accessible to those who did not use the ASCII character set, and stating that internationalisation of the DNS ‘must be accomplished through standards that are open, non-proprietary, and fully compatible with the Internet's existing end-to-end model and that preserve globally unique naming in a universally resolvable public name space’.<sup>626</sup> The Board called on VeriSign to consult closely with the IETF and IAB concerning the design and implementation of the testbed, with the goal that the testbed ‘should promote, rather than complicate, technical standardisation efforts in this area’ and to ‘conduct the testbed in full compliance with its agreements with ICANN, including by providing equivalent access within the testbed to all ICANN-accredited registrars that meet reasonable technical-qualification’.<sup>627</sup>

In November 2000 at ICANN’s annual meeting at Marina del Rey, California, the first of a series of Workshops on IDNs was held.<sup>628</sup> This was followed by the first Public

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<sup>625</sup> ICANN (2000). Minutes of special meeting of the Board. 25 November 2000. Retrieved 10 August 2011, from <http://www.icann.org/en/minutes/minutes-25sep00.htm>

<sup>626</sup> ICANN (2000). Minutes of special meeting of the Board. 25 September 2000. Retrieved 4 January 2009, from <http://www.icann.org/en/minutes/minutes-25sep00.htm>

<sup>627</sup> Ibid

<sup>628</sup> ICANN (2000). ICANN meetings in Marina Del Rey. 13-16 November 2000. Meeting schedule. Retrieved 23 September 2011, from <http://www.icann.org/en/meetings/mdr2000/>

Comments Period on IDNs (February – March 2001).<sup>629</sup> ICANN's Melbourne meeting (9<sup>th</sup>-13<sup>th</sup> March 2001) saw the first statements from the DNSO and the GAC on the issue; the DNSO presented a business plan calling for the establishment of a task force to develop consensus policies for IDN implementation<sup>630</sup>, while the GAC produced an initial statement identifying public policy areas relevant to the issue-area.<sup>631</sup> (See Appendix 5.1.A) The Board meeting at Melbourne recognised both of these developments, and also noted that the RSSAC had begun discussions on the possible implications of these efforts for the operation of the root servers. It then set up a Working Group of Directors on IDNs to research the issues further.<sup>632</sup>

At the following meeting in Stockholm (June 2001), the GAC produced its initial nine Principles on IDNs (See Appendix 5.1.B). The Board Working Group presented its Final Report on 9<sup>th</sup> September 2001.<sup>633</sup> It recommended that ICANN should begin considering IDN policy issues on the assumption that the IETF would adopt a standard in the near future. A number of issues for further study were also identified.<sup>Note\_5.2</sup> It further recommended that the Board charter a steering committee to study these policy areas and provide it with recommendations.<sup>634</sup>

In response to the Working Group Report, the Board created an IDN Committee, chaired by Masanobu Katoh, and including Board members as well as representatives from the Supporting Organisations and the GAC.<sup>635</sup> The IDN Committee was intended to serve as a general co-ordinating body for work on IDN policy issues and to produce recommendations for Board consideration. It began work in November

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<sup>629</sup> ICANN (2004). Public Comment Forum: Introduction of Internationalised Domain Names.

Retrieved 25 August 2011, from <http://forum.icann.org/idn1/>

<sup>630</sup> ICANN (2001). Business Plan for the DNSO Names Council 2001-2002. Retrieved 4 February, 2009, from <http://www.dnsso.org/dnsso/notes/2001-02.NCbusinessplan.html>

<sup>631</sup> ICANN (2001). GAC Communiqué VIII-Melbourne, 10 March 2001. Retrieved January 6, 2009, from <http://www.icann.org/en/committees/gac/communique-10mar01.htm>

<sup>632</sup> ICANN (2001). Minutes of regular meeting of the Board. 13 March 2001. Retrieved 9 February, 2009, from <http://www.icann.org/en/minutes/minutes-13mar01.htm>

<sup>633</sup> ICANN (2001). Report of the Internationalized Domain Names Internal Working Group of the ICANN Board of Directors. Retrieved 18 May, 2009, from <http://www.icann.org/en/committees/idn/final-report-28aug01.htm>

<sup>Note\_5.2</sup> These included whether to introduce IDN TLDs in only the ccTLD market or to have IDN gTLDs; prevention of cybersquatting and resolution of trademark disputes in IDN environments; the application of principles of competition, market access, consumer protection, and intellectual property protection; and interoperability of the present and future Internet, including the use of testbeds.

<sup>634</sup> ICANN (2001). Report of the Internationalized Domain Names Internal Working Group of the ICANN Board of Directors. Retrieved 18 May, 2009, from <http://www.icann.org/en/committees/idn/final-report-28aug01.htm>

<sup>635</sup> ICANN (2001). Minutes of regular meeting of the Board. 10 September 2001. Retrieved 2 February, 2009, from <http://www.icann.org/en/minutes/minutes-10sep01.htm>

2001 and presented its Final Report to the Board on 27 June 2002.<sup>636</sup> This report did not make any specific policy proposals, but recommended that the ICANN Board should continue to take a ‘conservative approach’ to IDN policy issues and also recommended that ongoing policy development should be facilitated by the establishment of an ‘Expert Group’ that would serve as a ‘general advisory body’ on IDN issues. In response, the Board stated that it had ‘begun consideration of the substance and implications of the IDN Committee’s papers and final report’ but was ‘not yet prepared to determine its next steps in this area.’<sup>637</sup> The Board also delayed formal termination of the IDN Committee until the October ICANN meeting in Shanghai, so that the Committee would remain available to monitor developments, review community feedback and advise the Board as needed.<sup>638</sup>

At Shanghai (31<sup>st</sup> October 2002), the Board further extended the life of the IDN Committee until the 2002 Annual Meeting.<sup>639</sup> At that meeting (15<sup>th</sup> December 2002)<sup>640</sup> the Committee was further extended for an additional two years, with an additional committee, known as the President’s IDN Registry Implementation Committee, being created “to consider and exchange information on ways to resolve the issues associated with implementation of IDN capabilities in existing top level domains”. This body was to be composed of interested registries, registrars, and technical experts.<sup>641</sup>

In March 2003, the IETF produced the long-awaited IDNA standard with the publication of RFCs 3490, 3491 and 3492. This left ICANN with the task of producing an implementation strategy, which would take the form of ‘guidelines’ for registries to follow in implementing IDN second-level domains under their namespaces. The first draft of these guidelines was produced by the IDNs Committee shortly afterwards and published in a Topic Paper for public comment<sup>642</sup> and

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<sup>636</sup> ICANN (2002). Internationalized Domain Names (IDN) Committee: Final Report to the ICANN Board. 27 June 2002. Retrieved 8 January, 2009, from <http://www.icann.org/en/committees/idn/final-report-27jun02.htm>

<sup>637</sup> ICANN (2002). Preliminary Report: ICANN Meeting in Bucharest. 28 June 2002. Retrieved 12 May, 2009, from <http://www.icann.org/en/minutes/prelim-report-28jun02.htm>.

<sup>638</sup> Ibid

<sup>639</sup> ICANN (2002). Minutes of regular meeting of the Board. 31 October 2002. Retrieved April 11, 2009, from <http://www.icann.org/en/minutes/minutes-31oct02.htm>

<sup>640</sup> ICANN (2002). Minutes of fourth annual meeting of the Board. 15 December 2002. Retrieved 19 January, 2009, from <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm>

<sup>641</sup> Ibid

<sup>642</sup> ICANN (2003). Submissions to the IDN Comments Forum. Retrieved 20 January 2009, from <http://forum.icann.org/riodejaneiro/idn-comments/general/index.html>

discussion at the ICANN meeting in Rio de Janeiro (26 March 2003).<sup>643</sup> VeriSign was initially hostile to the proposed IDN Guidelines, arguing that they should not be mandatory and that ICANN was proposing to supplement the IETF standard with new conditions that significantly exceeded the scope of that standard.<sup>644</sup> VeriSign were to some degree supported by the representative of the Japanese ccTLD manager, NaoMasa Maruyama (JPNIC), who argued that all guidelines apart from point 1 should be recommendations, not mandatory.<sup>645</sup>

Following further refinement, a finalised version of the Guidelines was unanimously endorsed by the ICANN Board on 27<sup>th</sup> March 2003.<sup>646</sup> (See Appendix 5.2.A). This marked the ‘official’ implementation of IDN second level domains in the ICANN system. The Guidelines were initially adopted by the registries for .cn, .info, .jp, .org, and .tw, making these the first TLDs to ‘officially’ offer IDN registrations (as opposed to a ‘testbed’).<sup>647</sup> In February 2004, the Board approved a set of procedures put forward by PIR (.org operator) and VeriSign for migration of their testbed registrations to the IETF standard.<sup>648</sup> This was a significant victory for VeriSign, who were allowed to retain their ‘testbed’ registrations into the commercial IDN environment. However, not all registries that participated in the IDN testbed elected to continue supporting IDN registrations after the migration to the new standard.

Although IDNs had now been officially implemented at the second level of the DNS hierarchy, discussions continued on the issue, including proposals for modifying the Guidelines and the question of IDN TLDs. A series of IDN Workshops provided one of the main forums for discussion. These workshops did include representatives from

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<sup>643</sup> ICANN (2003). Rio de Janeiro Meeting Topic: Internationalized Domain Names. 13 March 2003. Retrieved 20 January 2009, from <http://www.icann.org/en/meetings/riodejaneiro/idn-topic.htm>

<sup>644</sup> Lynn, S. (2003). 'VeriSign's Response to ICANN's IDN Proposal.' 21 Mar 2003. Comment posted on ICANN Rio de Janeiro public comments forum on internationalised domain names. Retrieved 5 September 2011, from <http://forum.icann.org/riodejaneiro/idn-comments/general/msg00002.html>

<sup>645</sup> Maruyama, N. (2003). ‘Comments from NaoMasa Maruyama, Japan Network Information Center (JPNIC) on proposed IDN Guidelines.’ 26 March 2003. Comment posted on ICANN Rio de Janeiro public comments forum on internationalised domain names. Retrieved 5 September 2011, from <http://forum.icann.org/riodejaneiro/idn-comments/general/msg00006.html>

<sup>646</sup> ICANN (2003). Minutes of regular meeting of the Board. 27 March 2003. Retrieved 4 May, 2009, from <http://www.icann.org/en/minutes/minutes-27mar03.htm#InternationalizedDomainNames>.

<sup>647</sup> ICANN (2003). Guidelines for the Implementation of Internationalized Domain Names. Version 1.0. 20 June 2003. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-20jun03.htm>

<sup>648</sup> ICANN (2004). Preliminary Report: Special Meeting of the Board. 18 February 2004. Retrieved 9 March, 2009, from <http://www.icann.org/en/minutes/prelim-report-18feb04.htm#item3>

Also see ICANN (2004). Advisory: ‘Internationalized Domain Names (IDN): Implementation Update: 20 February 2004’. Retrieved 23 March, 2009, from <http://www.icann.org/en/announcements/advisory-20feb04.htm>

various stakeholders but predominantly from the domain name supply side. Following the Luxembourg ICANN meeting, a working group of registries with IDN experience was formed to work on a revision of the guidelines, to be put forth for public comment.<sup>649</sup> The draft revised Guidelines<sup>650</sup> (see Appendix 5.2.B) were offered for public comment 30 days from 20 September 2005.<sup>651</sup> On 4th November, the Guidelines for Implementation of IDNs version 2.0<sup>652</sup> were posted as final following Board approval on 8<sup>th</sup> November.<sup>653</sup> There were some relatively minor changes, mostly to wording, but the underlying policy remained substantively unchanged compared to the draft. (See Appendix 5.2.C).

On 8 November 2005, the Board passed a resolution tasking the IDN Working Group to continue its work and return to the Board with specific IDN improvement recommendations before the ICANN Meeting in Morocco (June 2006).<sup>654</sup> The Working Group responded by producing another amended set of Guidelines, numbered version 2.1.<sup>655</sup> (See Appendix 5.2.D). The proposed amendments were limited to the addition of an additional Guideline 9, which set a new technical condition.

### IDN TLDs

The next phase in IDN implementation concerned development of a strategy for IDN deployment in top-level domains. Dialogue on the potential for IDN TLDs took place in IDN Workshops held at successive ICANN meetings, which seem to have acted as a forum bringing together a wide range of stakeholders including the registries and registrars, software vendors, the technical community, At-Large groups and even UNESCO. (See Appendix 5.3.)

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<sup>649</sup> ICANN (2005). Announcement: 'Draft Revised IDN Guidelines: Public Comment Period: 20 September 2005.' Retrieved 14 March, 2009, from <http://www.icann.org/en/announcements/announcement-20sep05-en.htm>

<sup>650</sup> ICANN (2005). Guidelines for the Implementation of Internationalized Domain Names. Draft Version 2.0. 20 September 2005. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-20sep05.htm>

<sup>651</sup> ICANN (2007). IDN Guidelines Public Comments Forum (archived). Retrieved 3 July 2009, from <http://forum.icann.org/lists/idn-guidelines>

<sup>652</sup> ICANN (2005). Guidelines for the Implementation of Internationalized Domain Names. Version 2.0. 8 November 2005. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-14nov05.htm>

<sup>653</sup> ICANN (2005). Minutes of special meeting of the Board. 8 November 2005. Retrieved 4 July 2009, from <http://www.icann.org/en/minutes/minutes-08nov05.htm>

<sup>654</sup> Ibid

<sup>655</sup> Guidelines for Implementation of IDNs, version 2.1. 22 February 2006. Retrieved 6 July 2009, from at <http://www.icann.org/topics/idn/implementation-guidelines.htm>

In May 2006, the GNSO requested that ICANN staff produce a preliminary Issues Report regarding the implementation of IDNs into the root zone of the DNS. The Issues Report identified several issues for discussion related to the implementation of top-level IDNs, which were very similar to those identified in the issues report for new gTLDs (December 2005).<sup>656</sup> These included selection criteria, allocation methods and contractual criteria. Among other matters, the issue of whether entities other than the existing TLD registry should be allowed to run an IDN equivalent of that TLD was raised as an issue. The Issues Report went on to recommend that the GNSO launch a policy development process on these issues, in cooperation with the CCNSO (on the ccTLD aspects) and the GAC (on the public policy aspects), as well as in ‘close consultation with the broader ICANN community’.<sup>657</sup> In response, the GNSO Council established a joint working group in coordination with the CCNSO to ‘analyse, prioritise, and select issues for further policy development’.<sup>658</sup>

In October 2006, the IETF began to revise the original IDNA standards in line with the latest version of Unicode (version 5.0).<sup>659</sup> The basic framework for discussion was published as RFC 4690, which highlighted a number of issues including: language specific character issues where the same script is used across different languages; issues related to cases where languages can be expressed by using more than one script, bi-directional cases; and the question of visually confusing characters. Of particular importance, the IETF also would determine the ‘inclusion list’ of characters that could be used for IDN TLD in the DNS. This was a very significant development in that what had been a controversial issue (deciding which characters / code points would be permissible) was effectively taken out of ICANN’s hands.

In March 2007, the GNSO IDN Working Group produced its Outcomes Report.<sup>660</sup> This identified seven issue areas to be prioritised for discussion:

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<sup>656</sup> ICANN (2006). GNSO Preliminary Issues Report: “Policy Issues relating to IDN at the top-level: 28 May 2006.” Retrieved 18 February 2009, from <http://gns0.icann.org/issues/idn-tlds/issues-report-28may06.htm>

<sup>657</sup> Ibid

<sup>658</sup> Ibid

<sup>659</sup> ICANN (2006). Announcement: ‘IDNA Protocol Review and Proposals for Changes: 31 October 2006’. Retrieved 14 May, 2009, from <http://www.icann.org/en/announcements/announcement-31oct06.htm>

<sup>660</sup> ICANN (2007). Outcomes Report of the GNSO IDN WG, Version 3.1, 22 March 2007. Retrieved 28 March, 2009, from [https://st.icann.org/data/workspaces/alach/attachments/lisbon\\_documents:20070322133647-0-](https://st.icann.org/data/workspaces/alach/attachments/lisbon_documents:20070322133647-0-)

- Aspects on introduction of IDN gTLDs in relation to new non-IDN gTLDs
- IDN aspects on Geo-Political Details
- Aspects relating to existing gTLD strings and existing IDN SLDs
- Aspects relating to existing SLD Domain Name Holders
- Specific Techno-Policy Details relating to IDN gTLDs
- Particular IDN aspects relating to Privacy & Whois Details
- IDN aspects on Legal Details

The last two topics were accorded a lower priority and were only discussed initially by the Working Group. The Report went on to set out some ‘areas of agreement’ where the Working Group had achieved rough consensus under these headings, and also ‘areas of support’ where debate still existed. On the matter of priority rights for existing gTLD operators, the report noted agreement among the Working Group that priority rights for new strings did not derive from existing strings.

In May 2007, ICANN published another modified draft of the IDN Guidelines for public comment. This draft was the first version of the IDN Guidelines to make specific reference to IDNs in top-level labels.<sup>661</sup> (See Appendix 5.2.E). The draft was the work of the same group (comprised of ccTLD and gTLD registries) that produced version 2.1 of the Guidelines.

Extensive technical testing was carried out to ensure that there would be no unexpected adverse effects in deploying IDN TLDs. In October 2006, ICANN entered into a contract with Autonomica AB, a Swedish company, to test the impact of IDN on the DNS in a laboratory setting.<sup>662</sup> On 7<sup>th</sup> March 2007, ICANN announced the successful completion of these tests.<sup>663</sup> The next phase in testing involved experimental insertion of IDN TLDs in the root zone for evaluation.<sup>664</sup> On 31 January

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[22034/original/GNSO%2520IDN%2520WG%2520Final%2520Outcomes%2520Report%2520-%2520EN.pdf](http://www.icann.org/en/announcements/announcement-2-11may07.htm)

<sup>661</sup> ICANN (2007). Announcement: ‘Draft IDN Guidelines, v.2.2 for Public Comments: 11 May 2007’. Retrieved 12 June, 2009, from <http://www.icann.org/en/announcements/announcement-2-11may07.htm>

<sup>662</sup> ICANN (2006). Announcement: ‘IDN Laboratory Testing Progress: 19 October 2006’. Retrieved 4 May, 2009, from <http://www.icann.org/en/announcements/announcement-19oct06.htm>

<sup>663</sup> ICANN (2006). Announcement: ‘IDN Laboratory Test Design Plans: 5 December 2006’. Retrieved 18 May, 2009, from <http://www.icann.org/en/announcements/announcement-05dec06.htm>

<sup>664</sup> ICANN (2007). Update: ‘IDN .test Root-Zone Evaluation: 23 August 2007 Update’. Retrieved 4 June, 2009, from <http://www.icann.org/en/announcements/announcement-2-19jun07.htm>.

2008, ICANN announced that these tests had been successful.<sup>665</sup> Note 5\_3 With the successful completion of these tests, the way was opened for development of policy for full-scale deployment of IDNs.

Policy development for IDNs in the ccTLD and gTLD namespaces effectively became separated into two tracks, though dialogue continued between the GNSO and CCNSO on IDN issues of mutual interest.

### *IDN ccTLDs*

At ICANN's São Paulo meeting (December 2006) a series of joint IDN working group meetings between the GNSO and CCNSO and between CCNSO and the GAC allowed the exchange of information about each working group's position and progress regarding IDN. These joint meetings identified the need for a 'fast track' to expedite implementation of certain ccTLD IDNs.<sup>666</sup> This was seen as desirable because attempting to move forward with IDN implementation across all ccTLDs simultaneously risked the whole process being indefinitely delayed by difficulties

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<sup>665</sup> ICANN (2008). Announcement: 'Successful Evaluations of .test IDN TLDs: 31 January 2008'.

Retrieved 1 July, 2009, from <http://www.icann.org/en/announcements/announcement-31jan08.htm>

Note 5\_3 In August 2007, a technical procedure was finalised for insertion into the root of a number of TLDs representing the top-level domain .test in various scripts, including provision for their emergency removal in the event of their causing an unforeseen problem in the operation of the DNS (which was considered 'very unlikely'). (See ICANN. (2007). Procedures for IDN TLD Evaluation Deployment in the Root Zone: 6 August 2007. Retrieved 28 March, 2009, from

<http://www.icann.org/en/announcements/announcement-06aug07.htm>)

On 14 August the Board approved the finalised IDN .test Evaluation Plan based around the delegation of eleven evaluative top-level domains representing the term 'test' translated into Arabic, Persian, Chinese (simplified and traditional), Russian, Hindi, Greek, Korean, Yiddish, Japanese and Tamil. (see ICANN (2007). Procedures for IDN TLD Evaluation Deployment in the Root Zone: 6 August 2007.

Retrieved 28 March, 2009, from <http://www.icann.org/en/announcements/announcement-06aug07.htm>)

The test went live on 15 October 2007, with Internet users in the relevant languages being encouraged to register experimental names under the IDN .test namespaces. A publicity campaign with the tagline 'My Name, My Language, My Internet' was launched by ICANN to promote this. (See ICANN (2007). "Announcement: My Name, My Language, My Internet: IDN Test Goes Live: ICANN launches global test of Internationalized Domain Names " Retrieved 11 March, 2009, from

<http://www.icann.org/en/announcements/announcement-15oct07.htm>) This marked the first

deployment of IDN TLDs in a live environment. On 31 January 2008, ICANN announced that the .test IDN TLDs evaluation had been successful. (See ICANN. (2008). Announcement: 'Successful Evaluations of .test IDN TLDs: 31 January 2008.' Retrieved 1 July, 2009, from

<http://www.icann.org/en/announcements/announcement-31jan08.htm>

<sup>666</sup> ICANN (2009). IDN ccTLD Fast Track Program Proposed Implementation Details Regarding Financial Contributions to Support the Development and Deployment of IDN ccTLDs. 29 May 2009. Retrieved 18 August 2011, from

<http://www.icann.org/en/topics/idn/fast-track/proposed-implementation-details-financial-contributions-29may09-en.pdf> P1

with individually problematic cases, due to linguistic, coding or political issues.<sup>667</sup> In response, the Board asked the CCNSO and the GAC to produce an Issues Report relating to the introduction and selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes.<sup>668</sup> The Issues Paper produced by the GAC a few months later was subsequently adopted by the CCNSO<sup>669</sup> and submitted to the Board as a joint GAC / CCNSO Issues Paper in July 2007.<sup>670</sup> It identified a set of questions as a framework for further discussion (See Appendix 5.4). The Board invited input from a range of ICANN bodies on the issues identified by the Issues Paper.<sup>671</sup> At the next ICANN meeting in LA (November 2007), the GAC reiterated its support for the adoption of a fast track approach for IDN ccTLDs, as well as for the CCNSO Council proposal to create an IDN working group; it stated its intention to actively engage in this process.<sup>672</sup> Broad support was also received from the GNSO and ALAC. In October 2007, the Board requested that the chairs of the ALAC, CCNSO, GAC and GNSO collaborate to establish and appoint members to the IDNC Working Group.<sup>673</sup>

On 13 June 2008, the IDNC Working Group Draft Final Report of Recommendations for IDN ccTLD Fast Track Mechanism was made available and posted for comments.<sup>674</sup> It asserted that the fast track approach required two specific mechanisms: a mechanism for the selection of the IDN ccTLD string; and a mechanism to designate an IDN ccTLD manager. It also set out a methodology to accomplish this. Furthermore, the report set out a number of guiding principles, including an assertion that delegation of an IDN ccTLD should only be permitted in the fast track where the IDN ccTLD string and the designation of the selected delegate

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<sup>667</sup> ICANN (2006). Report from CCNSO-GAC Meeting – Sao Paulo. 5 December 2006. Retrieved 18 August 2011, from <http://www.icann.org/meetings/saopaulo/CCNSO-gac-meeting-05dec06.htm>

<sup>668</sup> ICANN (2006). Adopted Resolutions from ICANN Board Meeting: 8 December 2006. Retrieved 8 June, 2009, from [http://www.icann.org/minutes/resolutions-08dec06.htm#\\_Toc27198296](http://www.icann.org/minutes/resolutions-08dec06.htm#_Toc27198296).

<sup>669</sup> At its meeting on 27 June 2007, the CCNSO Council adopted the GAC Issues Paper as a CCNSO Issues Paper. See ICANN (2011). Minutes of meeting of the CCNSO Council. 27 June 2007. Retrieved 10 July 2010, from <http://ccns0.icann.org/meetings/san-juan/amended-CCNSO-council-minutes-27jun07.pdf>

<sup>670</sup> ICANN (2007). Issues Paper: Selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes. Retrieved 7 July, 2009, from <http://www.icann.org/en/topics/idn/CCNSO-gac-issues-report-on-idn-09jul07.pdf>.

<sup>671</sup> ICANN (2007). Adopted Board Resolutions - San Juan, Puerto Rico. 29 June 2007. Retrieved 21 April, 2009, from <http://www.icann.org/en/minutes/resolutions-29jun07.htm>

<sup>672</sup> ICANN (2007). GAC Communiqué XXX-Los Angeles. 31st October 2007. Retrieved 4 July, 2009, from <http://www.gac.icann.org/index.php?name=communiques&mode=detail&commId=47>

<sup>673</sup> ICANN (2008). "IDNC Working Group (Former)." Retrieved 8 July, 2009, from <http://ccns0.icann.org/workinggroups/idncwg.htm>

<sup>674</sup> ICANN (2008). Announcement: 'Draft Final Report of Recommendations for IDN ccTLD Fast Track Mechanism Made Available: 13 June 2008'. Retrieved 4 July, 2009, from <http://www.icann.org/en/announcements/announcement-3-13jun08-en.htm>

were both non-contentious within the territory.<sup>675</sup> Following a Public Comments Period, the IDNC Working Group submitted the report to the Board, together with the statement of GAC and CCNSO on the recommendations included in the report.<sup>676</sup> At the Paris meeting, (26 June), the Board approved the report and instructed ICANN staff to begin work on a detailed implementation strategy.<sup>677</sup> Staff duly produced a ccTLD Fast Track Draft Implementation Plan<sup>678</sup>, and a number of revisions to this draft were made over the following months. Public Comments periods were held on successive iterations of the Draft Implementation Plan in October-November 2008<sup>679</sup>, February-April<sup>680</sup> and May-July 2009.<sup>681</sup> On 30<sup>th</sup> September 2009, a proposed final version of the implementation plan was announced.<sup>682</sup> Final public comments were invited between that date and the Board meeting in Seoul. On 30<sup>th</sup> October 2009, the Board approved the Implementation Plan,<sup>683</sup> <sup>684</sup> and the Fast Track process became operational from 16<sup>th</sup> November. (See Appendix 5.5 for details of the IDN ccTLD Fast Track application process). The first IDN ccTLD delegations were considered by the Board on 22 April 2010.<sup>685</sup> <sup>Note 5\_4</sup> As of July 2011, 33 applications have been received for IDN ccTLDs in 22 languages under Fast Track.<sup>687</sup>

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<sup>675</sup> ICANN (2008). IDNC Working Group Board Proposal. Retrieved 28 March, 2009, from <http://ccnso.icann.org/workinggroups/idnc-wg-board-proposal-25jun08.pdf>

<sup>676</sup> ICANN (2008). Announcement: ‘Now Available: Board Proposal IDNC WG, the Final Report IDNC WG on Fast Track Process for IDN ccTLDs: 26 June 2008’. Retrieved 4 May, 2009, from <http://www.icann.org/en/announcements/announcement-26jun08-en.htm>

<sup>677</sup> ICANN (2008). Minutes of regular meeting of the Board. 26 June 2008. Retrieved 25 February, 2009, from [https://par.icann.org/files/paris/ParisBoardMeeting\\_26June08.txt](https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt)

<sup>678</sup> ICANN (2008). Draft Implementation Plan for the IDN ccTLD Fast Track Process. Retrieved 14 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-23oct08-en.pdf>

<sup>679</sup> ICANN (2008). Announcement: ‘Public Comment: IDN ccTLD Fast Track Draft Implementation Plan’. Retrieved 14 August 2011, from <http://www.icann.org/en/announcements/announcement-3-23oct08-en.htm>

<sup>680</sup> ICANN (2009). Announcement: ‘Public Comment: Fast Track Proposed Solutions’. 18 February 2009. Retrieved 14 August 2011, from <http://www.icann.org/en/announcements/announcement-18feb09-en.htm>

<sup>681</sup> ICANN (2009). Announcement: ‘Public Comment: Fast Track Implementation (3rd Revision)’. 31 May 2009. Retrieved 14 August 2011, from <http://www.icann.org/en/announcements/announcement-31may09-en.htm>

<sup>682</sup> ICANN (2009). Proposed Final Implementation Plan: IDN ccTLD Fast Track Process. 30 September 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/announcements/announcement-2-30sep09-en.htm>

<sup>683</sup> ICANN (2009). Adopted Board Resolutions. 30 August 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm#2>

<sup>684</sup> ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf>

<sup>685</sup> ICANN (2010). Minutes of special meeting of the Board. Retrieved 14 August 2011, from <http://www.icann.org/en/minutes/minutes-22apr10-en.htm>

<sup>Note 5\_4</sup> These included .рф (“R.F.”), representing the Russian Federation; .السعودية (“Al-Saudiah”) representing Saudi Arabia; .الإمارات (“Emarat”) representing the United Arab Emirates; and .مصر (“Misr”) representing Egypt. The delegations were approved by the Board by twelve votes in favour, with three

A CCNSO Working Group continues to examine issues of delegation and redelegation.<sup>688</sup> However, this issue must be handled with caution; as Janis Karklins of the GAC has noted, it is a sensitive area for governments and the measure of whether, for example, community support exists for the ccTLD has ultimately been based on whether the government says it does.<sup>689</sup> A second CCNSO Working Group is to report on changes to Article IX and relevant Annexes in the ICANN Bylaws to include IDN ccTLD registries as full members in the CCNSO on equal footing with the current members.<sup>690</sup>

Beyond Fast Track, the CCNSO is currently conducting a full PDP to formulate policy for IDN ccTLDs in the longer term. This was initiated by the CCNSO Council in October 2007<sup>691</sup> and confirmed in April 2009. An IDN ccPDP Working Group was formed to coordinate discussions and includes members from the GNSO, ALAC and GAC as well as from the ccTLD registries.<sup>692</sup> The CCNSO has further coordinated with the GNSO on IDN issues via the CCNSO/GNSO Joint IDN Working Group (JIG), formed after the Sydney meeting in June 2009.<sup>693</sup>

### *IDN gTLDs*

The New gTLDs programme, approved by the Board in June 2011<sup>694</sup>, incorporates provision for IDN TLD applications.<sup>695</sup> (See Chapter 4) For the most part, IDN

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abstentions and no opposition. The abstaining delegates explained their abstentions on the grounds of inadequate information and / or documentation. See ICANN (2010). Minutes of special meeting of the Board. Retrieved 14 August 2011, from <http://www.icann.org/en/minutes/minutes-22apr10-en.htm>

<sup>687</sup> ICANN (2011). "IDN Fast Track Process." Retrieved 12 August 2011, from

<http://www.icann.org/en/topics/idn/fast-track/>

<sup>688</sup> ICANN (2011). "CCNSO IDN PDP Working Group 1." Retrieved 14 August 2011, from

<http://ccnsoc.icann.org/workinggroups/ipwgl1.htm>

<sup>689</sup> ICANN (2010). Minutes of special meeting of the Board. 5 August 2010, Retrieved 14 August 2011, from <http://www.icann.org/en/minutes/minutes-05aug10-en.htm>

<sup>690</sup> ICANN (2009). "CCNSO IDN PDP Working Group 2." Retrieved 12 August 2011, from

<http://ccnsoc.icann.org/workinggroups/ipwg2.htm>

<sup>691</sup> ICANN (2009). Final Issues Report on IDN ccPDP. 2 April 2009. Retrieved 12 August 2011, from <http://ccnsoc.icann.org/workinggroups/final-issues-report-idn-ccpdp-02apr09.pdf>

<sup>692</sup> ICANN (2011). "CCNSO IDN PDP Working Group 1." Retrieved 14 August 2011, from

<http://ccnsoc.icann.org/workinggroups/ipwgl1.htm>

<sup>693</sup> ICANN (2009). Joint CCNSO-GNSO IDN Working Group (JIG WG) Draft Charter. Retrieved 15 August 2011, from <http://ccnsoc.icann.org/workinggroups/jiwg-charter.pdf>

<sup>694</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 15 August 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>695</sup> ICANN (2011). gTLD Applicant Guidebook. 30 May 2011. Retrieved 15 July 2011, from <http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf>

gTLDs will be covered by the same set of policies as new ASCII gTLDs, as set out in the New gTLDs Applicant Guidebook.<sup>696</sup> However, there are a few policies that apply specifically to IDN gTLDs; for example, unlike their ASCII counterparts, which must contain three or more characters, IDN gTLD strings will be allowed to consist of a minimum of two characters.<sup>697</sup> Note 5\_5 In addition to the other requirements that must be met by all new gTLD applicants, entities applying for IDN gTLDs must provide information indicating compliance with the IDNA protocol and other IDN-specific technical requirements<sup>698</sup> as well as the IDN Guidelines.<sup>699</sup> IDN tables must be submitted to ICANN for approval.<sup>700</sup> Additionally, as with IDN ccTLDs, mixed scripts in IDN labels are not permitted.<sup>701</sup>

As mentioned, dialogue is also ongoing between the GNSO and the CCNSO on IDN issues of mutual interest.

### *Draft IDN Guidelines version 3.0*

In July 2011, ICANN published a new draft of the IDN guidelines for discussion.<sup>702</sup> This draft was developed by the IDN Guidelines Revision Working Group (comprised of ccTLD and gTLD registry representatives with IDN experience), and modified the Guidelines from Version 2.2 to reflect the IETF's revision of the initial IDNA protocol (known as the IDNA2008 protocol).<sup>703</sup> Following the ICANN Board's acceptance of the new version at the October 2011 meeting in Dakar, Senegal,

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<sup>696</sup> Ibid

<sup>697</sup> Ibid, P65

<sup>Note 5\_5</sup> The Joint CCNSO-GNSO IDN Working Group (JIG) has made recommendations that this section be revised to allow for single-character IDN gTLD labels, however this has not yet been incorporated into policy. See ICANN (2011). Joint CCNSO-GNSO IDN Working Group Final Report in Single Character IDN TLDs. 30 March 2011. Retrieved 19 August 2011, from <http://gns0.icann.org/drafts/jig-final-report-30mar11-en.pdf>.

<sup>698</sup> ICANN (2011). gTLD Applicant Guidebook. 30 May 2011. Retrieved 15 July 2011, from <http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf> P34

<sup>699</sup> Ibid, P290

<sup>700</sup> Ibid, PP36-37

<sup>701</sup> Ibid, P64

<sup>702</sup> ICANN (2011). Guidelines for the Implementation of Internationalised Domain Names. 25 July 2011. Retrieved 15 August 2011, from <http://www.icann.org/en/topics/idn/idn-guidelines-discussion-draft-clean-25jul11-en.pdf>

<sup>703</sup> ICANN (2011). Announcement: 'Proposed IDN Guidelines Revision'. 27 July 2011. <http://www.icann.org/en/announcements/announcement-27jul11-en.htm>

ICANN gave notice of implementation for version 3.0 of the Guidelines on 22 November 2011.<sup>704</sup>

### **Analysis of PDP: Actors and Interests**

#### Role of the IETF

The IDN policy area provides a good example of the working relationship between ICANN and the IETF in action. The IETF played a key role in developing technical standards (RFCs 3490, 3491, and 3492) for the implementation of IDNs, while ICANN developed public policy and co-ordinated laboratory and live testbeds. Although some initial controversy was generated by ICANN's decision to allow testbeds to go ahead before the IETF's initial standard was complete, ICANN went on to accept the IETF standards unequivocally. All of ICANN's IDN Guidelines have used the IETF standards as a basis and required registries to adhere closely to them. The IETF's decision in October 2006 that it would determine the 'inclusion list' of permissible characters for IDN TLDs also took this tricky and potentially controversial issue out of ICANN's hands. ICANN has effectively recognised the IETF's authority as the rightful technical standardisation body, even though the IETF standards arguably affect some aspects of public policy related to IDNs, for example, string selection, in that they set limits on which strings and characters will be permissible. Unequivocal acceptance of the IETF standards may have limited ICANN's room for manoeuvre somewhat in defining IDN policy; on the other hand it has allowed IDNs policy development to take place in the context of, and underpinned by, a degree of technical certainty that would otherwise have been lacking.

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<sup>704</sup> ICANN (2011). Announcement: 'Implementation Notice - Version 3.0 of IDN Guidelines'. 22 November 2011. Retrieved 22 January 2012, from <http://www.icann.org/en/announcements/announcement-3-22nov11-en.htm>

## Role of the registries

Registry operators, particularly certain ccTLD registries and VeriSign, were some of the most important actors in developing and testing IDN technology prior to 2001, and their efforts placed the IDN issue on the agenda. Since that time, the registries have remained crucially important stakeholders and participants in ICANN's development of IDN policy. Both ccTLD and gTLD registries have played a key role on numerous IDN policy development groups, including the IDN Committee<sup>705</sup>, the IDN Working Group<sup>706</sup>, the IDNC Working Group<sup>707</sup>, the GNSO-CCNSO JIG<sup>708</sup> and the IDN Guidelines Revision Working Group.<sup>709</sup>

The prominent role accorded to the registries in IDN policy development reflects working realities; the registries are the entities that actually run IDN TLDs and as such their cooperation is essential, as is the practical real-world expertise they bring to the table. Clearly the registries have their own agendas and, as most of them are commercial businesses, their ultimate aim in offering IDNs is to sell more domain names. Indeed, Patrik Faltstom, who represented the IETF on the IDNs Committee, claims that the entities keenest to promote IDNs were those trading domain names rather than using them.<sup>710</sup> Nonetheless, the registries have worked in a highly collaborative manner with each other and with other ICANN stakeholders to make this possible.

Some of the ccTLD registries, such as SaudiNIC,<sup>711</sup> have shown opposition to being bound by mandatory formal contracts with ICANN, a position supported by some

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<sup>705</sup> ICANN (2011). "Internationalized Domain Names (IDN) Committee." Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

<sup>706</sup> ICANN. (2005). Announcement: 'Draft Revised IDN Guidelines: Public Comment Period: 20 September 2005.' Retrieved 14 March, 2009, from <http://www.icann.org/en/announcements/announcement-20sep05-en.htm>.

<sup>707</sup> ICANN (2008). "IDNC Working Group (Former)." Retrieved 8 July, 2009, from <http://ccns0.icann.org/workinggroups/idncwg.htm>

<sup>708</sup> ICANN (2011). "Ad-Hoc CCNSO/GNSO Joint IDN Working Group." Retrieved 25 August 2011, from <http://ccns0.icann.org/workinggroups/jiwg.htm>

<sup>709</sup> ICANN (2011). Guidelines for the Implementation of Internationalized Domain Names. Draft Version 3.0. 25 July 2011. Retrieved 27 August 2011, from <http://www.icann.org/en/topics/idn/idn-guidelines-discussion-draft-clean-25jul11-en.pdf>

<sup>710</sup> Email from Patrik Faltstrom to Paul White, 16 July 2009

<sup>711</sup> SaudiNIC (2009). Comments and Feedback On the Draft Implementation Plan for IDN ccTLD Fast Track Process By the SaudiNIC (.sa ccTLD registry). 7 January 2009. Retrieved 15 July 2011, from <http://forum.icann.org/lists/ft-implementation/pdf/L0i37cs9P.pdf>

governments, such as Egypt.<sup>712</sup> The Asia Pacific Top Level Domain Association (APTLD), an organisation for ccTLD registries in the Asia Pacific region, has also consistently opposed mandatory formal contracts as a condition of delegation.<sup>713</sup> APTLD has also urged that financial contributions to ICANN by IDN ccTLD registries should be voluntary only. As discussed, both of these points were accepted into policy under Fast Track. APTLD also favoured awarding any variant strings to the same ccTLD manager<sup>714</sup>; this issue has yet to be decided upon and will likely form part of the discussions surrounding IDN ccTLD policy beyond Fast Track.

All registries offering IDNs have accepted the IDN Guidelines. As discussed, VeriSign was initially resistant to the Guidelines, arguing that they were not required to do anything the IETF protocol didn't specify, but eventually accepted the Guidelines. John Klensin, a member of the IDN Committee, explains VeriSign's change of position as being due to a realisation that '...someone would hold them responsible for registrations that went outside accepted best practices and encouraged phishing and other crimes... and that the enforcer would more likely be courts in the US than ICANN.'<sup>715</sup> An alternative explanation might be that VeriSign agreed behind closed doors to accept the Guidelines in return for being allowed to carry over its 'testbed' IDN registrations into the live environment. While there is no direct evidence to prove such a link, this would explain the Board's decision to permit retention of the 'testbed' registrations, which was a significant gain for VeriSign.

As pointed out by Mueller, an important issue raised by the prospect of IDN TLDs has been the question of whether incumbent registries should have priority rights on an IDN string that corresponds to the meaning of their existing string in other scripts.<sup>716</sup> The question has significant implications for issues of competition; critics argue that such a policy would project incumbents' market power to the new IDN spaces and lock in their dominance.<sup>717</sup> As far as gTLD registries are concerned, under current

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<sup>712</sup> Government of Egypt (2009). 'Comments and Feedback By the Government of Egypt On the Draft Implementation Plan for IDN ccTLD Fast Track Process.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 5 January 2009. Retrieved 15 July 2011, from <http://forum.icann.org/lists/ft-implementation/pdfAgPsvMrUSP.pdf>

<sup>713</sup> Shea, J (2009). Letter from Jonathan Shea to Rod Beckstrom. 22 October 2009. Retrieved 15 July 2011, from <http://www.icann.org/en/correspondence/shea-to-beckstrom-22oct09-en.pdf>

<sup>714</sup> Ibid

<sup>715</sup> Email from John Klensin to Paul White, 13 July 2009.

<sup>716</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P233

<sup>717</sup> Ibid

policy as laid out in the New gTLDs Applicant Guidebook, incumbent registries are permitted to apply for IDN equivalents of their TLDs but may face competition for those strings; in that event, the outcome would be settled via the string contention process, possibly ultimately resulting in auction.<sup>718</sup> VeriSign has announced plans to apply for 9-20 IDN equivalents of .com in various scripts<sup>719</sup> and has also continued to lobby the Board for a change in policy to permit 'bundled' IDN packages, which would allow them to make a single application for the rights to operate TLDs equating to .com in numerous other scripts rather than having to apply for each separately.<sup>720</sup> Some of the prospective new gTLD registries have also supported a 'bundled' application policy.<sup>721</sup> It is unclear whether VeriSign could feasibly be assigned a Chinese - character equivalent of .com, which would clash with the Chinese government's own unilaterally created version of that TLD (see below). With regards to ccTLDs, the question of whether existing registries should have automatic rights to IDN equivalents of their ASCII TLDs was raised as part of the discussions around Fast Track. Current policy is that this decision will be left to national authorities.<sup>722</sup> Klensin argues that the prospect of gaining additional IDN TLD strings was a key factor motivating the ccTLD registries in their work on Fast Track.<sup>723</sup>

The role played by the registries in this PDP illustrates the point that, despite any idealistic notions of policymaking influence being shared equally among a wide range of stakeholders, in practice some stakeholders are always likely to be more influential than others, simply because their co-operation is vital to make the system work. This potentially gives them much leverage over policy; they hold a 'positional power' that other stakeholders do not. Nonetheless, the registries did not get their own way on every issue (particularly the question of whether incumbent registries would be accorded automatic priority rights on IDN equivalents of their strings).

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<sup>718</sup> ICANN (2011). gTLD Applicant Guidebook. 30 May 2011. Retrieved 15 July 2011, from <http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf> Section 1.1.2.10: String Contention.

<sup>719</sup> DomainNameWire (2011). "VeriSign's Pat Kane Discusses New TLDs and IDNs." DomainNameWire: The domain industry's news service. 7 July 2011. Retrieved 16 August 2011, from <http://domainnamewire.com/2011/07/07/VeriSigns-pat-kane-discusses-new-tlds-and-idns/>

<sup>720</sup> Andruff, R.N. et al (2011). Letter from Ronald N Andruff et al to Peter Dengate Thrush. 11 May 2011. Retrieved 19 August 2011, from <http://www.icann.org/en/correspondence/andruff-et-al-to-dengate-thrush-beckstrom-11may11-en.pdf>

<sup>721</sup> Ibid

<sup>722</sup> See reply by Tina Dam to question by Rahman Khanjohn at IDN ccTLD Fast Track Workshop, 26 October 2009, Seoul, Korea. Transcript retrieved 25 August 2011, from <http://sel.icann.org/meetings/seoul2009/transcript-idn-cctld-fast-track-26oct09-en.txt>

<sup>723</sup> Email from John Klensin to Paul White, 13 July 2009

## Role of the GNSO

The GNSO has played a significant and collaborative role in most of the policy development processes related to IDNs since its inception. Although it supplied no representatives to the original IDN Committee<sup>724</sup> (since this committee was formed before the GNSO's creation), three representatives from the GNSO's Registries Constituency sat on the subsequent IDN Working Group that was responsible for the redrafting of the IDN Guidelines.<sup>725</sup>

In May 2006, the GNSO Council requested that ICANN staff produce a preliminary Issues Report regarding the implementation of IDN TLDs. The Issues Report identified several issues for discussion, which were very similar to those identified in the issues report for new gTLDs (December 2005). These included: selection criteria, allocation methods and contractual criteria.<sup>726</sup> The GNSO Council subsequently established an IDN working group, which reported in March 2007. It identified seven areas for discussion, including: the relationship between IDN gTLDs and non-IDN gTLDs; management of existing IDN second level domains; geopolitical implications of IDNs; issues relating to existing IDN SLD holders; technical policy relating to IDN gTLDs; IDN aspects relating to Privacy & WHOIS Details; and IDN aspects on legal details.<sup>727</sup> The last two topics were accorded a lower priority and were only discussed initially by the Working Group. The report went on to set out some 'areas of agreement' where the Working Group had achieved rough consensus under these headings, and also 'areas of support' where debate still existed. None of its proposals appear particularly radical, in that they mostly advocate what was already established practice (enshrined in the Guidelines) for second level IDNs to be extended to IDN TLDs. For example, the Report proposed a 'no mixed scripts' rule that was already established practice for second-level IDNs, and recommended an approach to

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<sup>724</sup> ICANN (2011). "Internationalized Domain Names (IDN) Committee." Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

<sup>725</sup> ICANN (2005). Announcement: 'Draft Revised IDN Guidelines: Public Comment Period'. 20 September 2005. Retrieved 15 July 2011, from <http://www.icann.org/en/announcements/announcement-20sep05-en.htm>

<sup>726</sup> ICANN (2006). GNSO Preliminary Issues Report Policy Issues relating to IDN at the top-level. 28 May 2006. Retrieved 16 July 2011, from <http://gns0.icann.org/issues/idn-tlds/issues-report-28may06.htm>

<sup>727</sup> ICANN (2007). Outcomes Report of the GNSO IDN WG, Version 3.1. 22 March 2007. Retrieved 28 March, 2009, from [https://st.icann.org/data/workspaces/alaac/attachments/lisbon\\_documents:20070322133647-0-22034/original/GNSO%2520IDN%2520WG%2520Final%2520Outcomes%2520Report%2520-%2520EN.pdf](https://st.icann.org/data/workspaces/alaac/attachments/lisbon_documents:20070322133647-0-22034/original/GNSO%2520IDN%2520WG%2520Final%2520Outcomes%2520Report%2520-%2520EN.pdf)

intellectual property / priority rights, including an assertion that the UDRP does not require modification to deal with IDNs<sup>728</sup>, that was in line with the approach to these issues followed at the second level.<sup>729</sup>

At ICANN's São Paulo meeting in December 2006, joint IDN working group meetings took place between the GNSO and CCNSO, as well as between the CCNSO and GAC, which identified the need for a 'fast track' for some IDN ccTLDs.<sup>730</sup> The concurrence of opinion among the GNSO, CCNSO and GAC on this matter led to the Board's request for the CCNSO and the GAC to produce an issues paper relating to the selection of IDN ccTLDs associated with the ISO 3166-1 two-letter codes.<sup>731</sup> This paper was published on 9 July 2007 and identified a number of general and specific issues for further discussion (see Appendix 5.4 for details).<sup>732</sup> Commenting on the CCNSO-GAC Issues Paper, the GNSO declared itself supportive of 'efforts to determine the feasibility of a fast track process to enable the assignment of a few non-controversial IDN ccTLDs in the interim' and recommended that these should be limited to one IDN ccTLD per ISO 3166-1 country or territory, except in those cases where governmental policy makes selecting a single script impossible.<sup>733</sup> However, the GNSO did warn against allowing IDN ccTLDs to become de facto gTLDs, recommending that the classification of TLDs should be determined prior to allocation of any IDN TLDs and that this should be done jointly by the GNSO and CCNSO.<sup>734</sup>

Following publication of the Issues Paper, the Board created the IDNC Working Group, which included two members from the GNSO.<sup>735</sup> These representatives worked collaboratively with other Working Group members to produce the group's

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<sup>728</sup> Ibid

<sup>729</sup> Ibid

<sup>730</sup> ICANN (2006). Captioning of GNSO Council Meeting in Sao Paulo. 6 December 2006. Retrieved 16 July 2011, from <http://www.icann.org/meetings/saopaulo/captioning-gnsocouncilmeeting-06dec06.htm>

<sup>731</sup> ICANN (2006). Board Resolutions, 29 July 2007. Retrieved 16 July 2011, from <http://www.icann.org/minutes/resolutions-29jun07.htm#m>

<sup>732</sup> ICANN (2007). CCNSO-GAC Issues Paper: "Selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes". 9 July 2007. Retrieved 18 August 2011, from <http://www.icann.org/en/topics/idn/CCNSO-gac-issues-report-on-idn-09jul07.pdf>

<sup>733</sup> ICANN (2008). 'GNSO comments in response to the CCNSO-GAC Issues Report on IDN Issues.' Comment posted to ICANN public comments forum on IDN ccTLD issues. Retrieved 16 July 2011, from <http://forum.icann.org/lists/idn-cctld-issues/msg00013.html>

<sup>734</sup> Ibid

<sup>735</sup> ICANN (2008). "IDNC Working Group (Former)." Retrieved 8 July, 2009, from <http://ccnso.icann.org/workinggroups/idncwg.htm>

Final Report in August 2008. (Hiro Hotta, who was a member of this group, stated in email correspondence with the author that all members of the Working Group operated in a highly collaborative manner, holding ‘vigorous’ discussions both online and in person<sup>736</sup>). Commenting on the Final Report, the GNSO Council was supportive of moving towards implementation of Fast Track.<sup>737</sup> The Council did, however, draw attention to some issues that it felt required further work.<sup>738</sup> These included questions of how to deal with proposed strings not listed in the UNGEGN manual<sup>Note 5\_6</sup>; the GNSO felt that this should be handled in the context of the WIPO II discussions and recommendations regarding territory names and IDNs, along with experience from the geopolitical names discussion in the new gTLD process and expertise from UNESCO. The GNSO further recommended that requests for information be sent to relevant governments and ccTLD managers ‘to gain an understanding of the interest of territories to participate in the Fast Track’, and advised that the introduction of new Fast Track IDN ccTLDs should be processed in well publicised and predictable time schedules in order for stakeholders to attend and respond to the process. It also recommended that IETF work on updating the IDN standards should be completed before the introduction of any IDN TLDs.<sup>739</sup>

In the same document, the GNSO went on to identify some further areas of concern. One of these was the proposal to introduce a method whereby a territory would unilaterally propose a TLD string. This, the GNSO argued, was a significant departure from the current ccTLD practices, and therefore the overall process ‘must be designed and implemented with caution and should include ongoing public review’. It also stated the need for a mechanism to determine the non-contentiousness of a proposed IDN ccTLD. Furthermore, the GNSO expressed concern that, without some form of ‘expressed understanding’ between the registries and ICANN, it was not clear how ICANN policy requirements for IDN deployment, including compliance with IDNA standards and the ICANN IDN Guidelines, could be enforced. Finally, it warned that

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<sup>736</sup> Email from Hiro Hotta to Paul White, 18th July 2009

<sup>737</sup> ICANN (2008). ‘GNSO Council Comments on IDNC WG Final Report.’ Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 14 August 2008. Retrieved 16 July 2011, <http://forum.icann.org/lists/idn-ccTLD-fast-track/pdfGQBTTw4OVN.pdf>

<sup>738</sup> Ibid

<sup>Note 5\_6</sup> The UNGEGN (United Nations Group of Experts on Geographical Names) manuals, published in 2006, address technical issues regarding standardisation of ‘geographical names’ and their use in geo-referenced digital databases.. See United Nations Statistics Division (2011). Statistics and Statistical Methods Publications: Technical reference manual for the standardization of geographical names. Retrieved 18 August 2011, from <http://unstats.un.org/unsd/pubs/gesgrid.asp?id=377>

<sup>739</sup> Ibid

‘confusingly similar’ strings should be avoided, and also of the need to safeguard against misuse of IDNs for spoofing purposes. Nonetheless, the GNSO felt that the Fast Track process should move forward as expeditiously as possible.<sup>740</sup>

The GNSO provided further comments on the Draft Implementation Plan for the IDN ccTLD Fast Track Process (January 2009).<sup>741</sup> It again argued for the need for some sort of contract or formal ‘understanding’ between IDN ccTLD operators and ICANN, which would clarify how compliance with IDNA standards and ICANN policy could be enforced. On the matter of financial contributions from IDN ccTLD operators, the GNSO argued that the IDN ccTLD Fast Track implementation should be fully self-funding and that any contract between the registry and ICANN should include financial requirements as well as technical and operational ones. The GNSO also reiterated that Fast Track IDN ccTLD strings must not be confusingly similar to existing TLDs.

As discussed, many of the GNSO’s concerns were in fact addressed. In the final implementation plan, strings deemed to be confusingly similar to other requested strings or existing TLDs were not permitted.<sup>742</sup> Procedures were put in place for evaluating the non-contentious nature of requested TLDs and for dealing with any disputes.<sup>743</sup> ccTLD managers were not required to sign a formal Registry Agreement type contract, but were required to agree to a minimum set of conditions, including: a commitment to operate in a stable, secure manner; to adhere to IDNA protocols, other pertinent RFCs, and IDN Guidelines; to engage in cooperation to resolve disputes; and not implement DNS redirection and synthesised DNS responses.<sup>744</sup> On cost recovery, application fees were levied from ccTLD applicants; however, payment of the fee (USD \$26,000) for the processing of a request in the String Evaluation Stage was deemed to be ‘expected but not mandatory’.<sup>745</sup> Thus, it could be argued that the

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<sup>740</sup> Ibid

<sup>741</sup> ICANN (2009). ‘GNSO Council Comments on Draft Implementation Plan for IDN ccTLD Fast Track Process.’ Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 7 April 2009. Retrieved 8 August 2011, from <http://forum.icann.org/lists/ft-implementation/pdfv6YTzcuZ9Q.pdf>

<sup>742</sup> ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTld-implementation-plan-16nov09-en.pdf>

<sup>743</sup> Ibid

<sup>744</sup> Ibid

<sup>745</sup> ICANN (2009.) Requestors Manual: Fast Track Request System. Prepared for IDN ccTLD Fast Track Participants. 16 November 2009. Retrieved 4 September 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTld-requestors-manual-16nov09-en.pdf> P4

GNSO failed to ensure that IDN ccTLD registries would be subject to the same terms and conditions as their IDN gTLD counterparts.

The GNSO is also currently supplying four representatives to the IDN ccPDP Working Group set up by the CCNSO Council to develop IDN ccTLD policy beyond Fast Track. The GNSO has further co-ordinated with the CCNSO on IDN issues via the CCNSO/GNSO Joint IDN Working Group (JIG), formed after the Sydney meeting (June 2009)<sup>746</sup> to deal with issues related to the introduction of IDN TLDs that are of common interest to both the GNSO and CCNSO.<sup>747</sup> The JIG has identified three issues of common interest to date; single character IDN TLDs; IDN TLD variants; and universal acceptance of IDN TLDs.<sup>748</sup>

### Role of the CCNSO

Like the GNSO, the CCNSO has played an important and collaborative role in the development of IDNs policy. The importance of the ccTLD registries in developing IDNs has already been discussed; for the past nine years the CCNSO has been the main vehicle through which the ccTLD registries have participated in ICANN's IDN policy development processes.

The original IDN Committee was formed before the CCNSO's creation and so there were no CCNSO representatives per se on that body, though there was a representative of a ccTLD registry (Vincent Wen-Sung Chen of TWNIC).<sup>749</sup> However, the subsequent IDN Working Group, which redrafted the IDN Guidelines, included two CCNSO members out of a total of five.<sup>750</sup>

As discussed, when IDN TLDs first began to come onto the agenda, the CCNSO opened dialogue with both the GNSO and the GAC, culminating in the discussions at Sao Paulo that first identified the need for a 'fast track' to expedite implementation of

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<sup>746</sup> ICANN (2009). Joint CCNSO-GNSO IDN Working Group (JIG WG) Draft Charter. Retrieved 15 August 2011, from <http://ccnso.icann.org/workinggroups/jiwg-charter.pdf>

<sup>747</sup> ICANN (2011). "Ad-Hoc CCNSO/GNSO Joint IDN Working Group." Retrieved 25 August 2011, from <http://ccnso.icann.org/workinggroups/jiwg.htm>

<sup>748</sup> ICANN (2010) JIG Initial Report on Single Character IDN TLDs. 26 July 2010. Retrieved 25 August 2011, from <http://ccnso.icann.org/node/13979>

<sup>749</sup> ICANN (2011). "Internationalized Domain Names (IDN) Committee." Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

<sup>750</sup> ICANN (2005). Announcement: 'Draft Revised IDN Guidelines: Public Comment Period'. 20 September 2005. Retrieved 15 August 2011, from <http://www.icann.org/en/announcements/announcement-20sep05-en.htm>

‘non-controversial’ IDN ccTLDs. The CCNSO Council subsequently adopted the GAC Issues Paper as a CCNSO Issues Paper at its meeting on 27 June 2007.<sup>751</sup> Following this, the CCNSO supplied ten members to the IDNC Working Group, considerably more than any other ICANN organisation (for comparison, the GNSO supplied two members and the GAC three).<sup>752</sup>

Following publication of the IDNC Working Group’s Final Report, drafting of the actual Implementation Plan was passed to ICANN staff. However, the CCNSO continued to provide comments on the process. On 4 March 2009, the CCNSO Council made a statement of its position<sup>753</sup>, in which it addressed a number of the outstanding issues. It asserted that formal registry agreements between ICANN and an IDN ccTLD manager should be voluntary and not a requirement for the delegation of the IDN ccTLD (matching current policy with regards to ASCII ccTLDs). However, it went on to state that such a documented relationship should be ‘encouraged’, and that it was in the best interest of IDN ccTLDs managers to adhere to all relevant IETF standards and the IDN Guidelines. On the matter of financing and cost recovery, the CCNSO stated that financial contributions should be voluntary and should not be a requirement for the delegation of an IDN ccTLD. As discussed, the final Implementation Plan complied with both of these recommendations.

Beyond Fast Track, the CCNSO is currently working on a full PDP to create future policy that will eventually guide the delegation of additional IDN ccTLDs. In October 2007, the CCNSO Council initiated the country code Policy Development Process (ccPDP) to develop policy for the selection and delegation of IDN ccTLDs and asked ICANN to create an Issue Report.<sup>754</sup> A finalised Issues Report was released after some delay in April 2009.<sup>755</sup> It identified five areas for discussion regarding ccTLDs (see Appendix 5.6) and recommended that the CCNSO Council proceed with an IDN

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<sup>751</sup>ICANN (2007). Minutes of meeting of the CCNSO Council – San Juan. 27 June 2007. Retrieved 23 August 2011, from <http://ccnso.icann.org/meetings/san-juan/amended-CCNSO-council-minutes-27jun07.pdf>

<sup>752</sup> ICANN (2008). “IDNC Working Group (Former).” Retrieved 8 July, 2009, from <http://ccnso.icann.org/workinggroups/idncwg.htm>

<sup>753</sup>ICANN (2009). Resolution of the CCNSO Council in respect to IDN ccTLDs delegated under the Fast Track. 4th March 2009. Retrieved 29 July 2011, from <http://ccnso.icann.org/workinggroups/idn-resolution-04mar09.pdf>

<sup>754</sup> ICANN (2007). Minutes of meeting of the CCNSO Council – Los Angeles. 31 October 2007. Retrieved 29 July 2011, from <http://ccnso.icann.org/meetings/losangeles/CCNSO-council-minutes-31oct07.pdf>

<sup>755</sup>ICANN (2009). Final Issues Report on IDN ccPDP. 2 April 2009. Retrieved 29 July 2011, from <http://ccnso.icann.org/workinggroups/final-issues-report-idn-ccpdp-02apr09.pdf>

ccPDP to develop policy for the selection and delegation of IDN ccTLDs. The CCNSO Council voted to proceed with the ccPDP on 7 April,<sup>756</sup> setting up an IDN ccPDP Working Group to ‘report on and identify a feasible policy for the selection and delegation of IDN ccTLDs associated with the territories listed in ISO 3166-1’, within the context of the wider IDN ccPDP.<sup>757</sup> The Working Group included 17 representatives from ccTLD registries, but also had members from the GNSO, ALAC and GAC, as well as from the SSAC, the technical community and ICANN staff.<sup>758</sup> Its initial draft topic paper (October 2009) identified thirteen areas for discussion<sup>759</sup> (see Appendix 5.7.A for further details), which were near-identical to those set out in the CCNSO-GAC Issues Paper of 2007.<sup>760</sup> A Public Comments Period was held on the draft topic paper between 20<sup>th</sup> October and 3<sup>rd</sup> November 2009,<sup>761</sup> however no relevant comments appear to have been made on the specified forum during that time period.<sup>762</sup> A further topic paper was produced in February 2010, which expanded slightly on the range of issues for discussion<sup>763</sup> (see Appendix 5.7B for more details). The Working Group published its first Progress Report in November 2010,<sup>764</sup> reporting agreement on some draft points of policy but ongoing discussion on others. Areas where tentative agreement was reached can be found in Appendix 5.7.C. A PCP was announced on the progress report between 29<sup>th</sup> November 2010 and 14<sup>th</sup> January 2011<sup>765</sup>; however no comments were submitted to the specified forum.<sup>766</sup>

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<sup>756</sup> ICANN (2009). Resolutions of the CCNSO Council Relating to the Initiation of the IDN ccPDP. 7 April 2009. Retrieved 29 July 2011, from <http://ccnso.icann.org/node/10976>

<sup>757</sup> ICANN (2011). “CCNSO IDN PDP Working Group 1.” Retrieved 14 August 2011, from <http://ccnso.icann.org/workinggroups/ipwg1.htm>

<sup>758</sup> Ibid

<sup>759</sup> ICANN (2009). Draft Topic Paper: “Internationalised Domain Names country code supporting organisation policy development process working group on Selection and Delegation of IDN ccTLDs (IDNccPDP WG 1)”. 16 October 2009. Retrieved 14 August 2011, from <http://ccnso.icann.org/workinggroups/idn-topic-paper-16oct09-en.pdf>

<sup>760</sup> ICANN (2007). CCNSO-GAC Issues Paper: “Selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes.” 9 July 2007. Retrieved 18 August 2011, from <http://www.icann.org/en/topics/idn/CCNSO-gac-issues-report-on-idn-09jul07.pdf>

<sup>761</sup> ICANN (2009) Announcement: ‘Public Comments Requested on Draft Topic Paper for Policy on the Introduction of IDN ccTLDs’. 20 October 2009. Retrieved 14 August 2011, from <http://ccnso.icann.org/announcements/announcement-20oct09.htm>

<sup>762</sup> ICANN Public Comments Forum on IDN Country-Code Policy Development Process. Retrieved 18 July 2011, from <http://forum.icann.org/lists/idn-ccpdp/>

<sup>763</sup> ICANN (2010). Draft Final topic paper WG 1 of the IDN ccPDP. 26 February 2010. Retrieved 14 August 2011, from <http://ccnso.icann.org/workinggroups/draft-final-topic-paper-wg1-26feb10-en.pdf>

<sup>764</sup> ICANN (2010). 29 November 2010. IDN ccPDP Working Group 1 Progress Report: “IDN ccTLD String Selection Criteria and Requirements.” Retrieved 16 August 2011, from <http://ccnso.icann.org/workinggroups/final-progress-report-idn-ccpdp-wg1-29nov10-en.pdf>

<sup>765</sup> ICANN (2010). Announcement: ‘IDN PDP Working Group 1 Publishes its First Progress Report’. 29 November 2010. Retrieved 14 August 2011, from <http://ccnso.icann.org/announcements/announcement-29nov10-en.htm>

<sup>766</sup> ICANN Public Comments Forum on IDN ccPDP Working Group 1 Progress Report. Retrieved 14 August 2011, from <http://forum.icann.org/lists/idnpdpwg1-progressreport/>.

As mentioned, the CCNSO has further co-ordinated with the GNSO on IDN issues via the CCNSO/GNSO Joint IDN Working Group (JIG).<sup>767</sup>

### Role of the GAC

The GAC has been strongly supportive of ICANN's work on IDNs and has participated actively and collaboratively in the policymaking process, particularly through the representatives it has supplied to the IDN Committee and to the IDNC Working Group, and also through ongoing dialogue with other ICANN bodies at successive workshops and meetings. Unlike the New gTLDs policy development area, no significant disputes have emerged between the GAC and Board over IDNs. A key priority for the GAC appears to be securing recognition for the primacy of governmental public policy authority particularly over IDN ccTLDs; so far IDN ccTLD delegation has complied with that principle.

#### *Initial GAC policy statements on IDNs*

The first GAC statement on IDNs was produced at the Melbourne meeting (March 2001). It recognised three key public policy considerations in the introduction of IDNs: 'the essential importance of interoperability of the present and future Internet; the prevention of cyber-squatting and resolution of disputes in the IDN environments; and the application of competition and market access, consumer protection and intellectual property principles.'<sup>768</sup> The GAC established an IDN working group to examine these public policy issues and provide substantive advice regarding IDNs.<sup>769</sup> At the following meeting in Stockholm (June 2001), the GAC stated nine Principles on IDNs (see Appendix 5.1.B). These mainly concerned the 'testbeds', which the GAC was concerned should not be allowed to endanger the stability and security of the DNS; should not be assumed to confer any rights in future live IDN environments;

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<sup>767</sup> ICANN (2009). Joint CCNSO-GNSO IDN Working Group (JIG WG) Draft Charter. Retrieved 15 August 2011, from <http://ccnso.icann.org/workinggroups/jiwg-charter.pdf>

<sup>768</sup> ICANN (2001). GAC Communique VIII – Melbourne. 10 March 2001. Retrieved 8 July 2011, from <https://gacweb.icann.org/display/gacweb/GAC+8+Meeting+Melbourne%2C+Australia+-+9-10+March+2001>

<sup>769</sup> Ibid

should not undermine the standardisation process; and should not become effectively premature market launches in another guise.<sup>770</sup>

### *IDN Committee*

The GAC supplied one representative to the IDN Committee, Mohamed Sharil Tarmizi (Malaysia).<sup>771</sup> Following the release of the IDN Committee's Final Report in June 2002<sup>772</sup>, the GAC released a brief statement noting the recommendations and restating its advice that ICANN should 'exercise great care in the introduction of IDNs and to consult all parties affected by the introduction of IDNs'.<sup>773</sup>

### *IDN Guidelines: GAC response*

The GAC made no specific comment on any iteration of the IDN Guidelines. However, the GAC continued to be supportive of ICANN's efforts towards implementation of IDNs, as shown in GAC communiqués and correspondence with the Board.<sup>774</sup>

### *IDN ccTLDs and Fast Track*

The GAC played a particularly important role in setting up the Fast Track process for IDN ccTLDs. As discussed, the initial concept for the IDN ccTLD Fast Track developed out of discussions between the GNSO and CCNSO and between the

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<sup>770</sup> ICANN (2001). GAC Principles on Internationalised Domain Names, as stated in GAC Communiqué IX – Stockholm. 2 June 2001. Retrieved 3 August 2009, from [https://gacweb.icann.org/download/attachments/1540197/GAC\\_09\\_Stockholm\\_Communique.pdf?version=1&modificationDate=1312230827000](https://gacweb.icann.org/download/attachments/1540197/GAC_09_Stockholm_Communique.pdf?version=1&modificationDate=1312230827000)

<sup>771</sup> ICANN (2011). "Internationalized Domain Names (IDN) Committee." Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

<sup>772</sup> ICANN (2002). Internationalized Domain Names (IDN) Committee: Final Report to the ICANN Board. 27 June 2002. Retrieved 8 January, 2009, from <http://www.icann.org/en/committees/idn/final-report-27jun02.htm>

<sup>773</sup> ICANN (2002). GAC Communiqué XIV – Shanghai. 29 October 2002. Retrieved 8 July 2011, from [https://gacweb.icann.org/download/attachments/1540203/GAC\\_14\\_Shanghai\\_Communique.pdf?version=1&modificationDate=1312229903000](https://gacweb.icann.org/download/attachments/1540203/GAC_14_Shanghai_Communique.pdf?version=1&modificationDate=1312229903000)

<sup>774</sup> See for example, ICANN (2004). GAC Communiqué XX – Kuala Lumpur. 20 July 2004. Retrieved 8 July 2011, from [http://gac.icann.org/system/files/GAC\\_20\\_Kuala\\_Lumpur\\_Communique.pdf](http://gac.icann.org/system/files/GAC_20_Kuala_Lumpur_Communique.pdf). Also see Tarmizi, M.S. (2005). Letter from Mohammed Sharil Tarmizi to Paul Twomey, 3 April 2005. Retrieved 4 November 2011, from <http://www.icann.org/en/correspondence/tarmizi-to-twomey-03apr05.htm>

CCNSO and the GAC.<sup>775</sup> The GAC produced the initial Issues Report relating to the introduction and selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes, which was subsequently adopted by the CCNSO<sup>776</sup> and submitted to the Board as a joint GAC / CCNSO Issues Paper entitled ‘Selection of IDN ccTLDs associated with the ISO 3166-1 two-letter codes.’<sup>777</sup> Upon establishment of the IDNC Working Group, the GAC supplied three members: Bertrand de La Chapelle (France), Manal Ismail (Egypt) and Janis Karklins (Latvia / GAC Chair).<sup>778</sup>

On 13 June 2008, the IDNC Working Group Draft Final Report of Recommendations for IDN ccTLD Fast Track Mechanism was made available and posted for comments.<sup>779</sup> The GAC remained supportive of the implementation strategy, with Karklins stating a belief that the ccTLD Fast Track should progress to implementation in 2009.<sup>780</sup>

At the Nairobi meeting (March 2010), the GAC adopted a set of ‘GAC Interim Principles on IDN ccTLDs’.<sup>781</sup> (See Appendix 5.8) Among other points, these principles were an assertion of governmental public authority over IDN ccTLDs; this was explicitly stated in Principle 4. Principle 5 declared that no IDN ccTLDs should be created without the express approval of the government in question, while Principle 10 asserted that only the relevant government could give authoritative advice about the legitimacy of a given application.

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<sup>775</sup> ICANN (2009). IDN ccTLD Fast Track Program Proposed Implementation Details Regarding Financial Contributions to Support the Development and Deployment of IDN ccTLDs. 29 May 2009. Retrieved 18 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/proposed-implementation-details-financial-contributions-29may09-en.pdf> P1

<sup>776</sup> At its meeting on 27 June 2007, the CCNSO Council adopted the GAC Issues Paper as a CCNSO Issues Paper. See ICANN (2011). Minutes of meeting of the CCNSO Council, 27 June 2007. Retrieved 10 July 2010, from <http://ccnso.icann.org/meetings/san-juan/amended-CCNSO-council-minutes-27jun07.pdf>

<sup>777</sup> ICANN (2007). Issues Paper: “Selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes”. Retrieved 7 July, 2009, from <http://www.icann.org/en/topics/idn/CCNSO-gac-issues-report-on-idn-09jul07.pdf>.

<sup>778</sup> ICANN (2008). “IDNC Working Group (Former).” Retrieved 8 July, 2009, from <http://ccnso.icann.org/workinggroups/idncwg.htm>

<sup>779</sup> ICANN (2008). Announcement: ‘Draft Final Report of Recommendations for IDN ccTLD Fast Track Mechanism Made Available: 13 June 2008’. Retrieved 4 July, 2009, from <http://www.icann.org/en/announcements/announcement-3-13jun08-en.htm>

<sup>780</sup> Karklins, J. (2009). Letter from Janis Karklins to Peter Dengate Thrush, 10 March 2009. Retrieved 30 August 2011, from <http://gac.icann.org/system/files/karklins-to-dengate-thrush-10mar09-en.pdf>

<sup>781</sup> ICANN (2010). GAC Communique XXXVII – Nairobi. 10 March 2010. Retrieved 30 August 2011, from [https://gacweb.icann.org/download/attachments/1540146/GAC\\_37\\_Nairobi\\_Communique.pdf?version=1&modificationDate=131222673000](https://gacweb.icann.org/download/attachments/1540146/GAC_37_Nairobi_Communique.pdf?version=1&modificationDate=131222673000)

Since delegation of the first IDN ccTLDs began in April 2010, the GAC has had the opportunity to comment on each delegation via its liaison to the Board. On the occasion of the first four ccTLD delegations being brought before the Board, Janis Karklins, attending the meeting as GAC representative, raised no objections, although he did caution that without full definition of the community support requirements, there was a risk that some countries and territories would be differently organised and it would be unfair to impose an undefined standard.<sup>782</sup>

The GAC is currently supplying one member to the IDN ccPDP Working Group set up by the CCNSO Council to develop IDN ccTLD policy beyond Fast Track.<sup>783</sup> The draft policy points ('Overarching Principles') so far produced by this group<sup>784</sup> can be compared to several of the Interim GAC Principles on IDN ccTLDs, particularly the recognition that the relevant Government or Public Authority 'needs to be involved as a key factor ("has to be taken very seriously") and at a minimum express its non-objections'.

### *IDN gTLDs*

The implementation of IDN gTLDs forms an integral part of the new gTLDs policy development process and thus the GAC's response to these has been integrated with its approach to new gTLDs in general. Although there have been significant disputes between the GAC and Board over some aspects of the new gTLDs programme, these have not related specifically to IDNs.

### Role of public comments

(See Appendix 5.9A for a detailed review of each public comments period. See Appendix 5.9B for a statistical breakdown of all public comments periods.)

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<sup>782</sup> ICANN (2010). Minutes of special meeting of the Board. 22 April 2010. Retrieved 30 August 2011, from <http://www.icann.org/en/minutes/minutes-22apr10-en.htm>

<sup>783</sup> ICANN (2011). "CCNSO IDN PDP Working Group 1." Retrieved 14 August 2011, from <http://ccnsso.icann.org/workinggroups/ipwg1.htm>

<sup>784</sup> ICANN (2010). Progress Report: "IDN ccTLD String Selection Criteria and Requirements IDN ccPDP Working Group. 1-29 November 2010". Retrieved 30 August 2011, from <http://ccnsso.icann.org/workinggroups/final-progress-report-idn-ccpdp-wg1-29nov10-en.pdf>

### *Overall analysis of online public comments*

The most striking observation is the low volume of public comments submitted in this policy development area. A total of only 143 comments have been received across all official public comments periods (excluding comments submitted outside of official comments periods) and some PCPs attracted no comments at all. This suggests that IDNs policy is of interest to fewer individuals and interest groups than new gTLDs policy, and may also suggest that the policy area is less controversial. Of the 143 comments that were received, only three posters were opposed outright to the principle of introducing IDNs (all in the first PCP), and most of the discussion focused on particular points of policy, as opposed to the general question of whether IDN SLDs or TLDs ought to be introduced. Again, this contrasts with gTLDs policy, where a significant minority (11.9% over all PCPs) were opposed outright to new gTLDs. This may be partly explained by the fact that existing gTLDs could arguably be said to be adequate for the time being, and it can therefore be plausibly argued that no new gTLDs are required at this time, whereas it is difficult to make the argument that IDNs are not required at all.

The intellectual property lobby was conspicuous by its absence. Only two comments were posted by trademark interests (INTA) and only a handful of comments across all PCPs focused on trademark protection mechanisms. This is perhaps surprising, given the potential for IDNs to eventually result in many new TLDs and therefore open up new opportunities for cybersquatting. It represents another huge contrast with the new gTLDs policy development area, where 19.5% of the comments focused on trademark issues, and where similar protection mechanisms to those proposed for IDNs, such as sunrise periods, were not felt by the intellectual property lobby to be adequate.

Nonetheless, the comments that were received represented quite a wide variety of stakeholders, as shown in Appendix 5.9B . Unfortunately, around half of posters did not disclose their background or affiliation; nonetheless, those that could be identified represented a mix of registries, registrars, other private companies, governments and governmental agencies, academics, technical organisations such as APTLD, internet governance bodies such as the IAB and IETF, regional technical IGOs such as the Arab Team for Domain Names and Internet Issues, ICANN staff, the GNSO and its constituencies, INTA and private individuals. This represents a useful cross-section of

the range of organisations and entities involved in IDN issues. Private companies represented the largest single group of commentators, making up almost half of all identifiable posters (note that this includes registries and registrars). Overall, as with new gTLDs, it is clear that the ‘public’ comments periods were dominated by interested parties rather than the general ‘Internet using public’.

The overall effect that public comments had on IDNs policy development is more difficult to gauge, but some general observations may be offered. For the most part, the comments received on the drafts of the IDN Guidelines do not appear to have influenced the final versions of those documents. However, Fast Track policy seems to be mostly in accordance with majority opinion on the public comments boards. For example, the final version of the Fast Track Implementation Plan specified that payment of a percentage of registration fees to ICANN would be voluntary (though ‘expected’) <sup>785</sup>, an approach supported by more public commentators than mandatory payment. Contracts between ICANN and IDN ccTLD registries were also made voluntary, with registries having to make a mandatory commitment ‘to TLD operations that will secure and enhance the stability and interoperability of the Internet's Domain Name System (DNS) for the benefit of the local and global Internet community, and to working in good faith together with ICANN towards a stable and secure Internet DNS.’ <sup>786</sup> This was the model favoured by the majority of those who commented on this issue.

Patrick Faltstrom, who served on the IDNs Committee, was contacted by the author and asked directly how public comments were taken into account by the Committee; he replied that public comments were used to help determine ‘what the consensus was’ but offered no further details. This appears to have some echoes of the remarks made by Bruce Tonkin and Philip Sheppard that public comments were taken into account by the New TLDs Committee ‘as much as possible’.<sup>787</sup> In other words, Committee members appear to have been aware of the public comments and may or may not have been influenced by them, but they were apparently not used in any systematic way.

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<sup>785</sup> ICANN (2009). Proposed Final Implementation Plan for IDN ccTLD Fast Track Process. 30 September 2009. Retrieved 22 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTLD-implementation-plan-30sep09-en.pdf> P38

<sup>786</sup> Ibid, P39

<sup>787</sup> Email from Patrik Faltstrom to Paul White, 12 July 2009

In any event, given the low number of comments offered in most PCPs on IDNs, perhaps it would not be reasonable to expect the opinions of a handful of people or organisations to have a major influence on policy outcomes.

### *Role of public input at ICANN meetings*

An examination of transcripts from IDN Workshops reveals that very few members of the ‘general public’ spoke at these meetings. The limited number of people who commented from the floor were almost invariably individuals with a stake or direct interest in IDN matters. (See Appendix 5.3).

### Role of the Board

The Board does not appear to have intervened in the policy development processes surrounding IDNs to anything like the extent it did with New gTLDs policy. Instead, it has mostly acted to approve policy proposals developed from below, which is more in keeping with the way the ICANN model is meant to operate. IDN issues have been mostly uncontroversial at Board level. The decision to approve IDN implementation at the second level by acceptance of the initial IDN guidelines was passed unanimously (March 2003).<sup>788</sup> Approval for the ccTLD Fast Track (October 2009) was passed with one abstention.<sup>789</sup> Approval for IDN gTLDs (June 2011) came as part of the approval for the new gTLDs programme, which was passed by majority vote<sup>790</sup>; however the issues that caused certain Directors to vote against or abstain were not related specifically to IDNs according to their statements at the meeting in question.<sup>791</sup>

### Role of RSSAC and SSAC

The IDNs policy area also offers some illustration of the roles played by the RSSAC and SSAC within the ICANN regime. These bodies, dominated by the technical

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<sup>788</sup> ICANN (2003). Minutes of regular meeting of the Board. 27 March 2003. Retrieved 19 August 2011, from <http://www.icann.org/minutes/minutes-27mar03.htm>

<sup>789</sup> ICANN (2009). Transcript of regular meeting of the Board. Retrieved 19 August 2011, from <http://sel.icann.org/meetings/seoul2009/transcript-board-meeting-30oct09-en.txt>

<sup>790</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>791</sup> ICANN (2011). Transcript of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://singapore41.icann.org/meetings/singapore2011/transcript-board-new-gtlds-20jun11-en.txt>

community, have had relatively little direct involvement in policymaking and have shown little evidence of promoting any agenda of their own. They have, however, been called upon at several stages in the process to oversee laboratory and live testing and to evaluate the potential effects of introducing IDNs, particularly into the root zone. Given ICANN's core mandate to ensure the technical stability and security of the DNS, the advice of these bodies on such matters carries much weight. Current RSSAC advice is that the proposed introduction of no more than 1000 TLD entries per year for the next several years is anticipated to cause no stability problems. RSSAC will carry out further studies in order to model the theoretical capacity of the root nameserver system and will also monitor the system's performance.<sup>792</sup> The SSAC, however, has warned about potential instabilities that could be caused by IDN TLD variants; some technical and operational matters remain to be worked out, including methods to ensure that variants point to the same locations.<sup>793</sup>

### Roles of other actors

#### *United States government*

As with other types of TLD, the addition of IDN TLDs to the root requires acquiescence from the US Department of Commerce, since the US government still claims legal ownership of the root. The DoC appears to have been relatively silent on this issue-area, compared with its strongly worded comments on new gTLDs. Its main concern appears to have been the need to ensure that the introduction of IDN TLDs would not have detrimental effects on the stability of the DNS.

In December 2008, a letter from Meredith A. Baker (Acting Assistant Secretary for Communications and Information) urged ICANN to ensure that the introduction of a potentially large number of new gTLDs, including IDN TLDs, would not jeopardise the stability and security of the DNS.<sup>794</sup> This was echoed in Article 5 of the 2009

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<sup>792</sup> Murai, J. (2010). Letter from Jun Murai to ICANN Board, 25 June 2010. Retrieved 25 August 2011, from <http://www.icann.org/en/correspondence/murai-to-board-25nov10-en.pdf>

<sup>793</sup> ICANN (2010). SSAC Update on Root Scaling Issues. 9 March 2010. Retrieved 22 August 2011, from <http://nbo.icann.org/meetings/nairobi2010/presentation-root-scaling-09mar10-en.pdf> P6

<sup>794</sup> Baker, M.A. (2008). Letter from Meredith A. Baker to Peter Dengate Thrush. 18 December 2008. Retrieved 30 August 2011, from <http://www.icann.org/en/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>

Affirmation of Commitments, which, however, also states that ‘DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names’, provided related security, stability and resiliency issues are first addressed.<sup>795</sup>

### *European Union*

The EU has mostly contributed to the PDP via the GAC. In its only official correspondence with ICANN on the matter, the European Commission endorsed the principles of IDN TLDs and Fast Track.<sup>796</sup>

### *Chinese government*

In February 2006, the PRC government unilaterally announced the creation of three Chinese-character TLDs, corresponding to .com, .net and .org, in the nameservers under its control.<sup>797</sup> These domains only appear as TLDs from within China; if accessed from outside the country they appear under the .cn namespace, thus maintaining compatibility with the ICANN root. Mueller argues that, by taking this action, China effectively pre-empted the award of these IDN TLDs; with them in place, ICANN would not dare to award similar Chinese-character TLDs to anyone else because of the incompatibilities and instabilities that would result.<sup>798</sup> Thus, he concludes, the matter provides an instance of ICANN’s authority being effectively checked by the threat that states will defect from the network.<sup>799</sup> As will be argued,

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Also see NTIA (2008). Comments for ICANN's public consultation on new generic top level domains (gTLDs). 18 December 2008. Retrieved 30 August 2011, from <http://www.ntia.doc.gov/other-publication/2008/comments-icanns-public-consultation-new-generic-top-level-domains-gtlds>

<sup>795</sup> ICANN / United States Department of Commerce (2009). Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. Signed 30 September 2009. Retrieved 20 June, 2010, from <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>796</sup> Zangl, P (2007). Letter from Peter Zangl to Vint Cerf. 29 October 2007. Retrieved 29 August 2011, from <http://www.icann.org/en/correspondence/zangl-to-cerf-29oct07.pdf>

Reding, V. (2009). Letter from Viviane Reding to Rod Beckstrom. 16 November 2009. Retrieved 29 August 2011, from <http://www.icann.org/en/correspondence/reding-to-beckstrom-16nov09-en.pdf>

<sup>797</sup> Ward, M (2006). “Big push for Chinese net domains.” BBC News, 3 March 2006. Retrieved 9 August 2009, from <http://news.bbc.co.uk/1/hi/technology/4767972.stm>

<sup>798</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press.

<sup>799</sup> Ibid

the potential for states to defect from the regime is a key factor giving them considerable leverage over ICANN policy.

### *Other national governments*

For the most part, governments have contributed to the process via their GAC representatives; however, a few individual governments (besides the US) submitted comments directly. Governmental agencies of Egypt<sup>800</sup>, Morocco<sup>801</sup>, Jordan<sup>802</sup> and Qatar<sup>803</sup> submitted comments to the Public Comments forum. Qatar and Egypt favoured voluntary financial contributions only and a 'lightweight' relationship between ICANN and IDN ccTLD operators, without mandatory formal contracts; as discussed, this has been the policy adopted for Fast Track. Jordan also opposed formal contracts. The governments of Russia,<sup>804</sup> Bulgaria<sup>805</sup> and Greece<sup>806</sup> sent formal correspondence to ICANN endorsing the Fast Track programme and requesting to be a part of it. No government appears to have expressed significant dissatisfaction with ICANN's implementation of IDN policy to date.

The Arabic Team for Domain Names, a body created by the intergovernmental Arab League, also supplied some comments. This group also opposed formal registry

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<sup>800</sup> Egypt /NTRA (2008). 'Comments by the National Telecom Regulatory Authority of Egypt on the Draft Methodology for Fast Track.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 24 April 2008. Retrieved 5 August 2009, from <http://forum.icann.org/lists/idn-ccTld-fast-track/msg00014.html> and

Egypt / NTRA (2009). 'Egypt's Comments on Rev3.0 of the Draft Implementation Plan for IDN ccTLDs Fast Track Process.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 15 July 2009. Retrieved 5 August 2009, from <http://forum.icann.org/lists/ft-implementation/msg00034.html>

<sup>801</sup> ANRT / Morocco (2008). 'Comments from the Moroccan National Telecommunications Regulatory Agency (ANRT) regarding the DRAFT Methodology for Fast Track.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. Retrieved 5 August 2009, from <http://forum.icann.org/lists/idn-ccTld-fast-track/msg00012.html>

<sup>802</sup> NTIC/Jordan (2008). 'Comments of National Information Technology Center of Jordan on IDN Fast Track.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 16 July 2008. Retrieved 5 August 2009, from <http://forum.icann.org/lists/idn-ccTld-fast-track/msg00022.html>

<sup>803</sup> Qatar Supreme Council of Information and Communication Technology (2009). 'Plan for the IDN ccTLD ( Rev.3), ictQATAR, State of Qatar.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. Retrieved 5 August 2009, from <http://forum.icann.org/lists/ft-implementation/msg00035.html>

<sup>804</sup> Schegolev . I.O. (2008) Letter from Igor O. Schegolev to Paul Twomey, 19 June 2008. Retrieved 29 August 2011, from <http://www.icann.org/en/correspondence/shchegolev-to-twomey-19jun08.pdf>

<sup>805</sup> Vatchkov, P. (2008) Letter from Plamen Vatchkov to Paul Twomey, 18 June 2008. Retrieved 29 August 2011, from <http://www.icann.org/en/correspondence/vatchkov-to-twomey-18jun08-en.pdf>

<sup>806</sup> Anastasopoulos, G. (2008). Letter from George Anastasopoulos to Paul Twomey, 28 July 2008. Retrieved 29 August 2011, from <http://www.icann.org/en/correspondence/anastasopoulos-to-twomey-28jul08.pdf>

agreements<sup>807</sup> and mandatory financial contributions from IDN ccTLD registries to ICANN.<sup>808</sup>

### *ALAC*

The ALAC had a certain amount of direct involvement in the policymaking process via its supplying of two representatives to the IDNC Working Group.<sup>809</sup> The ALAC also submitted comments to the Public Comments Periods.

In August 2009, the ALAC submitted a formal statement to the Board regarding its position on Fast Track.<sup>810</sup> The statement was generally supportive of the programme and urged concerted action by all relevant stakeholders to resolve all remaining issues and move forward with Fast Track implementation in the last quarter of 2009. The ALAC did, however, warn that the estimated processing fees of approximately \$24,391 per request plus \$115,000 of fixed costs was 'prohibitively high' and represented a financial barrier for IDN ccTLD managers especially from developing countries which would 'widen the digital divide'. The ALAC proposed an alternative model of cost recovery intended to result in a more affordable up-front fee. Ultimately, in the final implementation the ALAC's alternative model was not adopted, but payment of the fee was, as discussed, deemed 'expected but not mandatory'.<sup>811</sup>

The ALAC also currently supplies one member to the IDN ccPDP Working Group set up by the CCNSO to develop IDN ccTLD policy beyond Fast Track.

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<sup>807</sup> Oueichek, I. (2008). 'Comments from the Arabic team for domain names regarding the fast track draft interim report'. Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 22 April 2008. Retrieved 30 August 2011, from <http://forum.icann.org/lists/idn-cctld-fast-track/msg00009.html>

<sup>808</sup> Oueichek, I. (2009). 'Comments from the Arab Team for Domain Names and Internet Issues on Rev3.0 of the Draft Implementation Plan for IDN ccTLDs Fast Track Process.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 16 July 2009. Retrieved 30 August 2011, from <http://forum.icann.org/lists/ft-implementation/msg00036.html>

<sup>809</sup> ICANN (2008). "IDNC Working Group (Former)." Retrieved 8 July, 2009, from <http://ccnso.icann.org/workinggroups/idncwg.htm>

<sup>810</sup> ICANN (2009). 'ALAC Comment on the 3rd Revision of the Draft Implementation Plan for IDN ccTLDs.' Comment posted to ICANN public comments forum on IDN ccTLD Fast Track implementation. 27 July 2009. Retrieved 24 August 2011, from <http://forum.icann.org/lists/ft-implementation/pdfXTXo9udqHp.pdf>

<sup>811</sup> ICANN (2009.) Requestors Manual: Fast Track Request System. Prepared for IDN ccTLD Fast Track Participants. 16 November 2009. Retrieved 4 September 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-requestors-manual-16nov09-en.pdf> P4

## *DNSO*

Prior to its replacement by the GNSO and CCNSO in the 2002-03 reforms, the DNSO had begun to play a role in ICANN's early work on IDNs. In March 2001, the DNSO Names Council established an interim committee to propose terms of reference on Multilingual Domain Names.<sup>812</sup> The Names Council also requested ICANN to review and evaluate the VeriSign testbed prior to live launch of IDN registrations<sup>813</sup> and presented a business plan at the Melbourne meeting calling for the establishment of a task force to develop consensus policies for the implementation of internationalised domain names.<sup>814</sup> The DNSO's recognition of the IDN issue, together with the interest shown by the GAC, helped to put the matter on the ICANN agenda.<sup>815</sup>

Following the creation of the IDN Committee in September 2001, the DNSO supplied one member to that Committee.<sup>816</sup>

## *ICANN staff*

Compared with new gTLDs policy, ICANN staff appear to have played less of a role in filling in details of policy. Staff were, however, responsible for drafting up the implementation plan for Fast Track.

## **Conclusions**

### Summary and analysis of key patterns

In some respects, the IDNs policy development case study has revealed some quite different patterns compared with new gTLDs policy. Whereas the addition of new ASCII TLDs is trivial task from a technical perspective and raises only public policy

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<sup>812</sup> Park, Y.J. (2001). Email from Y.J. Park to DNSO Council members: RE: Interim Committee on Internationalized Domain Names. 16 March 2001. Retrieved 30 August 2011, from <http://www.dnso.org/clubpublic/council/Arc05/msg00018.html>

<sup>813</sup> Park, Y.J. (2001). Email from Y.J. Park to IDN Task Force members: RE: IDN TF Update. 2 October 2001. Retrieved 30 August 2011, from <http://www.dnso.org/clubpublic/nc-idn/Arc00/msg00001.html>

<sup>814</sup> ICANN (2001). Minutes of regular meeting of the Board. 13 March 2001. Retrieved 24 August 2011, from <http://www.icann.org/en/minutes/minutes-13mar01.htm>

<sup>815</sup> Ibid

<sup>816</sup> ICANN (2011). "Internationalized Domain Names (IDN) Committee." Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

issues rather than technical ones, IDN implementation has been uncharted territory in terms of technology as well as public policy. Particularly in the earlier years, ICANN was heavily reliant on other organisations in developing IDN technology. It has relied on the IETF for the IDNA standard, ISO and the Unicode Consortium for character tables, and software developers such as Microsoft and the Mozilla Foundation to provide IDNA compatible applications. There has also been a reliance on outside agencies to provide the linguistic and cultural expertise that does not exist within ICANN, particularly when dealing with matters such as defining a language or script and creating relevant conversion tables.

Compared to new gTLDs policy, the development of IDNs policy appears to have been somewhat less controversial for the most part. This is all the more interesting considering the range of organisations and interests that have been represented in the policymaking process. The IDN working groups and committees have tended to draw their membership from across ICANN and even from outside agencies. This policy development process has thus appeared, on the surface, to be very much ‘multistakeholder’ in nature. Furthermore, the various groups involved in bodies such as the IDNs Committee have tended to work collaboratively. Although this was difficult to confirm from the documentary evidence alone, it is the perception expressed by members of those bodies contacted by the author.<sup>Note 5\_7</sup>

However, closer inspection reveals that, despite the collaborative nature of the various policy committees working on IDNs, IDN policymaking could not be said to have been based on broad multistakeholderism in the truest sense. While a wide set of groups may have been given a chance to voice an opinion, a much more limited set of stakeholders have often been in the driving seat in terms of producing concrete policy.

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<sup>Note 5\_7</sup> According to one of its members, Patrik Falstrom (a representative of the technical community), the IDN Committee operated mostly in a collaborative manner as opposed to a bargaining forum between different interests. However, Falstrom also noted that some representatives were there for ‘political reasons’ and did not contribute a great deal to the process (he did not specify which ones). (Patrick Falstrom, email to Paul White, 15 July 2009.) Hiro Hotta (a representative of the .jp registry), who acted as a consultant to the Committee, confirmed this, stating that “As far as I remember (or perceive), Committee members from gTLD registries and ccTLD registries were very collaborative. On the other hand, registries other than Committee members were not very much involved.” (Email from Hiro Hotta to Paul White, 18 July 2009).

The collaborative rather than confrontational style of the discussions is similar to the way the New gTLDs Committee operated (see previous chapter) but it is also interesting that those registries that served on the IDNs Committee (together with members of the technical community, such as Klensin) appear to have been the main driving force behind its work.

With regard to IDN implementation at the second level, the IDN Committee was dominated by the supply side (registries and registrars), and the IDN Guidelines in their several incarnations have been largely the work of the registries. To some degree, this makes practical sense, as the registries are the entities responsible for implementing IDNs in practice and thus in bringing real-world practical experience and expertise to policy setting; but it nonetheless makes the claim of multistakeholder policymaking somewhat less convincing.

In terms of IDN TLDs, the split between gTLD and ccTLD policy was brought about by the creation of the Fast Track process for IDN ccTLDs, promoted by an alliance between the country-code registries and the GAC. Such close cooperation between the GAC and the CCNSO is perhaps an interesting reflection of the links between governments and their ‘national’ namespaces, notwithstanding the fact that some of the ccTLD registries are private corporations lacking formal close ties with their respective national governments. For many ccTLD registries, the incentive to support rapid introduction of IDN ccTLDs is likely to have been largely commercial (at any rate for those registries that are profit-making entities), particularly in those cases where Fast Track gives additional domains to the established operators rather than letting others propose to compete in-country (this decision is left to the discretion of national authorities<sup>817</sup>). On the governmental side, the GAC claims to be representing the interests of national language communities. There is strong pressure from many governments for IDN introduction, usually presented in the context of a need to broaden accessibility to the Internet, in line with goals set at WSIS. However, while these issues are important, it is also worth noting that demand for IDNs can become something of a political football and perhaps used to divert attention away from other issues. John Klensin notes that many of the languages that have been promoted by governments as ‘needing’ IDNs are used in territories that have very low literacy rates, as well as very low rates of Internet access. As he points out, people who have no Internet connection and who cannot read in any case will not derive much benefit from IDNs. Thus, the demand from governments for IDNs in those languages may have more to do with politics than a real urgent need, or an excuse to divert attention away from the real barriers to Internet penetration in the regions in question. Klensin

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<sup>817</sup> See reply by Tina Dam to question by Rahman Khanjohn at IDN ccTLD Fast Track Workshop, 26 October 2009, Seoul, Korea. Transcript retrieved 25 August 2011, from <http://sel.icann.org/meetings/seoul2009/transcript-idn-ccTLD-fast-track-26oct09-en.txt>

argues that some of the IGF discussions on the issue have been characterised by ‘IDNs as excuse’ for not having good Internet penetration in a given country despite significant investment; he cites both Brazil and China as examples of this.<sup>818</sup>

Despite the strong support for IDNs from many governments, it is also the case that recognition and definitions of languages and scripts can potentially be politically very sensitive; in politics, passions can, of course, run very high around language and culture, and this could potentially spill over into IDN issues. There could, for example, be considerable political ramifications if ICANN were to grant an IDN TLD to a language community not officially recognised by the sovereign state where it resides. Fast Track is thus a pragmatic approach that allows the IDN ccTLD implementation process to move forward without being held up by controversial cases; in a sense, its very existence is recognition that some languages and scripts could prove controversial. It effectively gives governments control over what they will and will not accept; the measure for whether the ccTLD is required has been based ultimately on governmental request, and issues such as whether community support for the TLD exists have ultimately been settled on the basis that the relevant government says it does.<sup>819</sup> It is also interesting that a number of governments have tended to oppose formal registry agreements for ccTLDs; this could be interpreted as a resistance to increased ICANN control over what governments see as ‘national’ ccTLD registries.

Fast Track therefore effectively gives strong recognition to the primacy of governmental authority, and it does so for fundamentally pragmatic reasons. Whether this will continue to beyond Fast Track will depend upon the final shape of the future IDN ccTLD policy currently being developed by the CCNSO. It also remains to be seen whether more controversial cases will arise when IDN gTLDs begin to be created, or whether the governmental objection procedure will be used to allow governments to effectively control what they will and will not accept with regards to IDN gTLDs also.

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<sup>818</sup> Email from John Klensin to Paul White, 15 July 2009

<sup>819</sup> ICANN (2010). Minutes of special meeting of the Board. 5 August 2010. Retrieved 24 August 2011, from <http://www.icann.org/en/minutes/minutes-05aug10-en.htm>

Overall, though, the pattern to date concerning governmental input has been similar to that observed in the new gTLDs area, in that the GAC has wielded strong influence and the principle of state sovereignty has been respected to a strong degree.

Turning to the gTLD registries, the pattern has once again been one of collaboration with other ICANN agencies. The gTLD registries worked effectively with their ccTLD counterparts in developing and rewriting the various iterations of the IDN Guidelines. Collaboration between the ccTLD and gTLD registries has also been reflected in the ongoing dialogue between the CCNSO and GNSO via initiatives such as the CCNSO/GNSO Joint IDN Working Group (JIG). Nonetheless, there have been some areas of disagreement. On the question of mandatory formal contracts and mandatory financial payments for IDN ccTLD registries, the GNSO failed to secure a level playing field between ccTLD and gTLD IDN registries.

Besides the GAC and the registries, other stakeholders have had a voice, but have tended to be less influential in the creation of real concrete policy. The ALAC, together with various other groups such as UNESCO, have had some input through the IDN Workshops and similar channels, but have had limited involvement with the groups that actually drew up policy (though the ALAC did supply two representatives to the IDNC Working Group). The RSSAC and SSAC have played a role in the creation of testing programmes and in providing evaluation of the likely technical impact of introducing IDN TLDs to the root zone, but have not tended to be involved in the public policy aspects. It is difficult to quantify exactly how much impact public comments have had, but given the very limited number of comments submitted, public commentators do not appear to have played a very large role in the process. As with new gTLDs, those comments that were submitted came mostly from interested parties rather than the 'Internet-using public at large'.

Intellectual property interests do not seem to have had a particularly large impact on the IDNs policy development area, and indeed have been much less vocal compared to their input into the new gTLDs PDP. Although the no-mixed-script rules were introduced to combat potential for cybersquatting and spoofing, other measures advocated in public comments and workshops by members of the intellectual property lobby, such as mandatory sunrise periods and modification of the UDRP, have not become part of policy so far as the IDN ccTLDs introduced to date have been

concerned. However, the strong intellectual property protections incorporated into the new gTLDs programme will, of course, apply to IDN gTLDs as well as to ASCII gTLDs. Furthermore, a policy development process to re-examine the UDRP is currently being considered (see Chapter 6), which, if it goes ahead, may well pay attention to some of the particular issues raised by IDNs.

Another interesting pattern that has emerged throughout the case study has been the apparent contest between ICANN's attempts to centralise policymaking and the registries' efforts to maintain autonomy. Something of this was identified in the gTLDs case study, but it has been more prominent here. VeriSign, in particular, has resisted such centralisation. Ultimately, however, VeriSign and other registries have accepted the Guidelines. John Klensin's view, that VeriSign reconsidered its position due to the threat of being held responsible by the US courts for registrations outside of best practice, would seem to suggest that ICANN's authority was implicitly propped up by the US judicial system. Whether this is the case or not, the episode did provide another demonstration of an area where regime norms, and the limits of ICANN's authority, were not set in stone and were being explored and tested.

A somewhat similar pattern can be discerned in the discussions around whether IDN ccTLD registries should be compelled to sign a formal contract with ICANN. On the one hand, formal registry agreements are not mandatory for existing ASCII ccTLD registries, and so to make them mandatory for IDN ccTLDs would in some ways appear to be an extension of ICANN's authority over and above that currently existing for ASCII ccTLDs. On the other hand, it seems reasonable to suggest that some sort of agreement is required to enforce compliance with relevant IDN standards and policies. It remains to be seen whether the compromise reached in Fast Track, of avoiding full mandatory registry agreements while requiring the registry to sign up to a certain minimum set of conditions, including compliance with the IDNA standard and the IDN Guidelines<sup>820</sup>, will be carried over beyond Fast Track.

Commercially, IDNs have so far been perhaps less successful than some of the registries might have hoped. Uptake of second-level IDNs has been steady, but not as

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<sup>820</sup> ICANN (2011). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 20 August 2011, from <http://www.icann.org/en/topics/idn/CCNSO-gac-issues-report-on-idn-09jul07.pdf> P36

spectacular as some had predicted. At the end of 2007, 3.8% of all domain registrations were IDNs.<sup>821</sup> Looking at the example of Japan, a country where IDNs are well established at the second level, IDN registrations do not appear to have displaced traditional ASCII registrations to any great degree. As of January 2012, 14% of all general purpose domain registrations under the .jp namespace were IDNs.<sup>822</sup> Since these figures include all pre-existing registrations, it is inevitable that ASCII names would continue to outnumber IDN ones for at least a while; however, the number of IDN registrations in the .jp namespace has actually fallen from its peak in 2009 and registration rates show that .jp IDNs are still being registered at a much lower rate than ASCII ones<sup>823</sup>, so on current trends there is no sign of an end to the dominance of ASCII registrations under the .jp namespace. If Japanese IDNs have seen relatively modest uptake, on the other end of the scale there is very little interest at all in minority languages with a small number of speakers, and therefore little commercial incentive from the registries' perspective to offer IDN registrations in those languages.

Ultimately, most of the registries, particularly the gTLD registries, are commercial interests, and their aim is to make a profit from selling domain name registrations. If support for a given language / script is left to pure market considerations, it seems likely that minority scripts that do not currently represent a significant market will be ignored by the registries. In the final analysis this is likely one reason why many small / minority language groups have not yet obtained IDN support and may find it difficult to do so in the future. However, that is not to say that market considerations are the only barrier to the provision of IDNs for smaller language groups. The chapter has highlighted the difficult task involved in even getting a language defined and drawing up relevant Unicode tables. Creation of language tables is very complex matter and requires intimate knowledge of a particular language. Minority languages are particularly likely to pose problems since they usually have no clear orthographic authority (such as a ccTLD manager) to define them, and additionally, as discussed, there are also often political considerations / controversy relating to their recognition.

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<sup>821</sup>EURID (2008). EURID's Quarterly Progress Report to the European Commission, First Quarter 2008,. Retrieved 24 August 2011, from [http://www.eurid.eu/files/Q1\\_08.pdf](http://www.eurid.eu/files/Q1_08.pdf)

<sup>822</sup> JPRS (2012). "Time-Series Data of JP Domain Name Registration (since 1992)." Retrieved 23 January 2012, from <http://jprs.co.jp/en/stat/domains.html>

<sup>823</sup> Ibid

The advent of IDN gTLDs, and later the expansion of the IDN ccTLD programme beyond Fast Track, may prove to open up more opportunities for small language communities to gain an IDN TLD, but political and economic barriers are likely to remain in at least some cases. With regards to IDN gTLDs, governments may use the governmental objection procedure to block any applications they find politically unacceptable, while the substantial fees are also likely to prove a barrier to small groups, particularly in developing countries.

A good example of these issues may be provided by the case of India. In January 2011 ICANN approved the delegation of seven IDN ccTLDs to the National Internet Exchange of India, representing various languages spoken in the country.<sup>824</sup> While this represents a major step in providing IDN support for speakers of India's most common languages, there are actually several hundred languages spoken across the country, at least 85 of which are in written use,<sup>825</sup> and it seems unlikely that all of these will be granted a ccTLD in the foreseeable future. Smaller Indian language communities might have more chance of obtaining an IDN gTLD, but here too there are barriers. These include the challenges of putting together a consortium with sufficient financial backing to pay the gTLD application fees; this may not be economically viable for a language community with only a few tens or hundreds of thousands of speakers, as is the case with many Indian languages. Just as significant a barrier may be presented by the difficulties of drawing up language tables for each individual Indian language and making them distinct from each other. For example, the Tamil character ஶ (U+0BB5) is similar to the Malayalam character ഴ (U+0D16) and in some fonts may be virtually indistinguishable.<sup>826</sup> If there are difficulties in supporting both languages, it seems likely that the more widely spoken (and already implemented) Tamil will win out.

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<sup>824</sup> ICANN (2011). Minutes of special meeting of the Board. 25 January 2011. Retrieved 29 August 2011, from <http://www.icann.org/en/minutes/minutes-25jan11-en.htm>

<sup>825</sup> Government of India: Ministry of Home Affairs. (2001). "Census of India 2001: Data on Language." Retrieved 8 July 2011, from [http://www.censusindia.gov.in/Census\\_Data\\_2001/Census\\_Data\\_Online/Language/data\\_on\\_language.html](http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/data_on_language.html)

<sup>826</sup> Hussain, S. and R. Mohan (2008). 'Localization in Asia Pacific.' Digital Review of Asia Pacific 2007-2008. F. Librero and P. B. Arinto. New Delhi, Sage Publications India: 43-58. P48

## Conclusion to Chapter 5

The IDNs case study provides further evidence to undermine the conception of ICANN as a mere ‘technical co-ordinator’. While IDNs policy is partly about the implementation of an IETF technical standard while safeguarding the stability of the DNS, it also inevitably raises political and public policy issues, such as issues of which groups will get an IDN TLD and how to define a language or script. Furthermore, there is clearly a potential for significant political controversy over IDN implementation, particularly with regard to recognition or definition of languages. The existence of Fast Track is effectively an acknowledgement of this; its purpose being to prevent the whole process being stalled by intractable ‘problem’ cases. While ICANN appears to have avoided getting embroiled in any major overt political controversy over IDNs so far, there is clearly always a danger of this. The desire to avoid such controversy has resulted in significant approval or veto power being handed to national governments over which languages / scripts will be supported.

Notwithstanding this, IDNs policy development has arguably come somewhat closer to the ideal of ‘consensus’ based policymaking than the New gTLDs PDP, in that IDNs policy has proved significantly less controversial overall. For the most part, the broad strokes of policy have been widely supported; unlike new gTLDs, there does not appear to have been much opposition to the basic principle of creating IDN sLDs and TLDs. Nonetheless, some areas of policy have been contested. There have been significant commercial interests and competition issues at stake, for example the issue of whether incumbent ASCII registries should be entitled to the IDN equivalent of their existing TLD string; political interests, including questions surrounding the right of governments to approve or veto applications; and questions as to whether IDN ccTLD registries should be subject to mandatory registry agreements and compulsory annual fees. Overall, therefore, the case study lends further support to Weinberg’s contention that the issues dealt with by ICANN are not amenable to resolution by consensus.<sup>827</sup>

At least on the surface, the patterns observed through the policy development

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<sup>827</sup> Weinberg, J (2000). “ICANN and the Problem of Legitimacy.” *Duke Law Journal* 50(1):187-260. P252

process have appeared to conform to the multistakeholder model, given the range of ICANN bodies and associated interest groups playing a role in the process. However, closer examination reveals that some groups and interests have played a much more dominant role than others in terms of actually producing concrete policy. The IDNs case study provides further demonstration of the influence held both by governments via the GAC, and some commercial interests, particularly on the supply side; it is the registries, along with governments, that appear to have largely driven the IDNs process. Despite the fact that the intellectual property lobby has been much less prominent compared with the new gTLDs policy area, the overall pattern with regard to IDNs has therefore reinforced the lessons gleaned from the gTLDs study; that two of the most significant forces within ICANN are commercial interests, and political (governmental) ones. By contrast the ‘global Internet using public’ has had very little influence and in fact has hardly participated. Like the New gTLDs study, therefore, the IDNs case study provides further evidence to support a model of ‘narrow multistakeholderism’ as opposed to the truly broad-based multistakeholder policymaking model promoted by ICANN’s founders and by some subsequent analysts such as Mathiason and Crawford.

The strong influence held by governments in this policy development area could be used to lend some weight to a statist interpretation of ICANN. While such a view would be too simplistic, as governments were obviously not the only actors of significance, with the registries being at least as important, the influence held by governments in this policy area tells us something both about governmental priorities and the leverage they have within the regime. Mueller believes that governments got their own way on a number of issues related to IDN ccTLDs (including issues of application fees, annual financial contributions and registry agreements) because there was a credible threat of them opting to defect from the regime over the issue and create national IDN roots much as China did in 2006.<sup>828</sup>

Like the new gTLDs study, the IDNs case study also provides a further demonstration that some of the ICANN regime norms remain in flux and are being modified via the interactions of policy development. A good example of this has been the contest between ICANN’s efforts to exert authority over the registries versus the desire of

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<sup>828</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P234

some registries (particularly VeriSign) to remain as autonomous as may be; and also in the debates surrounding the issue of mandatory versus voluntary registry agreements for IDN ccTLD registries.

The policy area also highlights the fact that ICANN does not operate in isolation but forms part of a wider web of Internet governance bodies. There has been a reliance on other agencies to provide both technical standardisation and the linguistic and cultural expertise that does not exist within ICANN.

On a final note, the process of implementing IDNs is far from complete, but based on uptake so far, IDNs do not appear to have yet had a big enough impact to really transform Internet accessibility and perhaps provoke a new online commercial boom in the way some proponents have hoped. However, from the foundations laid over the last decade in terms of testing, developing and maturing IDN technology, these goals may eventually come to fruition. It remains to be seen whether commercial and political interests will continue to dictate which languages are supported, or if non-commercial groups, particularly minority language and cultural groups, are able to press their case strongly enough within the ICANN system to ensure that their interests are served also. In the longer term, the answers to these questions may provide further interesting insights into the nature of the ICANN regime.

The next chapter will turn to a significantly different but no less important area of ICANN policy, namely the Uniform Domain-Name Disputes Resolution Policy (UDRP).

# **Chapter 6**

## **Policy development case study 3:** **Uniform Domain Name Disputes Resolution Policy** **(UDRP)**

### **Introduction**

ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a mechanism for the resolution of disputes pertaining to the registration of domain names. The need for such a system was recognised by ICANN's founders due to the activities of 'cybersquatters', a group of speculators who would register names that corresponded to the trademarks of companies and then seek to resell the names to those companies at a greatly increased price. The UDRP is intended to provide a fast, cheap arbitration system as an alternative to lengthy and expensive court proceedings in cybersquatting cases. Based on a WIPO study<sup>829</sup> commissioned by the Clinton administration immediately prior to ICANN's founding, it was adopted by ICANN's initial Board in late 1999.<sup>830</sup> It has so far survived unchanged since that time, though an abortive review took place in 2002-03 and the GNSO is currently considering whether to initiate another review.

The fact that the UDRP has survived without modification for so long makes this policy area quite different to the previous two case studies. However, the policy's longevity is interesting in itself. This chapter will explore why the UDRP has persisted unchanged for more than a decade, and whether this is due to a consensus view that the policy is basically sound, or to the influence of certain interests within ICANN.

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<sup>829</sup> WIPO (1999). Final Report of the First WIPO Internet Domain Name Process. April 30, 1999. Retrieved 15 September 2011, from <http://www.wipo.int/amc/en/processes/process1/report/index.html>

<sup>830</sup> ICANN (1999). Minutes of Meeting of the Initial Board. 26 August 1999. Retrieved 20<sup>th</sup> September 2011, from <http://www.icann.org/en/minutes/minutes-26aug99.htm>

## **Background**

### UDRP Overview

The UDRP consists of two documents: the Policy itself<sup>831</sup>, and the UDRP Rules, which provide the baseline procedural requirements that must be followed in a UDRP proceeding.<sup>832</sup> It currently applies to all .biz, .com, .info, .name, .net, and .org gTLDs, and has been adopted, either in its original form or a modified one, by many ccTLD registries. When a domain name is registered in one of these TLDs, the registrant is required to ‘represent and warrant’ that registering the name ‘will not infringe upon or otherwise violate the rights of any third party’ and agree to UDRP arbitration should any third party assert a claim. The scope of the policy is limited to cases of bad faith cybersquatting as defined in the policy, and is not intended to apply to any other kind of domain name dispute. The UDRP’s stated aim is to create a streamlined process for resolving such disputes, intended to be quicker and cheaper than a standard legal challenge. However, a dissatisfied party may still challenge a UDRP decision in court.<sup>833</sup>

A trademark or service mark owner that believes it can prove a case of cybersquatting initiates a UDRP proceeding by filing a complaint with one of the four ICANN accredited dispute-resolution service providers (DRPs): the Czech Arbitration Court (CAC), the Asian Domain Name Dispute Resolution Centre (ADRC); the National Arbitration Forum (NAF); and the World Intellectual Property Organisation (WIPO).<sup>834</sup> There have also been two other accredited dispute resolution providers in the past, including the CPR International Institute for Conflict Prevention and Resolution, and eResolution.<sup>835</sup> All DRPs follow a similar procedure as mandated by the UDRP. A panel of one or three members acts as arbiter; the party that initiates the proceeding (called the ‘complainant’) specifies whether a one or three member panel is desired. If the complainant designates a single-member panel, the domain name

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<sup>831</sup> ICANN (1999). Uniform Domain Name Dispute Resolution Policy. Adopted: August 26, 1999. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/policy.htm>

<sup>832</sup> ICANN (1999). Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"). As approved by the ICANN Board of Directors on 30 October 2009. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>

<sup>833</sup> ICANN (1999). Uniform Domain Name Dispute Resolution Policy. Adopted: August 26, 1999. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/policy.htm>

<sup>834</sup> ICANN (2011). List of Approved Dispute Resolution Service Providers. Retrieved 16 September 2011, from <http://www.icann.org/en/dndr/udrp/approved-providers.htm>

<sup>835</sup> Ibid

owner (the ‘respondent’) may elect to have the dispute heard by a three-member panel, at extra cost which is met by the respondent, otherwise the whole fee is paid by the complainant.<sup>836</sup> Fees for a standard proceeding for one domain name with a one-member panel vary from US \$1000 (ADRC)<sup>837</sup> to US \$1500 (WIPO)<sup>838</sup>, rising to \$2500 (ADRC)<sup>839</sup> to \$4000 (WIPO)<sup>840</sup> for a three-member panel.

To secure a name transfer under the UDRP, the burden is on the complainant to demonstrate each of these three elements:

- (i) The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- (ii) The holder has no rights or legitimate interests in respect of the domain name; and
- (iii) The domain name has been registered and is being used in bad faith.<sup>841</sup>

It should be noted that both bad faith registration *and* use are required to be demonstrated in order to secure transfer. Paragraph 4(b) of the policy lists some examples of what might be considered ‘bad faith’ registration and use, but the list is non-exhaustive and leaves panellists much scope to use their own judgement.<sup>842</sup>

If the panel deems all three criteria to have been adequately demonstrated, it will order transfer or cancellation of the domain name. There is no appeal mechanism, although, as noted, a dissatisfied party retains the right to take the matter to a national court. Losing respondents are allowed ten business days to file a challenge in a competent court, otherwise the domain name is transferred to the complainant (or occasionally cancelled).<sup>843</sup>

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<sup>836</sup> ICANN (1999). Uniform Domain Name Dispute Resolution Policy. Adopted: August 26, 1999. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/policy.htm>

<sup>837</sup> ADRC (2011). Asian Domain Name Dispute Resolution Centre: Fees (US Dollars). Retrieved 16 September 2011, from [https://www.adndrc.org/hk\\_schedule\\_fees.html](https://www.adndrc.org/hk_schedule_fees.html)

<sup>838</sup> WIPO (2011). Schedule of Fees under the UDRP (valid as of December 1, 2002). Retrieved 16 September 2011, from <http://www.wipo.int/amc/en/domains/fees/index.html>

<sup>839</sup> ADRC (2011). Asian Domain Name Dispute Resolution Centre: Fees (US Dollars). Retrieved 16 September 2011, from [https://www.adndrc.org/hk\\_schedule\\_fees.html](https://www.adndrc.org/hk_schedule_fees.html)

<sup>840</sup> WIPO (2011). Schedule of Fees under the UDRP (valid as of December 1, 2002). Retrieved 16 September 2011, from <http://www.wipo.int/amc/en/domains/fees/index.html>

<sup>841</sup> ICANN (1999). Uniform Domain Name Dispute Resolution Policy. Adopted: August 26, 1999. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/policy.htm>

<sup>842</sup> Ibid

<sup>843</sup> Ibid

Rule 15 gives panels the power to designate bad faith complaints as ‘reverse domain name hijacking’ (RDNH) attempts; however there are no actual sanctions for an RDNH finding.<sup>844</sup> A panel has the freedom to apply ‘any rules and principles of law that it deems applicable’.<sup>845</sup> In practice, some panellists have used this clause to apply the laws of a party’s home country; however, sometimes they apply the laws of their own country, and in other cases apply no laws at all, instead inventing or adopting UDRP rules to deal with a particular situation.<sup>846</sup>

## **Policy development: history**

### Initial policy creation

With the commercialisation of the Internet in the 1990s, domain names began to be viewed as an important identifier, or even as a brand name, by corporate entities. Once domain names were thought of as a brand, it quickly led trademark holders to the conclusion that trademarks might or should imply rights to corresponding domain names.<sup>847</sup> At the same time, from the mid-1990s, the phenomenon known as ‘cybersquatting’ emerged. In response to pressure from trademark owners to tackle the issue, NSI developed a Dispute Settlement Policy, first implemented in November 1996. Under this policy, a complaint about a domain name registration from a corresponding trademark owner resulted in the name being suspended until the dispute was resolved, either in court or by mutual agreement.<sup>848</sup> However, this policy attracted much criticism, as the domain name would be automatically suspended regardless of the rights and wrongs of the case. Additionally, since the domain name was made unavailable for use by any party until the dispute was settled, and because court proceedings could take a long time, companies wanting to make immediate use

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<sup>844</sup> ICANN (1999). Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"). As approved by the ICANN Board of Directors on 30 October 2009. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> Rule 15.

<sup>845</sup> Ibid

<sup>846</sup> Simon, D.A. (2011). “An empirical analysis of fair use decisions under the Uniform Domain-Name Dispute Resolution Policy.” *Boston College Law Review* 53(1) (forthcoming 2012). Retrieved 18 November 2011, from [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1993121\\_code1008893.pdf?abstractid=1887888&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1993121_code1008893.pdf?abstractid=1887888&mirid=1) P27

<sup>847</sup> Froomkin, M. (2002). "ICANN'S ‘Uniform Dispute Resolution Policy’ – Causes and (partial) Cures." *Brooklyn Law Review* 67(3): 605-718. PP620-622

<sup>848</sup> Network Solutions Inc. (1995). NSI Domain Dispute Resolution Policy Statement. July 2005. Retrieved 15 August 2011, from <http://www.lectlaw.com/files/inp08.htm>

of the disputed domain name often had no choice but to settle the issue by making a payment to the other party, even in clear cases of cybersquatting.<sup>849</sup>

In the White Paper (June 1998) that led to the formation of ICANN, the US government stated its intention to commission the World Intellectual Property Organisation (WIPO) to conduct a consultative study on domain name/trademark issues.<sup>850</sup> This was carried out between July 1998 and April 1999, during which time ICANN came into being. The final WIPO report was submitted to ICANN on 30<sup>th</sup> April 1999 and recommended institution of a policy followed uniformly by all registrars in the .com, .net, and .org TLDs. On May 27<sup>th</sup>, the ICANN Board commended WIPO on its report, instructed the testbed registrars to collaborate on a model dispute resolution policy for voluntary adoption, and referred the WIPO report to the DNSO for its recommendations.<sup>851</sup>

In response, the DNSO appointed a working group, known as Working Group A, to study the matter. (See Appendix 6.1 for full list of members). On 29 July 1999, Working Group A submitted its final report to the DNSO Names Council, recommending establishment of a uniform domain-name dispute-resolution policy for all registrars. The Names Council adopted the Working Group A report (with minor revisions) on 4<sup>th</sup> August and sent it to the ICANN Board as a consensus recommendation. It should be noted that the newly-formed Non-Commercial Users Constituency (NCUC) was not invited to participate in this process, a fact that was later criticised by a number of posters in the public comments periods.<sup>852</sup>

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<sup>849</sup> Kur, A. (2002) "UDRP: A Study by the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich." 15 January 2002. Retrieved 12 September 2011, from [http://www.zar.uni-karlsruhe.de/admin/get\\_data.php?resID=95P6](http://www.zar.uni-karlsruhe.de/admin/get_data.php?resID=95P6)

<sup>850</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses." ('White Paper'). 5th June 2007. Docket Number: 980212036-8146-02. Retrieved 5 July 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>851</sup> ICANN (1999). Minutes of meeting of the initial Board. 27 May 1999. Retrieved 12 September 2011, from <http://www.icann.org/en/minutes/minutes-27may99.htm>

<sup>852</sup> See comments made on ICANN Public Comments forum on the UDRP (opened 6 December 1999) by the following posters: KathrynKL@aol.com (NCUC); Association for Computing Machinery; Mark Perkins (Secretariat of the Pacific Community Library); Joop Teernstra (Cyberspace Association); Frederick W. Weingarten (American Library Association); Raul Echeberria (Foro Latinoamericano de Redes); Jim Fleming (Background undisclosed); Jeffrey Graber (Association of Internet Professionals); Ellen Rony (Author); A. Michael Fromkin (Professor of Law University of Miami School of Law); Jonathan Weinberg (Professor of Law, Wayne State University). Accessed 17 October 2011, at <http://www.icann.org/en/comments-mail/comment-udrp/current/maillist.html>

The registrars' model policy was published on August 20.<sup>853</sup> An ICANN Staff Report "Uniform Dispute Resolution Policy for gTLD Registrars" was presented to the 25 August public forum held in Santiago, Chile. It was supportive of most of the points of the GNSO report and recommended that a UDRP be introduced based on the registrars' model policy.<sup>854</sup>

On 26 August, the Board accepted the DNSO recommendation for establishment of a uniform domain-name dispute-resolution policy, and instructed ICANN staff to prepare implementation documents for approval after public comment, using the registrars' Model Policy as a starting point.<sup>855</sup> On 29 September a Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy, together with implementation documents consisting of the written UDRP and uniform rules, were published.<sup>856</sup> These were presented for public comment until 13 October 1999.<sup>857</sup>

Despite numerous objections in the Public Comments periods<sup>858</sup> and at the Public Forum in Santiago<sup>859</sup>, the process of implementing the proposals went ahead. On 24 October 1999, a Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy was presented to the Board.<sup>860</sup> This document noted the input received in the public comments, but recommended that implementation should go ahead of an essentially unaltered policy, pointing out that the nature of the policy had already been approved. It further suggested that implementation should not be

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<sup>853</sup> ICANN (1999). Model Domain Name Dispute Resolution Policy for Voluntary Adoption by Registrars. Posted August 20, 1999. Retrieved 17 September 2011, from <http://www.icann.org/en/meetings/santiago/registrar-dispute-policy.htm>

<sup>854</sup> ICANN (1999). ICANN Staff Report: Uniform Dispute Resolution Policy for gTLD Registrars. Posted August 24, 1999. Retrieved 16 September 2011, from <http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm>

<sup>855</sup> ICANN (1999). Minutes of meeting of the initial Board. 26 August 1999. Retrieved 16 September 2011, from <http://www.icann.org/en/minutes/minutes-26aug99.htm>

<sup>856</sup> ICANN. (1999). ICANN Staff Report: Uniform Dispute Resolution Policy for gTLD Registrars. Retrieved 16 September, 2011, from <http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm>.

<sup>857</sup> ICANN (2011). "Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy." Retrieved 16 September 2011, from <http://www.icann.org/en/udrp/udrp-schedule.htm>

<sup>858</sup> ICANN (1999). Public comments forum on Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy. Retrieved 17 September 2011, from <http://www.icann.org/en/comments-mail/comment-udrp/current/maillist.html>

<sup>859</sup> ICANN (1999). Scribe's Notes - ICANN Public Meeting, Santiago, Chile. August 25, 1999. Retrieved 17 September 2011, from <http://cyber.law.harvard.edu/icann/santiago/archive/scribe-082599.html>

<sup>860</sup> ICANN (1999). Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy. 24 October 1999. Submitted for Board meeting of October 24, 1999. Retrieved 17 September 2011, from <http://www.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm>

further delayed and that any refinements to the implementation strategy could be studied by the DNSO at a later date.<sup>861</sup>

The Board approved the implementation documents on the same date.<sup>862</sup> On 29 November, the first dispute-resolution service provider (WIPO) was approved, and the service became active on 1 December. The first proceeding under the UDRP (worldwrestlingfederation.com) commenced on 9 December 1999.<sup>863</sup>

### 2002- 03 UDRP review

Despite the apparent haste with which the UDRP was brought into being, very little opportunity has been given since for reconsideration or revision. The only significant review of the UDRP to date took place in 2002-2003, as part of the wider ICANN reform process that took place at that time. The issue was initially studied by the DNSO UDRP Review Task Force, and subsequently taken over by the DNSO's successor organisation, the GNSO.

The DNSO Task Force was made up of about 20 members, including representatives from each of the DNSO's constituencies and the DNSO General Assembly, representatives from the dispute resolution service providers, panellists, a representative complainant and respondent, and independent experts from the ADR and academic communities.<sup>864</sup> A questionnaire to solicit public comment was posted to the DNSO and ICANN websites for response.<sup>865</sup> A total of 377 responses were received.<sup>866</sup> In addition, the Task Force utilised a range of other existing studies and reports concerning the UDRP.<sup>867</sup> The positions of the various DNSO Constituencies in the matter are included in Appendix 6.2.

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<sup>861</sup> Ibid, Section 4.

<sup>862</sup> ICANN (1999). Minutes of special meeting of the Board. 24 October 1999. Retrieved 16 August 2011, from <http://www.icann.org/en/minutes/minutes-24oct99.htm>

<sup>863</sup> Source: ICANN (2011). "Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy." Retrieved 16 September 2011, from <http://www.icann.org/en/udrp/udrp-schedule.htm>

<sup>864</sup> ICANN. (2003). Staff Manager's Issues Report on UDRP Review. Retrieved 23 September, 2009, from <http://www.icann.org/en/gnso/issue-reports/udrp-review-report-01aug03.htm>

<sup>865</sup> ICANN (2001). UDRP Review Questionnaire. 2 November 2001. Retrieved 18 September 2011, from <http://www.dnso.org/dnso/notes/20011107.UDRP-Review-Questionnaire.htm>

<sup>866</sup> Ibid

<sup>867</sup> ICANN (2003). Staff Manager's Issues Report on UDRP Review. 1 August 2003. Retrieved 17 September 2011, from <http://www.icann.org/en/gnso/issue-reports/udrp-review-report-01aug03.htm>

The work of the Task Force, however, was interrupted following the disbandment of the DNSO in the 2002-2003 reforms. The GNSO Council, under whose remit the matter had now fallen, dissolved the UDRP Task Force and instead requested ICANN staff to produce an Issues Report on UDRP review, to be based on the research conducted by the Task Force.<sup>868</sup> This Issues Report was published on 1 August 2003 and identified a number of issues for further investigation, including both procedural and substantive issues.<sup>869</sup> However, it then went on to state that, based on the above, revision of the UDRP was likely to be contentious, as there were not many (if any) areas obviously amenable to achieving consensus; that, while there were some areas where improvements may be possible, there did not appear to be an urgent need for revision; and that the GNSO Council had other issues to deal with that may warrant a higher priority.<sup>870</sup>

The GNSO Council responded by requesting all Constituencies review the Issues Report.<sup>871</sup> Following this, however, the issue of UDRP review appears to have been quietly dropped, with no formal vote being held on whether to proceed with a PDP.

#### IDN-related UDRP reform proposals

Calls for UDRP modification to deal with the issues presented by IDNs were received in various public comments periods and meetings as part of the IDNs PDP (see previous chapter). The IDN Working Group (2001) recommended new guidelines setting out how the UDRP should be applied in disputes involving IDN registrations<sup>872</sup>, but this has so far not been implemented.

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<sup>868</sup> Ibid

<sup>869</sup> Ibid

<sup>870</sup> Ibid

<sup>871</sup> ICANN (2004). A review of the GNSO Council voting record. 22 December 2004. Retrieved 17 September 2011, from <http://gns0.icann.org/reviews/gns0-review-sec3-22dec04.pdf> P54.

<sup>872</sup> ICANN. (2001). Report of the Internationalized Domain Names Internal Working Group of the ICANN Board of Directors. Retrieved 18 May, 2009, from <http://www.icann.org/en/committees/idn/final-report-28aug01.htm>

## eUDRP

A proposal to move the UDRP towards a ‘paperless’ procedure, or ‘eUDRP’ was submitted by WIPO on December 30, 2008<sup>873</sup> and posted for public comment in summer 2009. On 30 October 2009, the ICANN Board approved changing the Rules to allow for electronic filing of complaints (previously required in hard copy), so long as hard copy notification that a complaint has been filed is provided to a respondent.<sup>874</sup>

## 2011 Issues Report

On 3 February 2011, the GNSO Council requested that ICANN staff prepare an Issues Report on the current state of the UDRP and whether a new PDP was required.<sup>875</sup> To support staff research activities, the Council convened a drafting team that focused on two efforts to quickly discern current thinking on the UDRP.<sup>876</sup> These included a UDRP Questionnaire sent to each of the ICANN approved UDRP providers<sup>877</sup>, and a UDRP ‘Webinar’, or online seminar, conducted on 10 May 2011.<sup>878</sup>

The ‘Webinar’ consisted of a series of short presentations by selected speakers. A list of these speakers is included in Appendix 6.3. The majority of speakers were individuals who could be expected to have a pro-UDRP bias, such as representatives of the DRPs, UDRP panellists and trademark lawyers. Most speakers opposed any substantive changes to the UDRP, though a number did suggest certain procedural changes and / or additional clarification of certain points.<sup>879</sup> Three speakers favoured

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<sup>873</sup> WIPO (2008). WIPO provisional draft amendments to the Rules for eUDRP. December 30, 2008. Retrieved 17 September 2011, from <http://www.icann.org/en/wipo/wipo-proposal-eudrp-rules-30dec08-en.pdf>

<sup>874</sup> ICANN (2009). Resolutions of special meeting of the Board. 20 October 2009. Retrieved 17 September 2011, from <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>

<sup>875</sup> ICANN (2011). GNSO Council Resolution 20110203. 3 February 2011. Retrieved 17 September 2011, from <http://gns0.icann.org/resolutions/#20110203>

<sup>876</sup> ICANN (2011). Preliminary GNSO Issue Report: The Current State of the UDRP. 27 May 2011. Retrieved 17 September 2011, from <http://gns0.icann.org/issues/prelim-report-current-state-udrp-27may11-en.pdf>

<sup>877</sup> ICANN (2011). “GNSO Council Requests Issue Report on the Uniform Dispute Resolution Policy (UDRP.)” 3 May 2011. Retrieved 17 September 2011, from <http://gns0.icann.org/issues/udrp/>

<sup>878</sup> ICANN (2011). “Webinar on the Current State of the UDRP: Information on the 10 May 2011 Webinar on the Current State of the UDRP.” Retrieved 18 September 2011, from <https://community.icann.org/display/gnsoudrpd/ Webinar+on+the+Current+State+of+the+UDRP>

<sup>879</sup> ICANN (2011). Uniform Domain-Name Dispute-Resolution Webinar Transcript. 10 May 2011. Retrieved 17 September 2011, from <http://gns0.icann.org/meetings/transcript-udndr-webinar-10may11-en.pdf>

changes to the ‘bad faith’ requirement so that complainants would need to demonstrate only bad faith registration *or* use, rather than both. An academic speaker, Konstantinos Komaitis, was the only individual to suggest deep substantive changes to the policy. Following the presentations, questions were taken from four members of the public.

The input from the questionnaires and ‘Webinar’ largely formed the basis of the Issues Report. The extent to which the Issues Report was based on balanced input is therefore somewhat questionable, since critics of the UDRP (with the exception of Komaitis) were not consulted in either of these exercises; and the apparently one-sided and closed nature of this process raises questions about the extent to which ICANN staff have been captured by the trademark lobby.

The Issues Report, published on 27 May 2011, recommended that a PDP on the UDRP not be initiated at this time.<sup>880</sup> It did, however recommend that a small group of ‘experts’ be convened to produce proposals on procedural improvements only. However, the final decision on whether to initiate a PDP rests with the GNSO Council, and at the time of writing that decision has not yet been made.

### **Perspectives on the UDRP**

There has been a substantial amount of analysis and comment on the UDRP in the academic literature, some of which has focused upon understanding the UDRP in the context of international trademark law, and much of which has tended to be critical of various aspects of the policy.

#### UDRP and international law

DNS is a good example of how global digital technologies, which transcend national boundaries, can challenge the jurisdictional competence of any single nation state.<sup>881</sup>

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<sup>880</sup>ICANN (2011). Preliminary GNSO Issue Report : “The Current State of the UDRP.” 27 May 2011. Retrieved 17 September 2011, from <http://gns0.icann.org/issues/prelim-report-current-state-udrp-27may11-en.pdf>

<sup>881</sup>Helfer, L. R. (2001). “International Dispute Settlement at the Trademark-Domain Name Interface.” Loyola Law School (Los Angeles) Research Paper No. 2001-9. April, 2001. Retrieved 10 September 2011, from [http://papers.ssrn.com/paper.taf?abstract\\_id=265922](http://papers.ssrn.com/paper.taf?abstract_id=265922) P1

The issue is, of course, not unique to domain names; however, previous efforts to create cross-border intellectual property regimes have been based on interstate treaties. The UDRP, as a system set up by a nongovernmental entity (ICANN), departs significantly from this principle. Furthermore, under more conventional intellectual property regimes, day-to-day enforcement is left to private party actions before national courts. Unlike these, the UDRP does not rely on state-based enforcement of its decisions; since it controls the DNS root, ICANN has the capacity to enforce its decisions over domain name registration disputes without reference to any other agency.

Because of these factors, a number of analysts have seen the UDRP as effectively playing the role of a private, globalised domain name trademark ‘law’. David Sorkin, for example, sees the UDRP as having effectively given rise to a new system of international common law, with panelists increasingly citing, and relying upon, previous UDRP decisions.<sup>882</sup> Elizabeth Thornburg similarly sees the UDRP as an attempt to create an effective ‘international trademark law’ that is difficult to reconcile with national law because of differences in substantive law and procedure.<sup>883</sup> Konstantinos Komaitis also views the UDRP as a supranational law of trademarks that amounts to a ‘usurpation of legislative rights of the nations of the world.’<sup>884</sup>

A counter-argument is that, in contrast to other forms of legal arbitration, UDRP arbitration is not legally binding except on the registrar, and does not take away the possibility to submit the case to national courts. In a study for the Max Planck Institute, Annette Kur argues that the UDRP is not in itself “law”, but ultimately draws its legal basis from contract law; in the contract between the registrar and the domain name registrant, the registrant expressly submits to the Policy and the Procedural Rules by which it is implemented.<sup>885</sup>

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<sup>882</sup> Ibid, p43

<sup>883</sup> Thornburg, E. (2002). "Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process." *Journal of Small & Emerging Business Law* 7 (2001): 191-233. P196

<sup>884</sup> Komaitis, K. (2003) “ICANN: Guilty as charged.” *Journal of Information, Law and Technology*, 2003(1). Electronic journal. Retrieved 14 October 2009, from [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003\\_1/komaitis/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/komaitis/)

<sup>885</sup> Kur, A. (2002). “UDRP: A Study by the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich. 15 January 2002.” Retrieved 14 October 2009, from [http://www.zar.uni-karlsruhe.de/admin/get\\_data.php?resID=95](http://www.zar.uni-karlsruhe.de/admin/get_data.php?resID=95) P10

Graeme Dinwoodie and Laurence Helfer describe the UDRP as a ‘new legal creature unlike any of its international dispute settlement antecedents’; a hybrid system made up of elements from three decision-making models: judicial, arbitral, and ministerial.<sup>886</sup> Unlike other transborder dispute settlement systems, they point out, neither the UDRP’s substantive content nor its prescriptive force necessarily depend upon the laws, institutions, or enforcement mechanisms of any single nation-state or treaty regime.<sup>887</sup> While it constitutes ‘soft law’ in theory, they assert, the UDRP represents much ‘harder law’ in practice, since the external checking role of national courts is very much weaker than might initially appear to be the case.<sup>888</sup> Not only is the window to initiate a court proceeding extremely brief, they assert, but furthermore respondents who do challenge panel decisions in court may not possess a clear cause of action in the relevant jurisdiction. Since national laws vary widely, diverse national courts are likely to differ widely over the extent of review they grant to UDRP rulings and over conflict-of-laws methodologies they apply to determine the applicable substantive rules.<sup>889</sup> Helfer argues that the UDRP’s operation has been ‘far more autonomous in practice than its drafters had envisioned.’<sup>890</sup>

It is certainly the case that only a very small percentage (less than 2%) of UDRP rulings are actually challenged in national courts.<sup>891</sup> Furthermore, critics, such as Michael Fromkin, argue that courts in the US and elsewhere would be inclined to defer to the UDRP decision.<sup>892</sup> No statistics appear to be available as to the percentage of cases where this has occurred. On some occasions, though, courts have shown themselves willing to overturn UDRP rulings. WIPO lists a ‘selection’ of UDRP cases that have subsequently been challenged in court, but only 31 cases are listed, and the final verdicts are not recorded on the list.<sup>893</sup> One of these cases, however, was well publicised, when a US court overturned a NAF panel decision (case

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<sup>886</sup> Dinwoodie, G. B. and L. Helfer, (2001). “Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy”. *William & Mary Law Review*, Vol. 43(1): 141-273. P149

<sup>887</sup> *Ibid*

<sup>888</sup> *Ibid*, P202

<sup>889</sup> *Ibid*, PP202-209

<sup>890</sup> Helfer, L. (2003). "Whither the UDRP: Autonomous, Americanized or Cosmopolitan?" Princeton Law & Public Affairs Paper No. 03-10; Loyola-LA Public Law Research Paper No. 17. Retrieved 10 September 2011, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437182). P3

<sup>891</sup> Kronenberger Burgoyne, LLP (2011). “Court challenges to UDRP decisions.” Retrieved 17 September 2011, from <http://cybersquatting.com/index.php?page=udrp-court-challenges>

<sup>892</sup> Fromkin, A.M. (2002), “ICANN’s Uniform Dispute Resolution Policy, Causes and (Partial) Cures”. *Brooklyn Law Review*, 67(3): 605-718. P637

<sup>893</sup> WIPO (2011). “Selection of UDRP-related Court Cases.” Retrieved 18 September 2011, from <http://www.wipo.int/amc/en/domains/challenged/index.html>

FA0204000112565). The original NAF decision (July 15, 2002) had transferred the domain name freebie.com to the complainant Freebies Publishing, Carpinteria, CA, on the grounds that the complainant held a trademark in the name 'Freebies', despite the fact that the respondent, Retail Services, Inc., Plano, TX, was engaged in a very different line of business to the complainant.<sup>894</sup> The decision was overturned by a US court. In overturning the decision, the judge ruled that UDRP decisions are not afforded deference by the district courts.<sup>895</sup> This ruling was subsequently upheld by US Court of Appeals for the Fourth Circuit, which held that the term "freebies" is generic.<sup>896</sup> In a similar case, that of barcelona.com, the US Court of Appeals for the Fourth Circuit, again ruled that it would not grant UDRP decisions any deference.<sup>897</sup>

Helfer sees the UDRP as a largely American invention, asserting that, although the original WIPO study had considered a wide variety of sources, the final text of the UDRP was dominated by American laws and legal structures and, he feels, bears 'more than a passing resemblance' to the US Anticybersquatting Consumer Protection Act (ACPA).<sup>898</sup> Note 6.1 Furthermore, Helfer argues, legal challenges to UDRP decisions have tended to be submitted mainly in US courts. He reasons that trademark owners find US courts attractive because of the existence of the ACPA, which offers the potential of claiming statutory damages, while for registrants, the ACPA is the only national law to create an express cause of action for review of UDRP rulings,

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<sup>894</sup> NAF (2002). Freebies Publishing v. Retail Services, Inc. NAF Claim Number: FA0204000112565 Retrieved 14 August 2009, from <http://domains.adrforum.com/domains/decisions/112565.htm>

<sup>895</sup> Matheson, J.A, and D. Nissen (2003) "Take Three: Why Cyberspace Still Matters In The Post Dot Com World." Trademark World (160):20-24. Retrieved 22 August 2009, from <http://www.thefreelibrary.com/Take+Three:+Why+Cyberspace+Still+Matters+In+The+Post+Dot+Com+World-a0111991934>

<sup>896</sup> NAF (2004). "United States: Once Federally Registered Mark "Freebies" is Now Free For All". National Arbitration Forum Domain News 5(6) June 9, 2004. Retrieved 22 August 2009, from <http://www.adrforum.com/users/naf/documents/Newsletters/DomainNews-Vol05No06.htm>

<sup>897</sup> United States Court of Appeal for the Fourth Circuit (2003). Barcelona.com Inc. vs Excellentissimo Ayuntamiento de Barcelona. Appeal from the United States District Court for the Eastern District of Virginia at Alexandria. Argued: February 28 2003. Decided: June 2 2003. Before Wilkinson, Niemeyer and Motz, Circuit Judges. Retrieved 25 August 2009, from <http://pacer.ca4.uscourts.gov/opinion.pdf/021396.P.pdf>

<sup>898</sup> Helfer, L. (2003). "Whither the UDRP: Autonomous, Americanized or Cosmopolitan?" Princeton Law & Public Affairs Paper No. 03-10; Loyola-LA Public Law Research Paper No. 17. Retrieved 16 October 2009, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437182). P4

Note 6.1 The 1999 Anticybersquatting Consumer Protection Act (ACPA) allows trademark holders to file lawsuits against cybersquatters in the United States federal courts, and allows for the recovery of up to \$100,000 per domain name in damages, plus costs and fees. The ACPA also addresses situations where the cybersquatter is located outside the US, or where the cybersquatter cannot be identified at all. In such situations, the ACPA enables recovery of the domain name, but does not allow for damages.

allowing registrants to establish the legality of their conduct and restore their ownership of the domain name.<sup>899</sup>

Helfer further claims that US courts may give less weight to non-US trademarks, citing the Barcelona.com case, in which the panel judged that, because the City Council of Barcelona had no US trademark rights in the word 'Barcelona', the registration and use of a domain name containing 'Barcelona' was not unlawful under US law. The logical consequence of this reasoning, Helfer notes, is that foreign mark owners will *always* lose UDRP review cases filed by domain name registrants in US courts.<sup>900</sup>

Helfer argues that other national governments have tended to acquiesce to this extension of US control over the domain name system, rather than, for example, passing their own national legislation that might conflict with the ACPA.<sup>901</sup> He suggests several possible reasons for this. Firstly, since nearly half of all UDRP disputes involve US mark owners or US registrants, it may be that other governments are content to let the US serve the world's domain name policeman. Secondly, Helfer suggests, governments may be willing to acquiesce to US dominance over gTLD disputes because they are primarily concerned with sovereignty over their ccTLDs.<sup>902</sup>

### Criticism of the UDRP

Since the UDRP's inception, two broad categories of criticism have been levelled at the policy. The first is based around the notion that, while some form of trademark protection for domain names is legitimate and necessary, the current UDRP is flawed, frequently returning inconsistent and often unjust decisions. The second type of criticism focuses upon a more fundamental issue, namely the extent to which trademark rights should hold sway over domain names and the inherent conflict with principles of free speech.

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<sup>899</sup> Helfer, L. (2003). "Whither the UDRP: Autonomous, Americanized or Cosmopolitan?" Princeton Law & Public Affairs Paper No. 03-10; Loyola-LA Public Law Research Paper No. 17. Retrieved 16 October 2009, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437182). P5

<sup>900</sup> Ibid, P6

<sup>901</sup> Ibid, PP8-9

<sup>902</sup> Ibid, P9

### *Criticism of policy design and procedure*

Soon after its inception, Helfer challenged the legitimacy of the UDRP on the basis that a legitimate disputes resolution mechanism must ensure that the private parties affected by the system have significant involvement in developing its mandatory rules, or at least a meaningful ability to challenge the results in specific cases, and that national governments must also have opportunities to contribute to the system's substantive outcomes. Helfer argues that the UDRP is deficient in both of these areas.<sup>903</sup>

Another early critic, Robert Badgley, asserted that the first year of UDRP operation had resulted in numerous low quality decisions, which, he argued, was the result of flawed UDRP design. Badgley proposed a series of reforms to rectify this, including: penalisation of bad-faith complaints; clarification of the analysis required to establish identity or confusing similarity; confirmation that “sucks.com” domain name is not identical or confusingly similar to the complainant's trademark; clarification of the relationship between free-speech rights and trademark rights in the context of protest sites; clarification of the definition of competitors; and clarification of the burden of proof on the rights or legitimate interests element.<sup>904</sup>

The compressed timeline of the UDRP, while lauded as a desirable feature by its proponents, has been seen as problematic by its critics, such as Elizabeth Thornburg and Michael Fromkin, who feel that the 20-day notice period is inadequate to allow respondents to prepare a proper defence;<sup>905</sup> <sup>906</sup> Fromkin believes this may be the main reason for high respondent default rates.<sup>907</sup> Komaitis notes that the short notice period affects the respondent only, as the complainant can take as much time as they

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<sup>903</sup>Helfer, L. R. (2001). “International Dispute Settlement at the Trademark-Domain Name Interface.” Loyola Law School (Los Angeles) Research Paper No. 2001-9. April, 2001. Retrieved 16 October 2009, from [http://papers.ssrn.com/paper.taf?abstract\\_id=265922](http://papers.ssrn.com/paper.taf?abstract_id=265922) P8

<sup>904</sup> Badgley (2001). “Improving ICANN in Ten Easy Steps: Ten Suggestions for ICANN to Improve its Anti Cybersquatting Arbitration System.” University of Illinois Journal of Technology and Policy 21(1): 109-128.

<sup>905</sup> Thornburg, E. (2002). “Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process.” Journal of Small & Emerging Business Law 7 (2001):191-233. P218

<sup>906</sup> Fromkin, A.M. (2002). “ICANN's Uniform Dispute Resolution Policy, Causes and (Partial) Cures.” Brooklyn Law Review, 67(3): 605-718. P674

<sup>907</sup> Ibid

please to prepare their case before submitting the complaint.<sup>908</sup> Froomkin also argues that the UDRP fails even to ensure that the respondent has actual notice of the proceeding,<sup>909</sup> and that the ten-day limit for losers to begin legal proceedings represents “a very cramped and limited opportunity” for complainants who lose a UDRP action to get their cases into court.<sup>910</sup>

Sorkin argues that US courts should not rely on the decisions reached by the UDRP system, given the problems of its procedure.<sup>911</sup> He feels that many of the decisions being relied upon as precedent involved controversial rulings, often reaching results that were inconsistent with other decisions or with the UDRP itself, and argues that the problem is compounded by the lack of an appeal or review procedure.<sup>912</sup> Sorkin believes that, while the UDRP was intended to balance the interests of trademark owners with those of domain name registrants, in practice it is quite unbalanced, and fails to afford parties the due process protections they would have in a legal proceeding.<sup>913</sup> Thornburg likewise criticises the UDRP as lacking the basic characteristics necessary for an adequate regime, arguing, like Sorkin, that it falls far short of due process ideals,<sup>914</sup> that it favours trademark holders<sup>915</sup> and that its problems are compounded by the lack of mechanisms to reconcile differing interpretations or rectify bad decisions.<sup>916</sup> Thornburg also identifies the lack of face to face arbitration, with no opportunities for cross-examination, as problematic.<sup>917</sup> Other analysts, including Kesan and Gallo, also agree that problems with the UDRP procedure are compounded by the absence of a review mechanism.<sup>918</sup>

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<sup>908</sup> Konstantinos, K. (2005). “Pandora’s Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration.” *International Review of Law and Computers and Technology*, 19(1): 99-116. P110

<sup>909</sup> Froomkin, A.M. (2002). “ICANN’s Uniform Dispute Resolution Policy, Causes and (Partial) Cures.” *Brooklyn Law Review*, 67(3): 605-718. P674

<sup>910</sup> *Ibid*, P671

<sup>911</sup> Sorkin, D. (2001). “Judicial Review of ICANN Domain Name Dispute Decisions.” *Santa Clara Computer and High Tech Law* 18(1): 35-54. P35

<sup>912</sup> *Ibid*, PP47- P52

<sup>913</sup> *Ibid*, P53

<sup>914</sup> Thornburg, E. (2002). “Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process.” *Journal of Small & Emerging Business Law* 7 (2001): 191-233. P207

<sup>915</sup> *Ibid*, P212

<sup>916</sup> *Ibid*, P224

<sup>917</sup> *Ibid*, P218

<sup>918</sup> Kesan, J. P., and Gallo, Andres A. (2005). “The Market for Private Dispute Resolution Services – An Empirical Re-assessment of ICANN-UDRP Performance.” *Michigan Telecommunications & Technology Law Review* 11(2): 285-380. P304

In her 2002 UDRP review, Kur took a more balanced view, concluding that the UDRP was functioning satisfactorily and had no major flaws.<sup>919</sup> She did, however, concede that “considerable differences” existed between the outcome of decisions reached by eResolution panels on one hand and NAF and WIPO panels on the other. She also made some recommendations for improvement, mostly related to procedure and clarification of policy guidelines, including: consideration of the conditions under which a domain name is found to be "confusingly similar" with a mark; measures to be taken in order to safeguard the interests of free speech; and rules concerning the burden of proof and the standards to be applied in the assessment of the parties' contentions. She felt that discussion between all providers and panellists on the aims and scope of the policy would help to reduce inconsistencies, and also suggested that an appeal mechanism should be considered, together with consideration of a rule that the respondent automatically forfeits the domain name in case of default.<sup>920</sup>

Similarly, Douglas Hancock, while overall supportive of the UDRP, acknowledges some of its shortcomings, including lack of a clear system of precedent, resulting in decisions continuing to go both ways on questions such as bad faith and the legitimacy of ‘parody’ names.<sup>921</sup> Hancock also acknowledges a number of other shortcomings of the policy, including: lack of guidance in choice of law questions; continuing uncertainty over the ambit of the UDRP as it relates to celebrities and geographical areas without registered trademarks; and difficulty in dealing with certain cases effectively based on the restricted length of submissions required of the parties.<sup>922</sup>

A recent study by David Simon found that on some of these questions, such as the legitimacy of ‘parody’ names, two competing viewpoints or sets of precedent have emerged among panellists. For example, a proportion of WIPO panels have held to the view that use of a trademarked word in a domain name aimed at criticism or

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<sup>919</sup> Kur, A. (2002). “UDRP: A Study by the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich. 15 January 2002.” Retrieved 14 October 2009, from [http://www.zar.uni-karlsruhe.de/admin/get\\_data.php?resID=95](http://www.zar.uni-karlsruhe.de/admin/get_data.php?resID=95) P52.

<sup>920</sup> Ibid

<sup>921</sup> Hancock, D (2001). “An Assessment of ICANN's Mandatory Uniform Dispute Resolution Policy in Resolving Disputes Over Domain Names.” *Journal of Information Law and Technology*, 2001 (3). Electronic journal. Retrieved 20 September 2011, from [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001\\_3/hancock/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_3/hancock/)

<sup>922</sup> Ibid

parody of the trademark owner represents fair use, while a rival doctrine holds to the opposite view. A similar situation exists with regard to ‘fan site’ names.<sup>923</sup>

The cause of inconsistencies in UDRP decisions, Dinwoodie and Helfer assert, stems from the lack of effective checking mechanisms in the policy’s design. They argue that, despite the hybrid nature of the UDRP, checking devices found in one or another of the adjudicatory, arbitral, and ministerial models are missing or insufficient to constrain UDRP panel decision making; moreover, they assert, ambiguities and contradictions as to the source and content of the UDRP’s checking functions send conflicting messages to panels and create incentives for them to act in ways the UDRP’s drafters did not intend.<sup>924</sup> In the traditional arbitration model, they assert, checks arise from the fact that the arrangement is entered into voluntarily by both parties; whereas the UDRP is mandatory. Furthermore, they argue, in contrast to traditional arbitration, UDRP proceedings lack meaningful external controls by national courts.<sup>925</sup> Moreover, whereas traditional arbitration mechanisms rely ultimately on national courts to enforce their decisions, the UDRP does not, and this removes another opportunity for a “second look” at the arbitral award. This leaves internal checking functions as the principal constraint on arbitral excesses, yet, Dinwoodie and Helfer assert, UDRP panels have only weak incentives to limit their own authority, as competition incentives are skewed in favour of complainant intellectual property owners; since complainants, not respondents, choose the dispute settlement provider and pay panel fees in all single-panelist cases.<sup>926</sup> This phenomenon of ‘forum shopping’ by complainants has also been identified by other analysts, as will be examined below.

The types of checking mechanism found in the ‘ministerial’ model of dispute settlement, Dinwoodie and Helfer assert, are similarly lacking in the UDRP. They define the ‘ministerial’ or ‘nondiscretionary administrative decisionmaking’ model as referring to systems in which the authority granted to decision makers is constrained by a tight set of predetermined rules that compel a particular result in response to a

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<sup>923</sup> Simon, D.A (2011). “An empirical analysis of fair use decisions under the Uniform Domain-Name Dispute Resolution Policy.” *Boston College Law Review* 53:1 (forthcoming 2012). Retrieved 18 November 2011, from [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1993121\\_code1008893.pdf?abstractid=1887888&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1993121_code1008893.pdf?abstractid=1887888&mirid=1) P28

<sup>924</sup> Dinwoodie, G B and Helfer, L (2001). “Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy.” *William & Mary Law Review*, 43 (1): 141-273. P190

<sup>925</sup> *Ibid*, PP203-208

<sup>926</sup> *Ibid*, P210

given set of facts. Under such a model, dissatisfied parties may be able to exercise a right to appeal against decisions that are in error or otherwise not in accordance with the rules.<sup>927</sup> In the case of the UDRP, however, such checks are missing due to the absence of any review procedure.<sup>928</sup>

Several attributes of the UDRP, Dinwoodie and Helfer assert, resemble the adjudicatory functions of domestic courts and international tribunals. These include the requirement for published, reasoned decisions, indicating an interpretive role for panels and the creation of trademark-domain name jurisprudence. However, they question whether UDRP panels are competent to create such jurisprudence within the constraints the policy imposes on them.<sup>929</sup> They go on to identify several potential checks on panels' adjudicatory power, none of which they find adequate. The first of these would be to include clear rules and limiting principles in the UDRP's founding documents; however the UDRP does not do this unequivocally.<sup>930</sup> Another checking mechanism might arise from the requirement for published, reasoned explanations for decisions; however, in practice, Dinwoodie and Helfer assert, there are few actual structural incentives for panels to produce carefully reasoned decisions, not least because well-reasoned decisions require a certain amount of deliberation, something that the compressed UDRP timeline is not conducive to.<sup>931</sup> Finally, panels' interpretative powers could have been constrained through external checking functions; however, Dinwoodie and Helfer assert, no effective external checks exist.<sup>932</sup>

Komaitis advances a number of similar arguments. He too feels that the UDRP diverges from conventional arbitration due to its non-voluntary nature; he also lists a number of other differences between the UDRP and traditional arbitration, including lack of information-sharing between the parties; the non-binding nature of the decisions; the reliance on written statements only, with no opportunity for cross-examination; the lack of 'meaningful' hearings, with no penalties for making false statements; the fact that choice of law is not available to the parties; and the lack of

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<sup>927</sup> Ibid, PP213-214

<sup>928</sup> Ibid, PP.141-273 P215

<sup>929</sup> Ibid, PP217-218

<sup>930</sup> Ibid, P223

<sup>931</sup> Ibid, P230

<sup>932</sup> Ibid, P255

opportunity for the parties to negotiate details of the arbitration agreement.<sup>933</sup> Likewise, Elizabeth Woodard finds that the UDRP differs from traditional arbitration on similar grounds, and agrees with Dinwoodie and Helfer that the flexibility in the UDRP has resulted in inconsistent decisions.<sup>934</sup>

Orion Armon argues that panellists treat the loose substantive and procedural provisions as a license to ‘do justice’ in each case, even in some cases ignoring the express language of the UDRP itself in order to reach the outcome they think is best. Some of the best examples of panelists overreaching the scope of the UDRP, he argues, are those cases where panels have construed non-use of the domain name as constituting bad faith ‘use’.<sup>935</sup>

Mueller has been similarly critical of the amount of latitude afforded to UDRP panellists, particularly their latitude to ‘classify anything they want as bad faith registration and use.’<sup>936</sup> He points to the tendency of panellists to cite non-response by the registrant as evidence of bad faith registration and use, despite this not being specified in the UDRP rules. Thornburg advances similar arguments.<sup>937</sup> In a study of the first 4000 UDRP cases (up to February 2002), Mueller found that respondents defaulted in 52% of cases and that, in 96% of cases where default occurred, transfer of the domain name was awarded to the complainant (99% in the case of NAF).<sup>938</sup> From this, he reasoned that a complainant who simply wants a domain name held by another party has at least a 50/50 chance of succeeding ‘by default’ under the UDRP, arguing that this creates incentive for unethical complainants to file meritless claims, knowing that they have a good chance of success even despite having a weak case<sup>939</sup>.

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<sup>933</sup> Konstantinos, K (2005). “Pandora’s Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration”. *International Review of Law and Computers and Technology*, 19(1): 99-116

<sup>934</sup> Woodard, E. C.(2009). “UDRP, ADR, and Arbitration: Using Proven Solutions to Address Perceived Problems with the UDRP.” *Fordham Intellectual Property, Media & Entertainment Law Journal* 19 (4): 1170-1213. P1169

<sup>935</sup> Armon, O. (2003). “Is This as Good as It Gets? An Appraisal of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) Three Years After Implementation.” *The Review of Litigation* 22 (1): 99-141. PP124-125

<sup>936</sup> Mueller, M. (2002). “Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN’s UDRP.” Report prepared for the Markle Foundation. Retrieved 19 September 2011, from <http://dcc.syr.edu/PDF/markle-report-final.pdf> P19

<sup>937</sup> Thornburg, E. (2002). “Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process.” *Small & Emerging Business Law* 7:191-233. P210

<sup>938</sup> Mueller, M. (2002). “Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN’s UDRP.” Report prepared for the Markle Foundation. Retrieved 19 September 2011, from <http://dcc.syr.edu/PDF/markle-report-final.pdf> P22

<sup>939</sup> Ibid

Mueller estimated that 25% of all defaults appeared to be cases in which there was no solid evidence of bad faith registration other than the respondent's failure to respond.<sup>940</sup>

Another of the most consistently cited criticisms of the UDRP has been the alleged phenomenon of 'forum shopping'. Like Helfer and Dinwoodie, analysts including Mueller, Fromkin and Geist argue that, since complainants pick which arbitration provider is used, dispute providers have an incentive to compete to appear the most "plaintiff friendly" provider.<sup>941 942 943</sup> Mueller and Geist argue that the two ICANN-accredited providers with the most favourable outcomes for complainants (WIPO and NAF) quickly captured the lion's share of the caseload.<sup>944 945</sup> Both supported their statements by statistical analysis. Geist also found differences in decisions when the panel is composed by three arbitrators, with single member panels more likely to find in favour of the complainant.<sup>946</sup>

Mueller, Geist and Fromkin also all raise the possibility of the UDRP being used for 'reverse domain name hijacking' from legitimate holders. All mention cases where complainants have used or attempted to use the UDRP to capture domain names from what appear to have been legitimate registrants.

In response to these criticisms, the International Trademark Association (INTA) produced a rebuttal of Geist's work, challenging his methodology and assumptions.<sup>947</sup> Geist was criticised for assuming that complainants should not win more than 50% of cases and failing to consider reasons that could justify a high complainant win percentage (i.e. the fact that the UDRP was designed to deal with abusive cases). INTA criticised Geist for reliance on bare statistics, rather than examining the relative

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<sup>940</sup> Ibid, P24

<sup>941</sup> Mueller, M. (2000). "Rough Justice: An. Analysis of ICANN's Uniform Disputes Resolution Policy." *The Information Society* 17 (3): 151-163. P151

<sup>942</sup> Fromkin, A.M. (2002), "ICANN's Uniform Dispute Resolution Policy, Causes and (Partial) Cures." *Brooklyn Law Review*, 67(3): 605-718. P672

<sup>943</sup> Geist, M. (2002). "Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP." *Brooklyn Law School Journal of International Law* 27(3):903-938. P4

<sup>944</sup> Geist, Ibid P4

<sup>945</sup> Mueller, M. (2000). "Rough Justice: An. Analysis of ICANN's Uniform Disputes Resolution Policy. *The Information Society* 17 (3): 151-163. P159

<sup>946</sup> Geist, M. (2002). "Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP." *Brooklyn Law School Journal of International Law* 27(3): 903-938. P8

<sup>947</sup> International Trademark Association (2002). "The UDRP by All Accounts Works Effectively: A Rebuttal to Analysis and Conclusions of Professor Michael Geist in 'Fair.com?' and 'Fundamentally Fair.com?'" Retrieved 14 July, 2009, from [www.inta.org/downloads/tap\\_udrp\\_2paper2002.pdf](http://www.inta.org/downloads/tap_udrp_2paper2002.pdf) pp 1-9

merits of the cases; and argued he had failed to specify exactly what was wrong with the UDRP rules. INTA further argued that the difference in respondent win percentage with three member panels did not prove three member panels to be 'fairer'. Rather, respondents who feel they have a strong case may be more likely to select a three member panel (for which they must pay a fee) than ones who know they have a weak case. Furthermore, INTA argued, perceived friendliness to complainants is likely not the only factor in 'forum shopping'.<sup>948</sup>

Kesan and Gallo provided further empirical evidence on the phenomenon of 'forum shopping' by complainants and performance differences across UDRP providers. They too found that the current system 'favors providers who are friendly to complainants, and the providers' optimal strategy is to favor complainants in order to ensure that they continue to be chosen in the future.'<sup>949</sup> However, Kesan and Gallo also reason that perceived bias towards trademark owners is not the only explanation for the phenomenon of forum shopping; other factors may include provider performance and efficiency.<sup>950</sup>

#### *Criticism of principles: trademark protection vs. free speech*

Criticism has not been limited to procedural issues or policy design shortcomings; the very principle of how trademark law should be applied to domain names has also been challenged. Although domain names have latterly been seen as equating to trademarks, they were not originally intended to fulfil that purpose, and the nature of DNS means that attempting to apply principles of trademark law to domain names can be problematic. Under conventional principles of trademark law, aside from a small number of globally famous marks (such as Microsoft or Coca-Cola) a trademark does not give the holder exclusive rights over every possible use of a trademarked word or term, especially when used by a business or entity not in direct competition with the trademark holder. Controversy has been generated over the extent to which the UDRP

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<sup>948</sup> International Trademark Association. (2002). The UDRP by All Accounts Works Effectively: A Rebuttal to Analysis and Conclusions of Professor Michael Geist in "Fair.com?" and "Fundamentally Fair.com?" from [www.inta.org/downloads/tap\\_udrp\\_2paper2002.pdf](http://www.inta.org/downloads/tap_udrp_2paper2002.pdf) pp 1-9

<sup>949</sup> Kesan, J. P., and Gallo, Andres A. (2005). "The Market for Private Dispute Resolution Services – An Empirical Re-assessment of ICANN-UDRP Performance." Michigan Telecommunications & Technology Law Review 11(2): 285-380. P311

<sup>950</sup> Ibid, P300

does or should adhere to this well-established principle.<sup>951</sup> The nature of DNS means that each domain name must be unique at a global level; for example, there can only be one ‘united.com’, but United Airlines, United Carpets, United Movers, and a considerable number of football clubs could all stake a legitimate claim to that name.

The debate is summed up by Mueller, who believes that conflicts over domain names are not a simple matter of ‘wronged intellectual property holders versus sleazy cybersquatters’ but rather a complex social negotiation over the control of words and their function as messages, identifiers and locators in a globally networked space.<sup>952</sup> Mueller believes that domain names are *not* equivalent to trademarks, and that the use of a trademarked term in a domain name should not automatically be assumed to be abusive.<sup>953</sup> Similar arguments are advanced by other analysts, such as Froomkin,<sup>954</sup> who argues that trademark law is ‘organized around a set of objectives and assumptions that map incredibly badly onto the Internet, and even worse onto an Internet that uses the current DNS.’<sup>955</sup> Komaitis takes a similar view, and criticises the UDRP for approaching all domain names under trademark law rationalisations, regardless of whether the disputed domain name performs trademark functions.<sup>956</sup> He too feels that the policy has resulted in a significant shift in favour of trademark holders compared to the more balanced approach under traditional principles of trademark law.<sup>957</sup>

Mueller further argues that a key part of the problem lies, not merely in the design or intentions of the policy creators, but also in the mindset of many UDRP panellists, who mostly tend to be intellectual property lawyers. Their training and business associations, he asserts, make them highly sensitive to the nuances of how and why

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<sup>951</sup> Ibid, P311

<sup>952</sup> Mueller, M. (2000). “Rough Justice: An. Analysis of ICANN’s Uniform Disputes Resolution Policy.” *The Information Society* 17 (3): 151-163. P152

<sup>953</sup> Mueller, M. (2002). “Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN’s UDRP. Report prepared for the Markle Foundation.” Retrieved 19 September 2011, from <http://dcc.syr.edu/PDF/markle-report-final.pdf> P31

<sup>954</sup> Froomkin, A.M. (2002), “ICANN’s Uniform Dispute Resolution Policy, Causes and (Partial) Cures.” *Brooklyn Law Review*, 67(3): 605-718. P611

<sup>955</sup> Froomkin, A.M. (2001). “The collision of trademarks, domain names, and due process in cyberspace.” *Communications of the ACM* 44 (2): 91-97. P92

<sup>956</sup> Komaitis, K (2011). “Trade mark law’s increment through the Uniform Domain Name Dispute Resolution Policy.” *Journal of Intellectual Property Law & Practice* 6 (8): 553-567. P556

<sup>957</sup> Ibid

exclusivities in the use of names might be advanced and enforced, but much less sensitive to the interests of free and open public communication and commentary.<sup>958</sup> Thornburg<sup>959</sup> and Kesan and Gallo<sup>960</sup> echo Mueller in asking whether panellists' backgrounds could have an influence over their verdicts.

### Summary and implications

In summary, the UDRP's proponents, particularly the intellectual property lobby, argue that the policy has proved highly effective in tackling cybersquatting and that it has proved to be an efficient, rapid and inexpensive alternative to court litigation. Many of its critics agree, but argue that this comes at the price of low standards of fairness, consistency and due process, thus calling its legitimacy into question. They argue that the policy gives trademarks far too much weight, especially with regard to generic terms or where the domain name registrant is not in competition with the trademark owner. Trademark holders, they claim, enjoy far more protection under the UDRP than under national law, and this affects rights of free expression.

The next section will go on to further explore the validity of some of these criticisms, particularly the extent to which the UDRP does indeed appear to unduly favour trademark interests. If it can be shown to do so it, this would be evidence of capture of a major aspect of ICANN policy by the trademark lobby at the expense of other stakeholders.

### **UDRP in action**

The following section will examine the UDRP's operation in practice in order to explore in more depth the validity of some of the arguments and criticisms raised in the academic literature. It will examine, in particular, the assertions that the UDRP favours trademark owners and that it produces inconsistent, biased and low quality decisions.

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<sup>958</sup> Mueller, M. (2002). "Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP." Report prepared for the Markle Foundation. Retrieved 19 September 2011, from <http://dcc.syr.edu/PDF/markle-report-final.pdf> P25

<sup>959</sup> Thornburg, E. (2002). "Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process." *Small & Emerging Business Law* 7 (2001):191-233. P221

<sup>960</sup> J. P., and Gallo, Andres A. (2005). "The Market for Private Dispute Resolution Services – An Empirical Re-assessment of ICANN-UDRP Performance." *Michigan Telecommunications & Technology Law Review* 11(2): 285-380. P318

Obviously, the definition of what constitutes a ‘low quality’ decision is difficult to pin down and is subjective. However, it is possible to examine case histories and make some assessment as to how well the decisions adhere to the UDRP’s stated rules and principles, whether the decisions tend to be consistent or arbitrary, and whether the rationalisations given for decisions appear to show objective logic or signs of bias.

### All cases statistical analysis

There is an archived UDRP statistical analysis page on the ICANN website, but this has not been updated since 2004.<sup>961</sup> For more up-to-date statistics, it is necessary to look at data made available by the dispute resolution providers.

WIPO is easily the largest provider, with 21228 cases settled as of 17 October 2011.<sup>962</sup> The WIPO data shows that the complainant was wholly successful (transfer or cancellation of domain name) in 13934, or 65.64% of cases. A verdict wholly in favour of the respondent (complaint denied) was returned in 2228 cases, or 10.5% of the total. However, 4891 cases (23.04%) were dismissed, meaning that the respondent also retained the domain name in those cases. Unfortunately these figures do not specify the proportion of one member to three member panels. NAF does not appear to publish any statistics, but a search of the NAF online database of cases establishes that 16232 cases had been heard as of 17 October 2011, of which 12389 resulted in transfer and 40 in cancellation of the domain name. Thus the complainant was successful in 12429 cases, or 76.57% of the total.<sup>963</sup> ADRC likewise does not publish any statistics, but a list of case histories maintained.<sup>964</sup> As of 11 October 2011, there were 573 cases on this list, of which 7 were pending, leaving a total of 566 finalised cases. 502, or 88.69% of these had resulted in domain name transfer or cancellation.

In summary, therefore, ADRC, rather than NAF or WIPO, appears to be the most ‘complainant-friendly’ of the current providers. This would seem to undermine the

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<sup>961</sup> ICANN (2004). “Archived Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy.” 10 May 2004. Retrieved 24 August 2009, from <http://www.icann.org/en/udrp/proceedings-stat.htm>

<sup>962</sup> WIPO (2011). “Total Number of Cases per Year.” Retrieved 17 September 2011, from <http://www.wipo.int/amc/en/domains/statistics/cases.jsp>

<sup>963</sup> NAF database of Domain Name Dispute Proceedings and Decisions available at <http://domains.adrforum.com/decision.aspx>

<sup>964</sup> ADRC database of UDRP decisions available at [http://www.adndrc.org/hk/case\\_decision.php](http://www.adndrc.org/hk/case_decision.php)

assertion that complainants tend to choose the most ‘complainant-friendly’ provider, since the ADRC still only receives a much smaller number of complaints than NAF or WIPO.

It has not been possible from this search to check the assertion that three-member panels are more ‘respondent friendly’ than single member panels, as those statistics do not seem to be readily available and there is no way to configure the online database searches to produce this data.

### Case history analysis

In order to gain more insight into the workings of the UDRP in action, a sample of 250 UDRP case histories were studied in detail. These were selected at random from the WIPO, NAF and ADRC databases.<sup>965</sup> See Appendix 6.4 for a complete list of cases included in the sample.

Statistically these cases break down as follows:

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<sup>965</sup> WIPO database available at <http://www.wipo.int/amc/en/domains/search/case.jsp>  
NAF database available at <http://domains.adrforum.com/decision.aspx>  
ADRC database available at [http://www.adndrc.org/hk/case\\_decision.php](http://www.adndrc.org/hk/case_decision.php)

**Table 6.1: Breakdown of sample of 250 UDRP case histories**

	Respondent retains domain name	Transfer or cancellation of domain name
WIPO – single member panel	10	78
WIPO – three member panel	7	5
WIPO – Total	17	83
NAF – single member panel	15	77
NAF – three member panel	5	3
NAF – Total	20	80
ADRC – single member panel	4	40
ADRC – three member panel	2	4
ADRC – Total	6	44
All cases – Total	43	207

As far as this sample is concerned, this does seem to correlate with the assertion that three-member panels rule in favour of the respondent far more frequently than single member panels.

After carrying out this simple statistical analysis, the details of the 250 cases were considered. The intention was to check for evidence of consistency, adherence to the UDRP guidelines, and whether there appeared to be any bias, particularly in favour of trademark interests. Even from this small sample size, inconsistencies were apparent.

With regards to interpretations of element 1 of the UDRP criteria, (confusing similarity) one such inconsistency reported by various scholars and apparent in this

sample relates to the legitimacy of ‘protest’ names, where a trademarked name is combined with another (usually derogatory) phrase. Within the sample, some panels found such names were not ‘confusingly similar’ to the trademark in question, and therefore denied the complaint on element 1, while other panels in similar cases took the opposite view. For example, in WIPO case No. D2000-1015 (31<sup>st</sup> January 2001, (<lockheedsucks.com> and <lockheedmartinsucks.com>), the complaint was denied on the grounds that the disputed domain names were not confusingly similar to the complainant’s trademarks. A similar verdict was returned in the case of NAF case FA 550345 (<homedepotsucks.com>, Oct. 25, 2005). On the other hand, in NAF case FA0612000861594 (<boycottplanetfitness.com>, January 18, 2007) the complaint was upheld. The panel in this case justified its decision by stating: ‘While the website to which the domain name resolves has some of the characteristics of a “gripe site,” it is used for commercial gain of Respondent in that it is for marketing the legal services of Respondent.’ This would indeed seem to be grounds for finding against the respondent on element 3 of the UDRP criteria, but the complainant is required to demonstrate *all three* elements. It is hard to see how element 1 has been met, particularly in light of the Lockheed Martin judgement; ‘boycottplanetfitness’ is unlikely to be mistaken for an official Planet Fitness site, any more than ‘lockheedmartinsucks.com’ is likely to be mistaken for an official Lockheed Martin site.

As various scholars have argued, this sort of inconsistency is clearly due to the fact that what constitutes ‘confusing similarity’ is not clearly defined by the UDRP. Other case histories in the sample show similar inconsistency. For example, <goldmansex.com>, was found to be confusingly similar to <goldmansachs.com> (NAF case FA0606000741852), yet indb.com was not considered confusingly similar to imdb.com. (NAF case FA0503000436735). The panel in NAF case FA0511000597496 (January 30, 2006) ordered transfer of the domain name <everythingcooking.com>, despite the fact that ‘cooking’ is a generic term and used as a component of many domain names. On the other hand, in the case of <bassets.com> (NAF case FA0003000094333, June 16, 2000) the complaint was rejected on element 1, despite the fact that ‘bassets’ is arguably less generic than ‘cooking’. Similarly, in NAF case FA0008000095415 (<800BEACHES.COM>, October 4, 2000), the panel denied the complaint on the grounds that the term ‘Beaches’ has a generic meaning.

The panel in NAF case No. D2000-1687 (August 20, 2004, <reinfolink.com> ruled that a trademark granted after the registration date of the contested domain may not be considered valid grounds for transfer under the UDRP. However, in ADRC case HK-0700150 (7<sup>th</sup> August 2008, <desciclopedia.org>, the panel found in favour of the complainant, despite the fact that the complainant's trademark was registered after the domain name. Moreover, the panel did not explain why the trademark rights still stood under this circumstance.

In ADRC case CN-0700134 (27 July 2007, <cqtv.com>), the Beijing office panel took the Chinese law interpretation that trademarks must be registered to hold any validity. This is interesting because the UDRP specifies that a service mark does not necessarily have to be registered in order to be considered legitimate under the policy. This provides an example of local law being taken into consideration by a panel, which has the discretion to do so under Rule 15 of the UDRP Rules.<sup>966</sup> In contrast, a panel from the Hong Kong office of the ADRC recognised a non-registered trademark in case HK-0800183(18<sup>th</sup> July 2009, <likashing.org>. This is in accordance with Hong Kong law, which does recognise common law service marks. Although these two verdicts appear contradictory on the surface, therefore, the context was different. To some extent, the panels' ability and willingness to apply local law also undermines the view that the UDRP is a globalised monolithic system that seeks to supplant territorial law. However, it must be borne in mind that the decision whether to apply local law is entirely at the discretion of the panel.

If what constitutes 'confusing similarity' (element 1) is vague and produces contradictory interpretations, the same seems to be true of element 2 of the UDRP criteria ('legitimate interests'). For example, in NAF case FA0509000567039 (29<sup>th</sup> September 2005, <teensmart.com>, despite the complainant having a trademark to the term 'teensmart', the respondent's use of the domain name for a portal / links site was held to be legitimate use, and the complaint was rejected on these grounds. However, in an apparently similar case, NAF FA0612000864072 (January 23, 2007, <deltasigmamatheta.com>), the respondent's use of the disputed domain name to resolve

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<sup>966</sup> ICANN (1999). Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"). As approved by the ICANN Board of Directors on 30 October 2009. Retrieved 15 September 2011, from <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> Rule 15

to a website that featured advertisements and links to other sites, was found to be ‘neither a *bona fide* offering of goods or services pursuant to Policy ¶4(c)(i) nor a legitimate noncommercial or fair use pursuant to Policy.’

Several other cases upheld the respondent’s ‘legitimate use’ rights despite the domain name corresponding exactly or closely to the complainant’s trademark. For example, in FA0106000097377 (July 23, 2001 <bioxide.com>), the complaint failed because the respondent had been using the name in connection with a ‘legitimate and substantial offering of goods and services’ since 1997, and became commonly known by the domain name. In NAF case FA003000094237 (April 4 2000, <sahajmarg.org>), Shri Ram Chandra mission of California, registered a complaint against another organisation with the same name in India over the latter’s use of the term ‘Sahaj Marj’ in its domain name, a term the Californian organisation held a US trademark for. The panel decided that, though the California organisation had a US trademark to the name ‘sahaj marg’, the Indian organisation had referred to the term in its constitution since 1945, and therefore had a legitimate interest in it (this complaint also failed on criterion 3). In WIPO case D2001-0903 (6th November 2001, <okidataparts.com>), the panel found in favour of the respondent, which was an authorized seller and repair centre for the complainant’s products, as it was using the <okidataparts.com> site to promote only Oki Data goods and services, and prominently disclosed that it was merely a repair centre, not Oki Data itself. The panel found this to be legitimate use. In a similar case, WIPO D2004-0481 (20<sup>th</sup> August 2004, <porsche-buy.com> and <porschebuy.com>), the panel similarly found the respondent’s use of the domain name to deal in products produced by the complainant to be legitimate use.

Like elements 1 and 2, element 3 of the UDRP criteria seems vaguely defined in terms of what is considered ‘bad faith’, and this has produced some contradictory interpretations in this sample. The panel in NAF case FA0002000093548 (April 22, 2002, <zaploan.com>) held that the registration of a name in which one has no legitimate interests constitutes bad faith in itself, despite the fact that the UDRP specifically states that the domain must have been both registered *and used* in bad faith for a complaint to be upheld. Similarly, in WIPO Case No. D2002-0448 (7<sup>th</sup> December 2002, freemandecorating.com>) the panel held that ‘in the absence of any showing of rights or legitimate interest by Respondent, it is reasonable to infer bad

faith in Respondent's registration and use of the Domain Name.' In contrast, the panel in <okidataparts.com> stated that for a bad faith verdict, there had to be 'a pattern of causing disruption'. In WIPO case D2002-030 (4<sup>th</sup> December 2002, <1ingrammicro.org> and <ingrammicro.net>), the panel found that the first two elements had been met, stating that '...there is no evidence that the Respondent has any particular right or legitimate interests in the domain names....' but went on to dismiss the complaint on element 3, stating there was no evidence of bad faith use. The inconsistency shown in these these cases provides a good illustration of Armon's findings regarding ambiguity over whether and how non-use of the domain name can be construed as bad faith 'use'.<sup>Note 6.2</sup>

In NAF case FA0112000103127 (January 14 2002, <idlj.com>), the panel found that there was no bad faith, as the respondent had never approached Complainant to try to sell the domain name, implying that this was a necessary criterion for a bad faith finding. However, in WIPO case D2005-0282 (6<sup>th</sup> August 2005, <alsa.com>), the panel did not find bad faith, despite the respondent openly admitting that he bought the domain name with the intention to sell it at a profit, which is basically the definition of cybersquatting under the UDRP. Similarly, in NAF case FA0006000095014 (26<sup>th</sup> June 2000, <littlefolkart.com>), the panel did not find bad faith even though the respondent had offered to sell the name to the complainant for \$150,000.

In ADRC case CN-0800198 (30<sup>th</sup> June 2008, <redoffice.com>), the panel found that the respondent had no legitimate interests in the name, since it was not currently being used, although it had previously been used for a nonprofit site. In ADRC case HK-1100367 (9<sup>th</sup> June 2011, <olayclub.net>) the panel took the respondent's non-use of the disputed name as evidence of bad faith, citing some previous precedents. However, in NAF case FA0612000868825 (January 22, 2007, <medhelp.com>), the panel found that the respondent had legitimate interests in the name, despite the fact that it was not being used at present, because it 'intended' to use the disputed domain

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<sup>Note 6.2</sup> According to Armon, the "nonuse as use" doctrine was created in *Telstra Corp. Ltd. v. Nuclear Marshmallows* (WIPO case D2000-003) in which the panellist found that it was 'possible, in certain circumstances, for inactivity by the Respondent to amount to the domain name being used in bad faith'. Armon argues that this analysis completely voids the intended effect of the UDRP provision requiring registration and use by suggesting that inactivity constitutes "use", and is contrary to the UDRP's plain language and the wording of the UDRP advisory committee. See Armon, O (2003). "Is This as Good as It Gets? An Appraisal of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) Three Years After Implementation." *The Review of Litigation* 22 (1): 99-141. PP124-125

name to provide access to medical information. Similarly, in NAF case FA0006000095014 (26<sup>th</sup> June 2000, <littlefolkart.com>), the panel found that the holder had legitimate interests, although he was not using the name. In WIPO case D2001-1177 (3 December 2001, <bauhaus.com>), the panel decided that the domain name did not have to be pointing to a publicly visible website in order for the respondent to be making 'legitimate use' of it. In this case, the respondent had been using the name for pages in subdirectories (both http and ftp protocols) and for email (SMTP protocol), as well as a login page for private web pages.

In WIPO cases D2005-0459, D2005-0877, D2004-0102, and D2002-0301, the respondents all retained the domain name despite not submitting a response. On the other hand, the panel in WIPO case D2001-1400 (20<sup>th</sup> January 2002, <panasonic.net>) inferred bad faith from the holder's non-response.

### Summary and implications

The analysis of these 250 case studies seems to underscore some of the criticisms of the UDRP made by various scholars. There is clear evidence of inconsistent rulings and widely varying interpretation of the rules even within this relatively small sample of 250 cases. Not all of the apparently poor quality decisions were in the trademark owners' favour, however; while there were some decisions where trademark owners appear to have had questionable verdicts go in their favour, there have also been certain cases where the trademark owner lost despite apparently having a strong case. It should also be also noted that, despite the inconsistencies and questionable verdicts reached in a minority of cases, the majority of the 250 cases reviewed returned well-reasoned verdicts that appear to be fully consistent with the UDRP rules.

It is clear that decisions made under the UDRP do not invariably favour trademark owners, and in many cases respondents do appear to receive fair hearings against trademark owners. However, it seems that outcomes can be something of a lottery and are dependent upon the panel. As Mueller and various other scholars have noted, the UDRP rules are loose and allow much scope for panels to apply their own interpretations. Moreover, panels are not consistently guided by past precedent, sometimes appearing to apply precedent and other times appearing to ignore it, resulting in inconsistent decisions. In some cases, panellists even appear to ignore the

express rules of the UDRP itself. These problems are compounded by the lack of an appeals procedure so that bad decisions cannot be corrected, except by going to court.

It seems fair to conclude, therefore, that the UDRP as it stands is, to some degree, a flawed policy; and its faults are well documented. Despite this, the policy has remained in place unmodified for well over a decade, during which time most ICANN policies, and indeed ICANN's organisational structure, have undergone substantial change. There is a need, therefore, to ask why this is so; what interests and groups have kept the current UDRP in place for such a lengthy period, and in what ways have they been able to apply their influence within the ICANN structure?

### **Analysis: Actors and interests in creating and sustaining the UDRP**

#### Role of intellectual property organisations

Aside from the role played by WIPO in initial policy creation, the intellectual property lobby has been able to exert influence over this policy area in various ways. These have included the initial lobbying efforts that prompted the US government to commission the WIPO study; the influence intellectual property interests have held in the DNSO / GNSO particularly through the IPC and BC; the apparent influence of trademark interests with governments and their representatives in the GAC; and (as with New gTLDs), the willingness of trademark holders, trademark organisations and IP lawyers to make use of the public comments facility to make their voices heard.

For the most part the intellectual property lobby has praised the UDRP, though some would like to see the rules made tougher with still greater protection for trademark interests; for example by removing the 'bad faith' requirement or implementing a 'loser pays costs' model. Such positions were expressed from some quarters during the recent discussions around UDRP review.<sup>Note 6.3</sup> The fact that such measures have not (so far) been adopted is a demonstration that the UDRP does in fact make some attempt to balance other interests and rights against trademark protection.

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<sup>Note 6.3</sup> See, for example, comments made by X, Paul McGrady (GT Law / IPC) and the Federation of Intellectual Property Attorneys on ICANN public comments forum. Retrieved 17 September 2011, from <http://forum.icann.org/lists/prelim-report-udrp/pdf84ZHuNpmgo.pdf>

## Role of the DNSO / GNSO Constituencies

### *Initial policy creation*

The Intellectual Property Constituency had a very strong presence on WG A (6 members out of 15). There were also two members from the Business Constituency. In addition, there were two gTLD registry representatives, three representatives from the non-commercial constituency, and one member each for the ISPs and ccTLD registries constituencies. Working Group A was divided into four sub-groups working on different aspects of dispute resolution policy. On July 8, 1999, the WG-A recommendations were posted for public comment on the DNSO website. A final report of WG-A was sent to the Names Council on July 29, containing five recommendations. A vote was taken by email, with 15 of the 18 members of the Names Council voting. The Names Council members voted, first, on whether the report should be forwarded to the Board as a community consensus recommendation; 13 of the Names Council members supported this.<sup>967</sup> The ballot also included separate votes on each of the five WG-A recommendations. The WG-A recommendations, and the Names Council vote on each, are shown in Appendix 6.5.

As several public commentators pointed out at the time, it is questionable whether the DNSO's approval for the policy was valid in accordance with ICANN's Bylaws, given that the newly-organised NCUC was given no opportunity to participate or vote on the Names Council at the time the approval was given. Even without the NCUC, there was no consensus on the proposals, which were approved by a majority vote with a substantial amount of dissent regarding various issues.<sup>968</sup> <sup>Note 6.4</sup> Despite these

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<sup>967</sup> ICANN (1999). ICANN Staff Report: Uniform Dispute Resolution Policy for gTLD Registrars. Retrieved 14 September, 2009, from <http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm>.

<sup>968</sup> Ibid.

<sup>Note 6.4</sup> The votes of the three gTLD representatives all contained a partial dissent noting: (a) that the DNSO General Assembly did not have significant input; (b) that registrars should be required to adhere to uniform dispute policies by contract with the gTLD registry administrator, rather than by establishment of the policy by ICANN; (c) that registrars should be satisfied with the process before it was put into place; (d) that variance should be allowed in fees, payment, dispute-resolution providers, and involvement of registrars; (e) that ICANN should not approve or accredit dispute-resolution providers; and (f) that registrars should work out remaining procedural problems before the policy is put into place. Furthermore, the ccTLD representative objected to recommending adoption of a policy without further study and to any continuing involvement by WIPO in the refinement or enhancement of procedures. One IPC representative also expressed dissent, stating that there was no consensus on expansion of the scope of the policy beyond abusive registrations, requesting that issue to be referred back to WIPO for further work, and stating that there was also no community consensus regarding the proposed timetable for implementation of voluntary arbitration. Source: ICANN. (1999). ICANN Staff

issues, the Board accepted the DNSO recommendation for establishment of a uniform domain-name dispute-resolution policy.<sup>969</sup>

The support of the registries and registrars was crucial (particularly since those constituencies carried double votes on the DNSO Council). The Registrars also played another significant role in initial policy development, in that the registrars' Model Policy was used as a starting point for the UDRP implementation documents.<sup>970</sup>

### *GNSO and policy review*

Since 2003, the decision whether to review the UDRP has been the remit of the GNSO. Perhaps one reason for the GNSO's inaction on the matter has been a lack of consensus among the Constituencies. With regard to the abortive 2003 review, the NCUC appears to have favoured some degree of procedural and substantive reform to provide safeguards and protections for registrants making legitimate non-commercial or fair use of their domain names. The BC and IPC were more concerned with the rights of the trademark holders, while registrars were keen to maintain a system that kept them out of having to act as arbiters in any disputes. Registries were supportive of the registrars as they too feared being drawn into disputes, and the ISPCP had little interest in the matter.<sup>971</sup> By the time of the 2011 discussions, consensus was no closer. The NCUC again favoured reform to give more balance to considerations other than trademark rights.<sup>972</sup> The BC and the IPC<sup>973</sup> opposed a PDP on the UDRP<sup>974</sup>, while the

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Report: Uniform Dispute Resolution Policy for gTLD Registrars. Retrieved 14 September, 2009, from <http://www.icann.org/en/meetings/santiago/udrp-staff-report.htm>.

<sup>969</sup> ICANN (1999). Minutes of meeting of the initial Board. 26 August 1999. Retrieved 16 September 2011, from <http://www.icann.org/en/minutes/minutes-26aug99.htm>

<sup>970</sup> Ibid

<sup>971</sup> ICANN (2003). Staff Manager's Issues Report on UDRP Review. 1 August 2003. Retrieved 18 September 2011, from <http://www.icann.org/en/gnsso/issue-reports/udrp-review-report-01aug03.htm>

<sup>972</sup> ICANN (2011). 'Comments of the Non Commercial Users Constituency on the current state of the UDRP.' Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. 14 July 2011. Retrieved 18 August 2011, from <http://forum.icann.org/lists/prelim-report-udrp/msg00003.html>

<sup>973</sup> ICANN (2011). 'Comments from the Intellectual Property Constituency'. Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. Retrieved 18 August 2011, from <http://forum.icann.org/lists/prelim-report-udrp/msg00020.html>

<sup>974</sup> ICANN (2011). 'Business Constituency (BC) comments on Preliminary Issue Report on the UDRP'. 15 July 2011. Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. Retrieved 18 September 2011, from <http://forum.icann.org/lists/prelim-report-udrp/msg00011.html>

registrars favoured one.<sup>975</sup> The other GNSO constituencies did not submit comments to the PCP.

### Role of governments

The United States government played an important unilateral role in establishing the UDRP, by commissioning the WIPO study as part of the process that led ultimately to the creation of ICANN. The original proposal, as set out in the Green Paper of February 1998, had been to refer domain name disputes to US courts.<sup>976</sup> However, this proposal was protested<sup>975</sup> by trademark holders and domain name registrants outside the United States, who characterised this as an inappropriate attempt to impose US trademark law as the law of the Internet.<sup>977</sup> As a result, the White Paper referred the matter to WIPO instead<sup>978</sup> and accepted the findings of that study. Since the UDRP's inception, the DoC has continued to endorse it.<sup>979</sup>

Although the newly-formed ICANN was not obligated to implement the findings of the WIPO study, the US government's action was nonetheless clearly very influential in initiating the chain of events that led ultimately to the UDRP. Despite the fact that the matter was referred ultimately to WIPO, an international body operating under the auspices of the United Nations, some scholars, such as Helfer, have nonetheless

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<sup>975</sup> ICANN (2011). 'RySG Comments - Preliminary Issue Report on The Current State of the Uniform Dispute Resolution Policy. 13 July 2011.' Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. Retrieved 18 August 2011, from <http://forum.icann.org/lists/prelim-report-udrp/msg00001.html>

<sup>976</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration. "A proposal to improve technical management of Internet names and addresses." Discussion draft, 30 January 1998. (Green Paper). Retrieved 25 July, 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N\\_1](http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm#N_1)

<sup>977</sup> Referenced in: United States Department of Commerce: National Telecommunications and Information Administration (1998). Statement of Policy: "Management of Internet Names and Addresses". ('White Paper'). 5<sup>th</sup> June 1998. Docket Number: 980212036-8146-02. Retrieved 14 February 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>978</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: "Management of Internet Names and Addresses". ('White Paper'). 5<sup>th</sup> June 2007. Docket Number: 980212036-8146-02. Retrieved 5 July 2009, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>979</sup> United States Department of Commerce: National Telecommunications and Information Administration (2001). NTIA 2000 Annual Report to Congress. January 18, 2001. Retrieved 12 September 2011, from <http://www.ntia.doc.gov/report/2001/ntia-2000-annual-report-congress> and

United States Department of Commerce: National Telecommunications and Information Administration (2002). Statement Regarding Extension of Memorandum of Understanding with ICANN (Amendment 5). Retrieved 12 September 2011, from <http://ntia.doc.gov/page/2002/statement-regarding-extension-memorandum-understanding-icann-amendment-5>

interpreted the UDRP as effectively an intellectual property regime imposed by a hegemon.<sup>980</sup> Note 6.5 Dinwoodie and Helfer argue that, notwithstanding its status as a UN agency, in conducting the domain name study, WIPO was engaged in an act of collaboration between public and private entities quite unlike its historical role. It acted upon a request from a single national government to convene a study that would ultimately be submitted for consideration not by other national governments or a governmental treaty convention, but by a private corporation. This corporation would have the power to implement the WIPO proposals without further consultation with or approval by any of the many affected national governments, a power drawn from its relationship with the United States government and its control over the DNS.<sup>981</sup>

Other governments do not appear to have had any significant direct influence on the policy, although almost half of ccTLD registries have adopted either the UDRP itself, or a variant of it.<sup>982</sup>

The GAC appeared to take little interest in the matter at the time of the UDRP's inception. However, today the GAC appears to endorse the current UDRP and recently added its voice to those opposing a PDP on the matter at this time.<sup>983</sup> Like some elements of the intellectual property lobby, the GAC reasoned that the current UDRP helps to provide stability at a time when the gTLD space is about to be greatly expanded; indeed, this was used by the Board as part of its rationale for rejecting certain elements of the GAC advice on new gTLDs.<sup>984</sup> The GAC's opposition to a PDP at this time provides further evidence of the pervasive influence of trademark interests; they appear to have powerful allies at the governmental level as well as within the GNSO.

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<sup>980</sup> Helfer, L. (2003). "Whither the UDRP: Autonomous, Americanized or Cosmopolitan?" Princeton Law & Public Affairs Paper No. 03-10; Loyola-LA Public Law Research Paper No. 17. Retrieved 12 September 2011, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437182).

<sup>Note 6.5</sup> This forms an interesting parallel with other international intellectual property regimes, such as the TRIPS agreement, which have also been interpreted as arrangements imposed by the hegemonic power of the United States (and to some extent its allies, the EU and Japan). See, for example, Braithwaite, J. and P. Drahos (2000). *Global Business Regulation*. Cambridge, Cambridge University Press. Chapter 7: 'Property and Contract': 39-85. PP61-67

<sup>981</sup> Dinwoodie, G B and Helfer, L (2001). "Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy." *William & Mary Law Review* 43(1): 141-273. P167

<sup>982</sup> Dryden, H. (2011). Letter from Heather Dryden to Stephane van Gelder. 14 September 2011. Retrieved 17 October 2011, from <https://gacweb.icann.org/download/attachments/1540170/GAC+advice+on+a+possible+UDRP+PDP+Sep.+2011.pdf?version=1&modificationDate=1317030819988>

<sup>983</sup> Ibid

<sup>984</sup> Ibid

## Role of public input

As with the previous two case studies, the public comments periods have been dominated by interested parties rather than the ‘Internet using public’ per se. Representatives of the intellectual property lobby have been prominent in each PCP.

### *Public comment on proposed UDRP (1999)*

A total of 118 comments by 83 individual posters were submitted on this topic.<sup>985</sup> Appendix 6.6 summarises the main positions taken by the public commentators.

15 posters urged abandonment of the idea of a UDRP altogether. 39 posters did not oppose the principle but suggested changes to the specific proposals. 14 posters criticised the lack of consultation and / or felt that the process was not representative enough. 11 posters criticised the lack of representation for the newly-formed NCUC in the Names Council deliberations and vote. Only 3 posters gave unqualified support to the proposals, two of which were trademark interests and the third of unascertained background.

A number of posters felt that the proposed policy unduly favoured trademark interests. Some representatives of trademark interests, however, wanted the rules made tougher than those proposed, with greater rights for trademark holders. Anne Lucey (Viacom), Scott B Schwartz (Intel), Caroline Chicoine (PeperMartin) and Sarah B. Deutsch (Bell Atlantic) all objected to the proposal that registrants could be permitted to retain the domain name if they were using it to make an offering of goods or services. Lucey also objected to the burden of fees being placed on the complainant. John Jacobs (affiliation unknown) suggested that losing registrants be made liable for all the trademark owner's costs, including UDRP fees, out-of-pocket expenses and legal fees.

The comments included posts from two scholars cited in this dissertation, Michael Fromkin and Jonathan Weinberg. Fromkin argued that the policy development process to date had been ‘seriously deficient’ and that consensus had not been demonstrated. He argued that WG A was not properly constituted according to ICANN's own rules, since it did not contain a representative from each constituency

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<sup>985</sup> ICANN Public Comments forum on the UDRP. Opened 6 December 1999. Accessed 17 October 2011, at <http://www.icann.org/en/comments-mail/comment-udrp/current/maillist.html>

of the DNSO, and furthermore claimed that the Working Group was ‘manipulated and railroaded’ both by the exclusion of interested parties, and by being divided up into sub-groups, with people not always being allowed access to the sub-group they wished to be in. Froomkin went on to claim that the ultimate report was written single-handedly by the Chair, and posted for comment to the full working group for only a brief period. He further expressed doubts as to the validity of the Names Council endorsement of the WG-A report, since at the time it existed only in a ‘rump form’, and also argued that, since the drafting committee was composed entirely of North Americans, there were doubts as to whether non-US viewpoints had been heard. Weinberg expressed full support for Froomkin’s comments. Both Froomkin and Weinberg asserted that the two-week comment period had been the only time that the policy, or any direct predecessor, had been subject to scrutiny by a range of interested and internationally representative actors.

Despite the considerable amount of criticism received, the public comments do not appear to have made any difference to the final shape of the policy. The Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy noted the input received in the public comments, but recommended that implementation should go ahead of an essentially unaltered policy, pointing out that the nature of the policy had already been approved. It further suggested that implementation should not be further delayed and that any refinements to the implementation strategy could be studied by the DNSO at a later date.<sup>986</sup> On the same date as this report was published, the Board approved the implementation documents.<sup>987</sup>

#### *Public forum (25 August 1999)*

An opportunity for stakeholder input was available to those physically present at the ICANN meeting in August 1999 (Santiago, Chile). At the Public Forum<sup>988</sup> (August 25), Rita Rodin (AOL, Register.com) gave an endorsement to the registrars’ draft,

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<sup>986</sup>ICANN (1999). Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy. Submitted for Board meeting of October 24, 1999. Retrieved 17 September 2011, from <http://www.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm#4> Section 4

<sup>987</sup>ICANN (1999). Minutes of special meeting of the Board. 24 October 1999. Retrieved 18 September 2011, from <http://www.icann.org/en/minutes/minutes-24oct99.htm>

<sup>988</sup>ICANN (1999). Scribe's Notes - ICANN Public Meeting. August 25, 1999 Santiago, Chile. Retrieved 17 September 2011, from <http://cyber.law.harvard.edu/icann/santiago/archive/scribe-082599.html>

arguing that the WIPO report represented a ‘majority rough consensus’ that tried to balance needs of trademark holders, registrars, and Internet users. However, some of the other comments were more critical. Kathy Kleiman, representing the Non-Commercial Constituency, challenged the assertion that the WIPO report was representative of general consensus. She identified a need for a better definition of cybersquatting. Peter Dengate Thrush (ccTLD representative on WG A) stated that he was worried about the ‘end-run around the process.’ He claimed there was no recognition of ccTLD comments and that ccTLD registrars had no opportunity to participate in the process. Karl Auerbach (cavebear.com) argued that requests for comment should have been sent to those holding domain names via the WHOIS database. ‘Davidson’ (identity unknown) asked what the process would be for the working group to get the input of non-commercial and public interest communities.

*PCP on eUDRP 12 July-12 August 2009*

21 comments were posted by 20 individual posters.<sup>989</sup> One of these was spam and two appeared identical (though apparently posted by different individuals). The main positions taken by the commentators are summarised in Appendix 6.7. 13 expressed open support for the eUDRP proposal, 6 offered no clear opinion for or against, and one was spam. No commentator completely opposed the principle of the eUDRP, although Frank Michlick (DomainCocoon) did state that his company opposed the eUDRP ‘as proposed’. He, together with several other commentators, recommended safeguards to ensure respondents have actual notice of a proceeding, such as mandatory paper letters. George Kirikos pointed out that it is very easy to miss an email; similarly, GoDaddy pointed out that email notification is not uniformly reliable.

Those supporting the eUDRP included several representatives of the intellectual property lobby, including the Intellectual Property Constituency, the International Trademark Association, and the Internet Commerce Association, as well as several intellectual law firm representatives. Two of the ICANN DRPs, NAF and the Czech

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<sup>989</sup> ICANN Public Comments forum on eUDRP Proposals. Opened 12 July 2009. Accessed 17 September 2011, at <http://forum.icann.org/lists/eudrp/>

Arbitration Court, also posted comments in support of the eUDRP, as did two registrars, a registry and a financial services company.

The Board approved the eUDRP on 30<sup>th</sup> October 2009<sup>990</sup> with the proviso that respondents must also be issued with hard copy notification of the proceeding. This appears to be in accordance with the arguments made by many contributors to this PCP.

*Public comment on Issues Report 15 May – 22 July 2011*

27 comments were submitted during this period.<sup>991</sup> Appendix 6.8 summarises the main positions taken by the public commentators.

As the appendix shows, 17 commentators opposed an immediate UDRP review. These mostly represented trademark interests and the dispute resolution providers (which naturally have an interest in maintaining the status quo, since they profit from handling UDRP disputes). However, some of these were willing to countenance a review at some point in the future, but argued the timing was currently wrong due to the present need to maintain the stability provided by the current UDRP in the context of the new gTLD programme. 7 commentators from a range of backgrounds supported an immediate review. 11 commentators, including some of those who argued against a full review, nonetheless believed that procedural amendments could improve the UDRP process. Only 3 commentators, two of whom were academics, argued for substantive change. One commentator (Kristine Dorrain of the NAF) opposed any kind of change, even procedural. Brian Beckham (WIPO) also argued that procedural change might become substantive change, although he did not say that there absolutely should not be any procedural change.

A number of commentators objected to the Staff statement in the Issues Report that opening up the UDRP to review may ‘undermine’ it, including Danny Younger (online journalist), Konstantinos Komaitis (academic), George Kirikos (Leap of Faith

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<sup>990</sup> ICANN (2009). Resolutions of special meeting of the Board. 20 October 2009. Retrived 19 September 2011, from <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>

<sup>991</sup> ICANN Public Comments Forum on Preliminary Report on the State of the UDRP. Opened 24 July 2011. Accessed 18 September 2011, at <http://forum.icann.org/lists/prelim-report-udrp/>

Financial Services Inc.) and the RySG. In addition, the NCUC declared itself unsatisfied with the Issues Report, which it described as being based upon an ‘internal opinion poll among insiders with an agenda’ rather than upon rigorous research. Shawn Gunnarson (Kirton & McConkie Attorneys at Law) argued that the Report had not been prepared in accordance with ICANN’s own Bylaws. He further claimed that there were ‘informal reports from multiple reliable sources’ that ICANN staff had been pressured into opposing a PDP on the UDRP at this time

### *Role of the ALAC*

The ALAC’s role in this policy area has been extremely limited to date. At the time of the UDRP’s inception, the organisation did not exist. Its role in the recent discussions around a UDRP review has so far been limited to providing a statement, which was stated to be the product of extended discussions among the RALOs.<sup>992</sup> The ALAC statement supported the Staff recommendation that a PDP on the UDRP should not be initiated at this time. However, it opposed the Staff recommendation that a *small* group of experts be convened to produce proposals to improve the process or implementation of the UDRP to be cause for concern; the ALAC argued that, if the UDRP was to be reviewed or studied, the group doing so should be more broadly based, open to all five geographical regions and ‘especially to experts from the non - Latin - language community and worldwide Internet community, who have no conflicts of interest.’<sup>993</sup>

### Role of the DRPs

The dispute resolution providers obviously have a significant vested interest in retaining the UDRP, since they profit from handling disputes. Though they have no direct representation on ICANN’s decisionmaking bodies, they have been able to make their voices heard through various channels. In particular, in the recent discussions around a possible UDRP review, the DRPs were directly consulted via the GNSO’s information gathering exercises, as well as (in the case of WIPO and NAF)

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<sup>992</sup> ICANN (2011). ‘ALAC Statement on the Preliminary Issue Report on the Current State of the UDRP.’ Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. 21 July 2011. Retrieved 17 September 2011, from <http://forum.icann.org/lists/prelim-report-udrp/msg00026.html>

<sup>993</sup> Ibid

contributing to the public comments process.<sup>994</sup> <sup>995</sup> Predictably, they opposed a review.

### Role of ICANN staff

As with other policy development areas, ICANN staff played a key role in drawing up the details of the actual implementation strategy. In the Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy (24 October 1999), staff recommended immediate implementation of the UDRP despite noting that there had been numerous objections in the recent PCP<sup>996</sup>. The Board accepted the staff recommendation, approving the implementation documents on the same day the report was published.<sup>997</sup>

Furthermore, staff produced the 2003 and 2011 Issues Reports, both of which recommended against a PDP on the UDRP at that time. Though the GNSO is, of course, under no obligation to accept staff recommendations, it did not proceed any further with a PDP following the publication of the 2003 Issues Report. Whether that decision will be repeated this time around remains to be seen.

Gunnarson's claim that staff were pressured into advising against a PDP in the most recent Issues Report is interesting if unsubstantiated. The 2011 Issues Report does, however, appear to be somewhat one-sided and based largely on input from groups likely to be pro-UDRP, with little attempt to balance this with input from the UDRP's critics.

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<sup>994</sup> WIPO (2011). 'WIPO Center observations on ICANN Staff "Preliminary Issue Report on the Current State of the UDRP"'. Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. 15 July 2011. Retrieved 17 September 2011, from <http://forum.icann.org/lists/prelim-report-udrp/pdfG7gPj3Hxss.pdf>

<sup>995</sup> NAF (2011). 'National Arbitration Forum Comments on UDRP PDP'. Comment posted to ICANN public comments forum on Preliminary Report on the State of the Uniform Domain-name Disputes Resolution Policy. 15 July 2011. Retrieved 17 September 2011, from <http://forum.icann.org/lists/prelim-report-udrp/pdfI749HNku.pdf>

<sup>996</sup> ICANN (1999). Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy. Submitted for Board meeting of October 24, 1999. Retrieved 17 September 2011, from <http://www.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm#4> Section 4

<sup>997</sup> ICANN (1999). Minutes of special meeting of the Board. 24 October 1999. Retrieved 18 September 2011, from <http://www.icann.org/en/minutes/minutes-24oct99.htm>

## Role of the Board

In 1999 the Board effectively rubberstamped a policy drafted by ICANN staff, based on the registrars' model policy and recommended by the Names Council and by staff. The decision was a unanimous one.<sup>998</sup> While questions can be raised about the appropriateness of an interim Board approving such a critical policy, particularly considering the obvious lack of true community consensus regarding the matter, no subsequent Board has appeared to show much enthusiasm for revisiting the issue. While the Board could intervene and request a PDP be begun, as it did in the case of new gTLDs, it has chosen to leave the question of whether to review the UDRP in the hands of the DNSO / GNSO.

## Conclusions to Chapter 6

As with the previous case studies, the UDRP represents a public policy issue of enormous significance that goes far beyond mere technical standards setting. Indeed, it is the most obvious case of ICANN making something akin to international law. Arguably, it does so without infringing the principle of state sovereignty, because UDRP decisions are ultimately subject to review by national courts. In practice, however, such review is the exception rather than the norm, and, as Dinwoodie and Helfer assert, the UDRP constitutes much 'harder law' in practice than it does in theory.

As with new gTLDs and IDNs policy, the UDRP could hardly be described as a 'consensus' policy. Its initial creation could not be said to have been carried out in a multistakeholder manner, or to reflect consensus decisionmaking. The policy developed from the WIPO report, commissioned by the US government without involvement of other stakeholders. The issue was subsequently passed to the DNSO's Working Group A, a body dominated by intellectual property and business interests, and the report it produced was accepted by the DNSO Names Council by 11 votes to 4. Thus there was not even a consensus between the members of the Names Council on the proposals, let alone among other stakeholders; furthermore, the NCUC was given no opportunity to participate. The report was also criticised in public comments. The details of the actual policy were drafted by the registries and refined by ICANN

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<sup>998</sup> Ibid

staff, and only briefly made available for public comment. Despite criticisms, the policy was effectively adopted without further discussion. The whole process appears to have been railroaded through with very little time for discussion or policy refinement.

Since that time, criticism of the policy has continued, particularly from the academic community but also from other quarters, as seen in the recent PCP. Despite the well documented and often well-founded criticism, however the policy remains in place. The reasons why the status quo has been maintained for so long are complex. One factor is probably the aforementioned lack of consensus. The UDRP ‘works’, in that it does provide cheap, fast dispute resolution, and despite its faults, in the absence of agreement on how it should be changed, and the likelihood of much contention in the event of a full PCP, it may simply be easier to leave the policy as it is. Undoubtedly, however, the strong influence of the trademark lobby within the GNSO and across other parts of ICANN (including the GAC) is another huge factor. The influence held by the trademark lobby, and its willingness and ability to pursue its interests in the domain name context, was previously demonstrated in the new gTLDs case study and is mirrored here.

It is also very notable that the pro-UDRP voices appear to have had considerable success in capturing ICANN staff, to the extent that the 2011 Issues Report mostly ignored the voices calling for reform. Of course, the 2011 discussions must also be seen in the context of the new gTLDs programme. There appears to be considerable doubt in many quarters as to whether the UDRP should be tinkered with at a time of uncertainty generated by the unprecedented expansion of the name space; it has been seen as a bastion of stability, not least by the GAC.

Against the powerful lobby in favour of the status quo, proponents of UDRP reform have had relatively little chance to assert themselves. Though there is no shortage of critics of the policy, these critics tend not to come from groups with any real influence in ICANN. The academic community carries little real weight within the organisation; neither does the average domain name owner who loses his/her domain name to a questionable UDRP verdict. This case study seems to confirm the pattern observed in the previous two chapters; that, while many groups have a voice in ICANN, rather fewer have real influence.



# **Chapter 7**

## **Perspectives on ICANN – evaluation**

### **Introduction**

This chapter will return to the competing perspectives on ICANN discussed in Chapter 3 and evaluate these in light of the evidence gained from the policy case studies. The case studies have revealed a complex picture, where the identities of the major actors in ICANN policymaking, and the relative influence they hold, is dependent upon the particular issue in hand. Some of the key characteristics of each policy development area are summarised in Table 7.1.

**Table 7.1 Summary of characteristics of case study policy areas**

	<u>New gTLDs</u>	<u>IDNs</u>	<u>UDRP</u>
<b>Recent PDP?</b>	Yes	Yes	No
<b>Public policy issue?</b>	Yes	Yes	Yes
<b>‘Consensus’ policy?</b>	No	No	No
<b>Level of controversy / opposition, e.g. in public comments</b>	High	Low	Moderate to high
<b>Level of conflict between Board and GAC</b>	High	Low	Low
<b>Level of GNSO influence</b>	High	Moderate	None (historically) (DNSO-high)  High (recently)
<b>Level of GAC influence</b>	Moderate to high	High (particularly with regard to IDN ccTLDs)	Low
<b>Level of CCNSO influence</b>	Low	High	Low to moderate (historically - involved as part of DNSO)  Low (recently)
<b>Level of ICANN staff influence</b>	Moderate to high (especially authorship of DAGs)	Low to moderate	High
<b>Level of ALAC influence</b>	Low	Low	Low
<b>Level of influence of public commentators</b>	Low to moderate	Low to moderate	Low
<b>Level of US government influence</b>	Low	Low	Moderate to high (historically), low (recently)
<b>Level of influence of gTLD registries</b>	Moderate to high	Moderate	Moderate to high
<b>Level of influence of ccTLD registries</b>	Low	High	Low
<b>Level of influence of registrars</b>	Moderate to high	Moderate	Moderate to high (drafted model Policy)
<b>Level of influence of intellectual property interests</b>	Moderate to high	Moderate	High

As this chapter will show, the findings from the case studies lend weight to some of the previously examined perspectives on ICANN and discredit others.

### **Competing perspectives on ICANN – Evaluation**

#### Technical agency or public policymaker?

All three case studies decisively demonstrate that ICANN is a public policymaker rather than a mere technical co-ordinator, thus supporting the assertions of analysts such as Mueller<sup>999</sup> and Fuller<sup>1000</sup> and refuting those of Solum.<sup>1001</sup> In each of the three case study areas, policymaking has involved arbitration between competing sets of interests, discrediting any notion of ICANN as an apolitical technical agency only.

ICANN's decisions on New gTLDs policy, for example, have major implications for various sets of interests. Decisions as to how many TLDs will be added and the selection and allocation criteria for those TLDs affects how many registries there can be in the market and who will and will not be allowed to set up business as a registrar. New gTLDs policy also impacts upon intellectual property rights and issues of freedom of expression, as well as issues of identity for organisations and other entities such as cities, subnational territories and cultural groups. Furthermore, it has significant ramifications for issues of state sovereignty, particularly with regard to 'geographical' names and governmental claims to authority over these. Similarly, the development of IDNs policy has important economic, social and political implications, such as issues of which groups will get an IDN TLD, how to define a language or script, the appropriate relationship between ICANN and IDN ccTLD registries, and questions around the extent to which governmental jurisdiction extends, particularly over IDN ccTLDs. The UDRP likewise represents a public policy issue, involving arbitration between trademark interests and other concerns, such as freedom

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<sup>999</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P239

<sup>1000</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html> P13

<sup>1001</sup> Solum, L. B. (2009). 'Models of Internet governance.' *Internet Governance: Infrastructure and Institutions*. L. A. Bygrave and J. Bing. Oxford, Oxford University Press: 48-91. PP60-61

of expression, and is in fact one of the most significant examples of what amounts to a system of private international 'law' in any regime area.

ICANN is thus very much a public policymaker at the global level, and possesses some very real authority and coercive power in its issue-area by virtue of its control of the naming and numbering systems, unique resources critical to the Internet's operation. Without an IP address, it is impossible to get online; without a domain name, one cannot be found. ICANN has the ability to delete or transfer domain names from those who refuse to comply with its policy. Despite this global scope and independent coercive power, however, ICANN is not entirely divorced from the Westphalian state system; yet neither is it a conventional intergovernmental organisation. It represents a much more complex and hybrid approach to governance.

ICANN's 'political' nature also undermines any attempt to view the organisation as a 'functionalist' agency in the sense described by David Mitrany<sup>1002</sup> and his successors. Since the 1930s, the functionalist school of IR theory has focused upon on the possibility of identifying common needs and interests among societies that cannot be fulfilled by traditional nation-states, particularly in technical and 'non-controversial' issue-areas. These scholars predicted that functional agencies above and beyond the nation-state system could arise to fulfil those needs, creating an ever-spreading web of international institutional relationships. They would initially concentrate on commonly experienced needs, gradually expanding the circle of the 'non-controversial' at the expense of the political.<sup>1003</sup> Thus, functionalism proposed to build a form of transnational authority linked with needs, scientific knowledge, expertise and technology.<sup>1004</sup> As such, it provided a concept of authority no longer linked to the territorial nation-state. If ICANN had turned out to be the apolitical technical regulator that some analysts had expected it to be, then there would have been a strong case for interpreting it as this kind of functionalist agency. However, its politicised nature in practice and its inability to fully divorce itself from the intergovernmental system discredits any attempt to view ICANN from a conventional functionalist perspective.

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<sup>1002</sup> Mitrany, D. (1933) *The Progress of International Government*. New Haven: Yale University Press. PP101-106

<sup>1003</sup> Haas, E. (1964). *Beyond the nation-state: functionalism and international organization*. Stanford, Stanford University Press. P6

<sup>1004</sup> *Ibid*, P9

### 'Liberal democratic' approach

For analysts such as Weinberg,<sup>1005</sup> Fuller<sup>1006</sup> and Koppell<sup>1007</sup>, the key issues revolve around concerns as to the extent to which ICANN meets 'liberal democratic' criteria for legitimacy. As a globalised public policymaking organisation, they feel, ICANN should be representative of, and accountable to, the global Internet using public.

As all three case studies have shown, these principles do not tend to underpin ICANN policymaking in practice. To be fair, Weinberg et al do not necessarily claim that ICANN actually lives up to the 'liberal democratic' model in reality, but seem to suggest that, ideally, it ought to. However, given the range of powerful interests involved in ICANN and the influence they can bring to bear, it must be asked whether such an approach could ever be realistically implemented. The influence of vested interests in the DNS issue-area seems to be far stronger than any idealistic vision of ICANN as a globalised 'liberal democratic' entity.

With regards to Weinberg's contention that ICANN has attempted to legitimise itself in three ways (the 'techniques of administrative law', the 'techniques of representation,' and the 'techniques of consensus')<sup>1008</sup>, the evidence reviewed in this dissertation supports Weinberg's conclusion that ICANN fails in each area. Though Weinberg made this statement in 2000, the evidence suggests that ICANN has made no progress towards legitimising itself on any of these bases, and arguably has moved further away from offering broad-based 'representation' with the scrapping of At-Large elections in 2002.

With regards to the first 'source of legitimisation', ICANN is clearly not a conventional US governmental agency; nor does the rest of the world think it should be. The US government is itself keen to emphasise ICANN's operational independence from US governmental oversight; and the replacement of the MoU / JPA with the AoC represents a further loosening of ties between ICANN and the DoC.

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<sup>1005</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260.

<sup>1006</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html>

<sup>1007</sup> Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"." *Public Administration Review* 65(1): 94-108.

<sup>1008</sup> Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260.

With regards to the ‘techniques of representation’, the case studies have shown little evidence of meaningful representation for the broad mass of the Internet using public within the ICANN system. Individual Internet users as well as interested organisations in theory are represented via the At-Large system; however, it is not clear that the At-Large mechanism has much influence over policymaking in practice, making such representation of limited value. The limited role played by the At-Large community was summed up by EURALO Chair Wolf Ludwig. When questioned about the role of the RALOs in ICANN’s policymaking processes, Ludwig expressed scepticism about the ‘so-called bottom-up or user-oriented approach’ and commented that he could only try his best to counter-balance ‘vested interests from the business or governmental sector’.<sup>1009</sup> Furthermore, there are serious questions regarding the extent to which the ALAC’s advice to the Board is actually based on broad-based grass-roots input. As some of its critics have noted in public comments, arguably the ALAC can be regarded as a few individuals claiming without a mandate to speak on behalf of the worldwide user community.

Though the At-Large community has recently been given the right to select a single Director, this is still a far cry from old concept of one-third of the Board being directly elected by the global Internet-using public. The selection procedure has not yet been finalised; proposals have included a range of options, from selection of the Director candidate by the ALAC only, to a return to direct user elections; and also interim options such as joint selection by the ALAC and the RALOs.<sup>1010</sup> Selection by the ALAC plus the RALO chairs is, however, the option recommended by the At-Large drafting team (which itself consists of ALAC and RALO representatives)<sup>1011</sup>.

Perhaps the most important channels for public input are the public comments forums made available at numerous stages of a typical policy development process. However, considering that the global Internet using population is currently estimated to exceed

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<sup>1009</sup> Email from Wolf Ludwig to Paul White, 13 February 2012

<sup>1010</sup> ICANN (2010). At-Large Draft Procedure for Appointment of a Director. September 18 2010. Retrieved 14 March 2011, from

<https://community.icann.org/display/atlarge/Draft+Procedure+for+Appointment+of+a+Director+by+At-Large>

<sup>1011</sup> ICANN (2010). White Paper on the Selection of an At-Large Board Member-Electorate. 8 September 2010. Retrieved 20 April 2011, from

<https://community.icann.org/display/alacdocs/White+Paper+on+the+Selection+of+an+At-Large+Board+Member+-+Electorate>

two billion users<sup>1012</sup>, the comments received represent only an infinitesimal fraction of the world's Internet using public. Furthermore, those who do comment appear to consist mostly of interested industry 'insiders'. The extent to which public comments have actually influenced policy is more difficult to gauge, but the case studies have not produced much evidence that public comments play a very large role in shaping policy direction. In any case, public comments tend to produce a range of views on any given issue rather than anything close to a consensus; therefore, whatever decisions are taken will almost always be at odds with at least a proportion of the public comments.

Overall, there is no evidence that ICANN's decisionmaking processes in any way represent the views of any significant proportion of the global domain-name owning and / or Internet-using public.

Finally, the three case studies confirm Weinberg's contention that ICANN policymaking is not based upon consensus, nor is consensus realistically achievable regarding the types of issues that ICANN deals with.

Mestdagh and Rijgersberg's 'market accountability' approach<sup>1013</sup> also fails to stand up to close scrutiny, since ICANN does not, in reality, have any true competitors. The true source of ICANN's legitimacy, however, is arguably provided through states' acceptance of the ICANN regime, and governmental participation in it via the GAC, despite the fact that this was not envisaged in the original vision for the organisation.

### Multistakeholder approach

If the 'liberal democratic' model is unworkable for ICANN in reality, the notion of ICANN decisionmaking as being based on broad multistakeholder consensus-based decisionmaking, as suggested by writers such as Crawford<sup>1014</sup>, may be equally unrealistic. As discussed, the notion of making policy by finding 'consensus' among

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<sup>1012</sup> Internet World Stats (2011). "World Internet Usage and Population Statistics." March 11, 2011. Retrieved December 19 2011, from <http://www.internetworldstats.com/stats.htm>

<sup>1013</sup> Rijgersberg, R. W. and de vey Mestdagh, C. N. J. (2007). "Rethinking Accountability in Cyberspace: A New Perspective on ICANN." *International Review of Law, Computers & Technology*, 21(1): 27-38.

<sup>1014</sup> Crawford, S. P. (2004). "The ICANN experiment." *Cardozo Journal of International & Comparative Law* 12 (2): 409-447. PP424-428

stakeholders whose interests and aims are often in direct competition is completely unworkable. Furthermore, the range of stakeholders with real meaningful influence seems to be much narrower than proponents of multistakeholderism admit. Undoubtedly, ICANN does offer some degree of representation to a range of stakeholders in the industry; however, some stakeholders have much more influence than others. As discussed above, there are serious questions as to whether the individuals and organisations participating in the At-Large system have much meaningful representation or influence. Only the stakeholders participating directly in the Supporting Organisations, as well as governments through the GAC, appear to have more than a token amount of representation and influence.

Nonetheless, it is true to say that the ICANN regime is based on a (sometimes uneasy) alliance between a few sets of major stakeholders, those that carry real clout in the issue-area. Some of the most important actors in the regime are the registries and registrars, but also of importance are governments, the technical community, intellectual property interests and major ISPs. All of these actors needed to be on board to make the regime work, and all of them had the capacity to disrupt it if their interests were not taken into account. From this perspective, ICANN's creation could be seen as the forging of a deal between various crucial players.

While the case studies have revealed that effective policymaking seems to have been in the hands of a relatively narrow group of stakeholders, the identities of the crucial stakeholders, and the relative amount of influence they wielded, has nevertheless varied depending on the policy area under discussion.

#### Corporate / free market approach

For writers like Klein, ICANN has been captured by corporate interests.<sup>1015</sup> There is some merit to this view as, in all three case studies, corporate entities played a huge role in shaping policy.

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<sup>1015</sup> Klein, H. (2005). "ICANN Reform: Establishing the Rule of Law. A policy analysis prepared for The World Summit on the Information Society (WSIS). Tunis. 16-18 November 2005." Retrieved 10 January 2010, from <http://www.internetgovernance.org/pdf/ICANN-Reform-Establishing-the-Rule-of-Law.pdf> P4

The broad outlines of New gTLDs policy were drafted by the New gTLDs Committee, which drew its membership mostly from the GNSO Constituencies. Five of the six Constituencies represent commercial actors of one type or another. The final shape of the policy, as represented by the Applicant Guidebook, was influenced by actors other than the GNSO; however, commercial interests, particularly the intellectual property lobby, were again highly influential in the later stages of policy development. Moreover, the public comments boards were dominated by commercial entities of one sort or another. Governments through the GAC did have a significant influence in later stages of policy development; however, to a considerable extent they were in support of the views of commercial interests, for example calling for stronger intellectual property protections.

Of course, in reality there was no single ‘commercial interest’ dominating the New gTLDs policy area, but rather multiple commercial actors or interest groups whose aims often clashed. For example, prospective registries had an interest in maximising the number of new gTLDs, while intellectual property interests aimed to minimise the number created. The intellectual property lobby was only partially successful in influencing policy; though there were many concessions made to intellectual property protection (far more than initially proposed by the GNSO in 2007), the number of new gTLDs to be introduced was to be very large and would include open ASCII TLDs, whereas the intellectual property lobby would have preferred a smaller number of TLDs and / or a restriction to sponsored and IDN TLDs.<sup>1016</sup> The final shape of the policy thus represented an accommodation between two powerful sets of commercial interests, one on the ‘supply side’ pushing for vast expansion of the namespace and the other on the ‘user side’ seeking to limit it. Prospective registries appear in many ways to be the biggest winners in from this process, since they are the ones likely to derive the most financial gain from new gTLDs.

IDNs policy has likewise been powerfully influenced by corporate entities, notwithstanding the important role also played by the GAC. The IDN Committee was dominated by the supply side (the registries and registrars), and the IDN Guidelines in their several incarnations have been largely the work of the registries. Ultimately,

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<sup>1016</sup> IPC (2006). ‘Comments of the Intellectual Property Constituency Terms of Reference for New gTLDs.’ Comment posted to ICANN public comments forum on Issues Report – Terms of Reference for New gTLDs. January 31 2006. Retrieved 8 March 2010, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf>

most of the registries, particularly gTLD registries, are commercial interests, and their aim is to make a profit from selling domain name registrations. IDNs have so far tended to be implemented in those languages with a large number of speakers, which makes sense from a commercial perspective. In the final analysis, the limited potential market for IDN registrations in languages with a small number of speakers is likely one reason (though not the only reason) why many of these groups have not yet obtained IDN support.

Intellectual property interests seem to have had a lower level of interest in, and impact upon, the IDNs policy development area compared to the New gTLDs PDP. However, the no-mixed script rules in the IDN Guidelines were introduced to combat potential for cybersquatting and spoofing. Furthermore, the strong intellectual property protections incorporated into the new gTLDs programme will, of course, apply to IDN gTLDs as well as to ASCII gTLDs; while an initiative to re-examine the UDRP has recently been initiated<sup>1017</sup> and may well pay attention to some of the particular issues raised by IDNs.

The UDRP case study reveals further lessons about the powerful influence of intellectual property interests from the beginning of the ICANN regime and continuing to the present. During the initial regime creation phase, pressure for a trademark protection mechanism was applied in several fora. One of these was the Department of Commerce, and bore fruit in the commissioning of the initial WIPO report. In the next stage of UDRP policy development, the intellectual property lobby wielded influence via their strong representation on the DNSO's Working Group A. Recent discussions surrounding the possibility of UDRP reform have demonstrated that the intellectual property lobby remains just as influential in ICANN today. It continues to have a powerful voice within the GNSO and across other ICANN bodies (including the GAC), and there is even a case to be made that trademark interests have had considerable success in capturing ICANN staff, given that that the 2011 Issues Report mostly ignored the voices calling for reform.

In terms of regulatory capture theory, the models discussed by Stigler et al do not quite compare to the ICANN regime, because, unlike those models, the ICANN

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<sup>1017</sup> ICANN (2011). GNSO Council Resolution 20110203. 3 February 2011. Retrieved 24 September 2011, from <http://gns0.icann.org/resolutions/#20110203>

system always intended industry players to have a voice in policymaking. However, it was also intended, according to the original design expressed in the White Paper, that a range of other groups would also have considerable influence, and this has not really occurred, with groups like the At-Large community playing a minimal role. Thus, ICANN could be said to have been 'captured' by a narrow range of corporate stakeholders to a degree not intended by the founders. This is likely to have occurred, just as Stigler suggested, because these groups have the incentive and the organisational and financial capacity to play a crucial role. By contrast, the ordinary Internet-using public is not organised, and individual Internet users likely do not see themselves as having a big stake in ICANN's decisions, if indeed they are even aware of ICANN and its activities at all; the fact that a typical PCP usually gets less than 100 comments, and then mostly from industry insiders, would seem to bear this out. The main challenge to complete corporate dominance of the organisation, however, has emerged in the shape of governmental influences, particularly through the GAC. This factor helps to lend some weight to the alternative, statist interpretations of the organisation put forward by writers such as Drezner.

### Statist model

States, particularly the US, played a crucial role in bringing about the ICANN regime. The US government, finding itself almost by an accident of history in unilateral control of the root, was in a unique position to shape the regime according to its own interests. Nonetheless, even the US could not completely ignore the demands of other powers, particularly the EU, for fear of fracturing the root and destroying the principle of universal connectivity. As a result, those states were able to modify the initial norms. As well as playing a crucial role in the regime's establishment, states helped to legitimise it through their recognition of its authority over the DNS.

Despite the views of writers such as Hagen and von Arx that ICANN represents an instrument of US foreign policy<sup>1018</sup>, there is little evidence of the US continuing to play a hegemonic role in ICANN today, at least in terms of routine policymaking, though the US government's continued claim to ownership of the root remains an

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<sup>1018</sup> Hagen, G. R. and von Arx, K.G. (2002). "Sovereign Domains A Declaration of Independence of ccTLDs from Foreign Control ." Richmond Journal of Law & Technology 9(1). Electronic journal. Retrieved 10 January 2010, from <http://jolt.richmond.edu/v9i1/article4.pdf>. P3

outstanding unresolved issue. Nonetheless, the legacy of US leadership in regime creation remains, not only in elements of ICANN's institutional design but also in some aspects of policy, particularly regarding WHOIS policy and the UDRP. The UDRP was built into the ICANN system largely at the behest of the US, and it reflects Western, and particularly US, approaches to intellectual property law. However, the UDRP was created very early on. The case study chapters have revealed little sign of US interference in or direct influence over present-day ICANN policymaking. Though the DoC supplied some strongly worded comments on the New gTLDs programme, the Board did not appear to have been unduly influenced by them. There is, admittedly, an argument to be made that the DoC's intervention on the matter of the proposed .xxx TLD demonstrated both an ability and a willingness on the part of the DoC under the Bush administration to interfere with ICANN's policy processes when convenient. However, some other governments, as well as some highly vocal public pressure groups, also objected to .xxx, and it would be a big stretch to conclude that the DoC's objections were the sole or decisive factor in blocking the .xxx application.

Nonetheless, state actors continue to play a crucial and indeed growing role in the ICANN system, not only in terms of underpinning and legitimising the regime, but also in influencing its policy decisions. The case studies have revealed that, mainly through the GAC, states have considerable influence on ICANN policymaking in those areas where they choose to wield it. The GAC tends to intervene in certain areas of policy to uphold particular principles, one of the most important of which (as pointed out by analysts such as Park<sup>1019</sup>) concerns matters of 'sovereignty' over ccTLDs. This has been particularly strongly reflected in the GAC's role in IDN ccTLD policy. The GAC did also intervene quite forcefully in the latter stages of New gTLDs policy development; but even in this policy area, the GAC's biggest concern was with the issue of 'geographical identifiers', which governments appear to see as belonging under their rightful jurisdiction in much the same manner as ccTLDs. By contrast, the GAC played little role with regard to the development of the UDRP. At that time, of course, the GAC was less influential; but even today the GAC does not appear at all keen to see the matter re-opened. In some ways, it may be seen as surprising that governments have not taken more interest in the UDRP, due to the potential for conflict between an internationalised, non-governmental disputes

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<sup>1019</sup> Park, Y. (2009). "The National ccTLD Disputes: Between State Actors and Nonstate Actors." *International Journal of Communications Law and Policy* 13(Winter 2008-09): 185-206. P192

resolution policy and national trademark law, with the attendant implications for state sovereignty. However, the fact that the UDRP does not apply to ccTLDs may be the factor that satisfies sovereignty concerns of national governments.

Through the GAC, governments are pursuing their interests through the ICANN system, rather than attempting to break away from it as Hagen and von Arx suggest they do. This adds weight to Christou and Simpson's model of regime construction, which recognises the key importance of states' material interests, but at the same time acknowledges how behaviour within institutions may be regulated by the propagation and adoption of constitutive beliefs and practices within the institution. As Christou and Simpson suggest, within the institutionalised environment that has been built around DNS governance, it is the rational choice for governments to behave appropriately.<sup>1020</sup> It is more rational for governments to pursue their concerns through the ICANN system than attempt to unilaterally break away from it, a move that might threaten the stability of the system and the principle of universal connectivity.

Mueller's identification of WSIS as the key forum through which governments have staked their claim to public policy authority over DNS<sup>1021</sup> holds considerable merit. In its responses to both the new gTLDs process and the IDNs process, the GAC has included a preamble citing the WSIS declaration. In a sense, this merely highlights the uncertain authoritative status of GAC advice; the GAC attempts to reinforce its own authority by an appeal to a document backed by the intergovernmental authority of the UN system. In his most recent work, Mueller argues that the GAC's most important interest is to advance the principle of state authority at the expense of nonstate actors. He goes so far as to argue that '...the GAC rarely if ever addresses public interest objectives in domain name policy. Its interventions in ICANN policy processes, almost without exception, have been to claim special benefits or powers *for its member governments*'.<sup>1022</sup> While it may be going too far to suggest that the GAC does not pursue public policy objectives but merely power for its own sake, the GAC's

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<sup>1020</sup> Christou, G. and S. Simpson (2007). "Gaining a Stake in Global Internet Governance: The EU, ICANN and Strategic Norm Manipulation." *European Journal of Communication* 22(2): 147-164. P151

<sup>1021</sup> Mueller, M. (2007). 'The New Global Politics of Internet Governance.' *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment*. W. Kleinwächter. Berlin, Marketing für Deutschland GmbH: 215-219. Retrieved 20 February 2010, from [http://medienservice.land-der-ideen.de/MEDIA/65534\\_0.pdf](http://medienservice.land-der-ideen.de/MEDIA/65534_0.pdf). PP216-217.

<sup>1022</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P244

behaviour in both the new gTLDs and IDN policy areas bears out Mueller's assertion that it consistently attempts to claim special authority or powers.

In reality, however, there are clearly limits to the GAC's power; its authority is ultimately subordinate to that of the Board. The evidence from the case studies challenges Kleinwaechter's assertion that the GAC gained 'something akin to veto power' through the Bylaw provisions stating that the Board must provide reasons in writing if it chooses to reject GAC advice.<sup>1023</sup> While the Board clearly does not reject GAC advice lightly, it has shown itself willing to do so on some occasions. In the New gTLDs case study, for example, the Board rejected some elements of GAC advice, though it did so only after protracted discussions in which the majority of GAC advice was accepted. As Mueller points out, the Board has no clear-cut rules or criteria for accepting or rejecting GAC advice; it can arbitrarily invoke the GAC when overruling the Supporting Organisations or vice-versa, and the effect of this is to make the Board less accountable.<sup>1024</sup> In the event of a dispute between the GAC and the Supporting Organisations the Board effectively has the option to play one off against the other. Nonetheless, the GAC's advice carries much weight and this may have more to do with the potential ability of governments to defect from the regime than any deference to abstract principles of state sovereignty. The IDNs case study provides one good example of this. As Mueller himself suggests, the favourable treatment shown to IDN ccTLDs compared to IDN gTLDs may have been prompted by the potential ability of governments to follow China's lead and set up national IDN roots if they did not get their way within the ICANN system.<sup>1025</sup>

One striking factor concerning the GAC is its ability to produce agreement on common positions between participating governments. The GAC's Operating Principles include a facility for a range of governmental views to be provided to the Board in the absence of GAC consensus<sup>1026</sup>; however, this appears to occur only rarely. Maria Häll (Swedish GAC representative) states that, while finding consensus

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<sup>1023</sup> Kleinwächter, W. (2003). "From Self-governance to Public Private Partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36(3): 1103-1126. PP1121-1122

<sup>1024</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P244

<sup>1025</sup> *Ibid*, P234

<sup>1026</sup> ICANN (1999). *Governmental Advisory Committee Operating Principles (Confirmed and Adopted 25 May 1999)*. Principle 48. Retrieved 29 August 2011, from <http://www.icann.org/en/committees/gac/operating-principles-25may99.htm>

is not always easy, it is usually a matter of finding language acceptable to all members.<sup>1027</sup> Andrew Maurer (Australian GAC representative) adds that there is a strong culture within the GAC of trying to be constructive, and also that ‘GAC representatives are generally conscious that they are not just putting forward their national positions, but are also contributing to the operation of the GAC itself as an important component of ICANN’.<sup>1028</sup> This sense of solidarity among the GAC members and their desire to speak with one voice is undoubtedly one reason for the strong influence that the GAC is able to wield within ICANN; a divided GAC providing a range of views to the Board would likely not carry so much weight. The GAC’s ability to reach ‘consensus’ positions may also stem largely from the fact that participating governments often have common interests on the issues under consideration. For example, most governments would tend to support the principle of state sovereignty over ccTLDs.

### Public-private model

The case studies have suggested that those writers who see ICANN as a ‘public-private partnership’, such as Christou and Simpson, Knill and Lehmukl, Mueller and Antonova, are broadly on the right track. Mueller<sup>1029</sup> and Antonova<sup>1030</sup>, in particular, identify a shift in the balance towards greater intergovernmentalism in the regime since 2002. The gTLDs and IDNs case studies support this assertion. Whereas governments through the GAC had virtually no input into the 2000 new gTLDs programme, their influence and involvement was greatly increased in the latest round. Similarly, the involvement of governments in IDNs policy has greatly increased in recent years.

Maurer asserts that the GAC has made a conscious decision to try to act as a constituent body within ICANN, rather than as an external entity. He believes that, as ICANN’s sphere of action has grown to encompass a broader range of public policy

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<sup>1027</sup> Email from Maria Häll to Paul White, 10 January 2012.

<sup>1028</sup> Email from Andrew Maurer to Paul White, 20 January 2012

<sup>1029</sup> Mueller, M. (2007). ‘The New Global Politics of Internet Governance.’ *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment*. W. Kleinwächter. Berlin, Marketing für Deutschland GmbH: 215-219. Retrieved 20 February 2010, from <http://medienservice.land-der-ideen.de/MEDIA/65534.0.pdf> P217

<sup>1030</sup> Antonova, S. (2007). “Global Internet Governance: Negotiating Power in ICANN. Communications, Civics, Industry – ANZCA2007.” Melbourne: Australia New Zealand Communications Association. Retrieved 12 January 2010, from <http://www.latrobe.edu.au/ANZCA2007/proceedings/Antonova.pdf> P2

issues, so governments have become more interested and engaged in its activities. Maurer adds that governments bring expertise to the table on the legal, economic and social dimensions of public policy, and argues that as a result of this, the GAC's suggestions and commentary have often 'hit the right note at the right time'.<sup>1031</sup> Häll feels that in recent years ICANN has made more effort to involve the GAC earlier in the decisionmaking process, and states that 'We now have a better dialogue between the GAC and ICANN even though everything is not perfect'.<sup>1032</sup>

Notwithstanding this, as noted, the term 'public-private partnership' is not wholly satisfactory, since it suggests a well-defined cooperative arrangement between governmental and private actors. ICANN differs from models offered by writers such as Ronit and Schneider<sup>1033</sup> and Knill and Lehmukl<sup>1034</sup>, who talk of 'cooperative patterns of interaction'<sup>1035</sup> between private and public actors, where states delegate particular governance responsibilities to nongovernmental entities. ICANN is, in practice, not based on clear-cut delegation of particular well-defined competencies to nonstate actors by states; there is considerable friction over where governmental 'public policy' authority begins and ends within the regime. Nor is the relationship between governments and nonstate actors always co-operative. Therefore, the ICANN regime is not always so much a public-private 'partnership' as a forum for a contest of interests between public and private actors.

Mueller's model of an ongoing contest between two competing approaches to governance, the nation-state system and the 'ODii network', is a useful conceptual tool, although it simplifies a more complex and nuanced reality. As Mueller himself points out, the 'ODii network' encompasses some diverse groups and interests and to a considerable extent blurs the boundaries between them. Individuals engaged in the network may have a foot in both the non-profit and commercial sectors; they may for example be based in academic or voluntary institutions but also consult for or sit on

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<sup>1031</sup> Email from Andrew Maurer to Paul White, 20 January 2012

<sup>1032</sup> Email from Maria Häll to Paul White, 10 January 2012.

<sup>1033</sup> Ronit, K. and V. Schneider (1999). "Global Governance through Private Organizations." *Governance* 12(3): 243-266. PP259-262

<sup>1034</sup> Knill, C. and A. D. Lehmukl (2002). "Private Actors and the State: Internationalization and Changing Patterns of Governance." *Governance. An International Journal of Policy, Administration and Institutions* 15(1): 41-63. PP 57-58

<sup>1035</sup> *Ibid*, P50

the boards of commercial technical companies.<sup>1036</sup> This is reflected in the backgrounds of many of the individuals serving in ICANN's Supporting organisations or the Board. However, Mueller appears to see those engaged in the 'ODii network' as being essentially united by a common loyalty to the 'ODii' system and the model of non-governmental governance of the Internet. He argues that 'ODii' is 'becoming a mature, institutionalized status quo, committed to maintaining itself and its prerogatives...its first commitment is to what it calls *the community*, by which it means: the ODii network itself'.<sup>1037</sup> While there certainly appears to be a strong element of that ideology among many of the members of the ICANN community, particularly at Board level and among ICANN's permanent staff, we also should not lose sight of the fact that the ICANN 'community' is far from a single homogenous group. It represents diverse interests often fiercely competing with each other, and sometimes some of these groups are not unwilling to enlist the support of governmental actors to advance their cause. Examples include intellectual property interests lobbying the GAC over new gTLDs; the various pressure groups that put pressure on the US government to oppose .xxx on their behalf; and the alliance between CCNSO registries and the GAC to promote IDN Fast Track. GAC representatives Maurer,<sup>1038</sup> Häll<sup>1039</sup> and Vera Sveinbjörnsdóttir<sup>1040</sup> confirm that lobbying of GAC members by various interest groups takes place.

Thus, ICANN politics cannot be reduced simply to a formula of 'ODii' versus governments; it represents a much more complex arena in which an array of competing actors and interest groups are willing to lobby and / or ally with whoever can help them advance their interests within the ICANN system, be that ICANN's nongovernmental institutions, the GAC or individual governments. Depending upon the issue, governments may sometimes be aligned with other sets of actors, such as the intellectual property lobby in the case of new gTLDs, or the CCNSO registries in the case of IDN Fast Track; or in opposition to them, as, for example, when the GAC disagreed with the GNSO over the issue of mandatory contracts and fees for IDN ccTLDs.

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<sup>1036</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P217

<sup>1037</sup> *Ibid*, P218

<sup>1038</sup> Email from Andrew Maurer to Paul White, 20 January 2012.

<sup>1039</sup> Email from Maria Häll to Paul White, 10 January 2012.

<sup>1040</sup> Email from Vera Sveinbjörnsdóttir to Paul White, 13 January 2012.

## **Conclusions to Chapter 7**

The identities of the major players in DNS governance depend, to some extent, on what level one is discussing the regime; whether one is discussing the overall shaping of the ICANN system and its norms, or looking at routine policymaking within that framework. With regards to ICANN's initial establishment, and to some extent underpinning its continued existence, the United States government played a hegemonic role. However, regarding policymaking within the regime, the US government is today one actor among many. In terms of ICANN's policy development processes, the identities of the major actors, and the relative degree of influence they hold, are dependent upon the issue-area in hand; however the range of actors with real influence is, in all cases, somewhat different from, and narrower than, that envisaged by ICANN's founders.

The evidence reviewed refutes both 'technical caretaker' and 'consensus-based policymaking' interpretations of the ICANN system. ICANN is very much a public policymaker, since the issues with which it deals involve competing interests and claims of right. ICANN policymaking is in no way based on 'consensus', nor is there any way it realistically could be. Instead, it is based on bargaining and very often compromise between competing interests, with the Board acting as final arbiter. Even the Board does not always find consensus among its members; for example, the decision to approve implementation of the New gTLDs process (June 2011) was by majority vote.<sup>1041</sup>

There is some justification for Drezner's position that sovereign states ultimately underpin the whole structure.<sup>1042</sup> ICANN was created by a hegemonic state with input from another 'great power' (the EU); and it requires at least the acquiescence of other governments for its continued existence since, in the final analysis, governments possess the power to break up the regime, by the creation of national or international roots. However, this would risk destroying the universal connectivity of the Internet, unless a universally accepted intergovernmental alternative to ICANN could be agreed upon. In the absence of such agreement, governments appear willing to work

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<sup>1041</sup> ICANN (2011). Minutes of regular meeting of the Board. 20 June 2011. Retrieved 23 July 2011, from <http://www.icann.org/en/minutes/minutes-20jun11-en.htm>

<sup>1042</sup> Drezner, D. W. (2004). "The Global Governance of the Internet: Bringing the State Back In." *Political Science Quarterly* 119(3): 477-498. PP495-497

with the ICANN system in practice, mainly through the GAC, even if some of them continue to argue in principle for reform at venues such as WSIS and the IGF. The GAC provides a mechanism for governments to advance their interests within the ICANN system, one that has become increasingly influential, in line with the growing interest of governments in Internet-related public policy matters.

Although the accommodation of governmental actors within the regime has proved crucial, the ICANN framework cannot be looked at from a statist perspective alone. Construction of the regime also required accommodation of some crucial nongovernmental actors, most of which represent commercial interests. Perhaps the most important of these are the registries and registrars, the actors that actually manage the DNS system below root level; the RIRs, which oversee management of the IP addressing system; and the ISPs, which also play a crucial role in the Internet infrastructure, including routing of data, maintenance of their own DNS servers, and distribution of IP addresses to end-users. The inclusion of these actors in the regime's governance mechanisms was and is critical because of the operational role they play and because, like governments, they possess the potential to seriously disrupt the smooth running of the regime by withdrawal of their co-operation. In order to make the Internet an environment conducive to the commercial success aimed for by Clinton administration, it was also necessary to involve and accommodate other actors and interests, particularly intellectual property interests. These actors too possess a significant potential to cause disruption to the regime, for example through legal challenges. Other actors were also invited to play a role, such as the non-commercial users constituency and the At-Large community, but these actors have proved less influential, perhaps largely because, in the final analysis, they do not possess the same leverage in terms of ability to disrupt the regime as the more critical regime participants. Thus, the ICANN system in practice represents 'multistakeholderism' of a sort, but not the broad ranging multistakeholderism that the idealists wanted. Rather, it is something of a mechanism for finding accommodation between a few powerful stakeholders, specifically those with the capacity to 'rock the boat' if ignored.

Statist and corporatist perspectives on ICANN therefore both hold some merit, but each examines only one dimension of the regime. Perhaps the best starting point offered in the literature for a true understanding of the ICANN system is the concept of a 'public-private partnership', put forward by scholars such as Christou and

Simpson<sup>1043</sup>, Antonova,<sup>1044</sup> and Kleinwächter.<sup>1045</sup> However, the term is still not entirely satisfactory, as it seems to suggest that governmental and corporate interests work co-operatively and in harmony, which, as the case studies have shown, is not always the case in reality. The clashes between the GAC and the GNSO over issues such as geographic identifiers in new gTLDs, for example, demonstrates that there is often a tension between private interests and governmental ones. ‘Corporate interests’ are themselves not a single homogenous group and not always in alignment. For example, in the gTLDs and IDNs case studies, registry interests have clashed with intellectual property interests. ICANN is, in practice, a forum for negotiation between various sets of interests, including those of governments and of various sets of nongovernmental actors.

Overall, therefore, ICANN is perhaps best viewed both as the result of a ‘deal’ between various actors and interest groups, both governmental and nongovernmental, and as a forum for ongoing contestation of interests between those actors. Although the various actors and interest groups are not always in agreement, and their policy preferences may often clash, all have a shared interest in avoiding wholesale break-up of the regime, since this would likely mean the end of universal connectivity and the destruction of the Internet as we know it, an outcome that would be in no-one’s interest. ICANN is therefore a mechanism for accommodating and balancing the interests of various state and nonstate actors. Furthermore, the study has indicated that only those actors that *must* be accommodated, i.e. those with real potential to break up the regime, appear to have much real influence on policymaking. Other groups, such as the general Internet using public, do not have the same organisational capacity and the same potential to ‘rock the boat’, and thus, it appears, they do not have the same leverage as actors such as governments, registries and registrars, or the intellectual property lobby.

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<sup>1043</sup> Christou, G. and S. Simpson (2007). "Gaining a Stake in Global Internet Governance: The EU, ICANN and Strategic Norm Manipulation." *European Journal of Communication* 22(2): 147-164. PP160-161

<sup>1044</sup> Antonova, S. (2007). "Global Internet Governance: Negotiating Power in ICANN. Communications, Civics, Industry – ANZCA2007." Melbourne: Australian New Zealand Communications Association. Retrieved 12 January 2010, from <http://www.latrobe.edu.au/ANZCA2007/proceedings/Antonova.pdf> PP 7-8

<sup>1045</sup> Kleinwächter, W. (2003). "From self-governance to public-private partnership: the changing role of governments in the management of the Internet's core resources." *Loyola Law Review of Los Angeles* 36 (3): 1103-1126. PP1119-1122

The role played by ICANN's own staff should also not be ignored. Mueller argues that ICANN's staff pursues its own personal and political agenda and often has more sway than the Board.<sup>1046</sup> While this may be overstating the case slightly, the case study chapters have shown that ICANN staff often wield considerable influence over a policymaking process, particularly through their role in drafting reports and policy documents.

The next chapter will further explore these findings in the context of international regime theory, in order to assess the extent to which ICANN represents a departure from conventional models of governance at the global level.

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<sup>1046</sup> Mueller, M. L. (2010). *Networks and States: The Global Politics of Internet Governance*. Cambridge, Massachusetts, MIT Press. P220

# **Chapter 8**

## **ICANN and international regime theory**

### **Introduction**

This chapter will draw upon international regime theory in an attempt to place ICANN within a broader context of patterns in global governance. It will ask what lessons ICANN can offer about the continuing applicability of the international regime concept, examining whether ICANN can in fact be understood as a regime, and will attempt to analyse the organisation in terms of concepts drawn from various paradigms on regime theory. It will also explore whether these theoretical models can help to explain why ICANN has evolved so much in a relatively short period of time.

As the previous chapter demonstrated, ICANN is a complex, multifaceted system that can be interpreted in a number of ways. The evidence reviewed in this dissertation has eliminated some previously offered interpretations, such as the view that ICANN is an apolitical technical agency only. It has also demonstrated that ‘liberal democratic’, ‘multistakeholder’ and ‘consensus based decisionmaking’ ideals expressed in the 1998 White Paper have not translated very well into reality. However, various other perspectives on the organisation have, to varying degrees, been validated. There are some grounds for interpreting ICANN in terms of interstate politics, as per the perspectives offered by scholars such as Drezner; however, the interstate aspect represents only one dimension of the ICANN system. Corporate capture models likewise have relevance, since some of the key actors within the organisation are commercial entities. Yet commercial influences are, in their turn, balanced by the input of public authorities. Views of ICANN as a ‘public-private partnership’ go some way towards taking on board both these aspects of the organisation, but the term implies a co-operative relationship based on clear-cut delegation of particular well-defined competencies to nonstate actors by states. In practice, the ICANN system is not that simple; nor is the relationship between states and nonstate actors always co-operative. ICANN is often not so much a public-private ‘partnership’ as an arena for controlled contestation of interests between public and private actors.

There is, therefore, a need to reconcile these different perspectives in order to build a fuller understanding of the ICANN system as a whole, and also to show how it relates to the broader context of patterns in global governance. There is also a need to explain how ICANN's principles and norms came to be modified over time. One key example concerns the shift away from the norm of a 'private' governance body with a very limited advisory role for governments, towards one where governments have real influence. At the same time, the original norm that envisaged a substantial role for the global Internet using public has been very much watered down. There has also been a de facto shift from a 'consensus' based model of policymaking to one based around arbitration between competing interests, and a shift from a 'bottom up' policymaking model in theory to a more 'top-down' model in practice.

This chapter will examine these issues in the context of international regime theory. In some ways, this body of theory may not immediately appear to be the obvious choice for an analysis of ICANN, since international regimes have conventionally tended to be framed mainly in intergovernmental terms. By contrast, intergovernmentalism is only one aspect of the ICANN system and arguably not the predominant one. The state-centric nature of the conventional regime concept has meant that its applicability to non-state governance arrangements has been dismissed by scholars such as Susan Strange.<sup>1047</sup> However, this chapter and the subsequent one will argue that the regime concept remains useful when applied to organisations such as ICANN, and that, despite some obvious differences, ICANN can still be understood as an international regime using the definition created by Stephen Krasner in 1983. Krasner defined international regimes as:

‘...sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.’<sup>1048</sup>

As A. Claire Cutler asserts, there is no reason why this definition could not apply to the activities of nonstate actors.<sup>1049</sup> She points out that the regime concept actually

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<sup>1047</sup> Strange, S. (1997). ‘Cave! Hic Dragones: A Critique of Regime Analysis.’ *The Politics of Global Governance: International Organizations in an Interdependent World*. P. F. Diehl. London, Lynne Rienner: 41-55. P52

<sup>1048</sup> Krasner, S. D. (1983). ‘Structural causes and regime consequences: regimes as intervening variables.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press: 2-22. P2

originated as an attempt to address inadequacies in the state-centric, formalistic realist approaches to international relations theory that predominated at the time. Cutler feels that regime analysis subsequently became ‘captured’ by a realist-neoliberal synthesis and in the process became progressively more state-centric.<sup>1050</sup> However, she argues, the regime concept does not necessarily have to be understood in interstate terms. She develops the concept of the ‘private international regime’, which she defines as ‘an integrated complex of formal and informal institutions that is a source of governance for an economic issue-area as a whole’.<sup>1051</sup> This definition applies quite neatly to ICANN.

Milton Mueller agrees that ICANN should be interpreted as a ‘nascent international regime’.<sup>1052</sup> He acknowledges that its origins as ‘the product of an informal political agreement among national governments’ and the extensive role for private sector actors make ICANN different from many other regimes,<sup>1053</sup> but still believes it more accurate to classify ICANN as a variant of a standard international regime than as a unique new form of global policymaking.<sup>1054</sup>

The first section of this chapter will further explore how ICANN may be understood in terms of the international regime concept. Subsequent sections will draw upon various paradigms on regime theory in an effort to analyse various facets of the ICANN regime and show how these can be reconciled to form a comprehensive analysis of the organisation.

### **ICANN as a regime**

Despite its unique characteristics, there seems to be no reason why ICANN cannot be classified as an international regime using Krasner’s classic definition, since it has identifiable principles, norms, rules and decision-making procedures around which actors’ expectations converge.

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<sup>1049</sup> Cutler, A. C. (2007). ‘Private international regimes and interfirm cooperation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 24-41. P27

<sup>1050</sup> *Ibid*, P26

<sup>1051</sup> *Ibid*, P26

<sup>1052</sup> Mueller, M. L. (2002). *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge, Massachusetts, MIT Press. P212

<sup>1053</sup> *Ibid*, P217

<sup>1054</sup> *Ibid*, P218

Using Krasner's definition as a starting point, this section will set out the basic parameters of the ICANN regime, both in terms of the actors and interests engaged in it, and the principles, norms, rules and decisionmaking procedures that define it.

## Actors

### *Actors in regime construction*

In the initial regime construction phase, the US government was the most influential single actor in terms of setting out the underlying principles and norms that would define the basic parameters of the regime. Because of its control of the root, the US government was in a position to enforce its policy choices. It effectively ignored the gTLD-MoU and presented its own framework in the Green and White Papers. Other actors were allowed to work out the finer details within this framework, but the broad strokes for the regime were set out in these documents. These basic parameters included the principles of private sector governance, free market competition and the 'multistakeholder' model.

As discussed in Chapter 2, the European Union, though playing a very much junior role to that of the US, also made significant contributions to the initial organisational design. The EU's preferred model was a mixed public-private regime with a well-established role for state authorities.<sup>1055</sup> Although the EU was forced to accept American leadership and the establishment of a 'private' ICANN, it was nonetheless able to successfully argue for the inclusion of public actors in an 'advisory' capacity in the form of the GAC.<sup>1056</sup> Over time, this proved to be a more important contribution than initially realised, since the GAC has grown to a much greater prominence than intended or predicted in 1998.

Certain nonstate actors also made important contributions to the initial regime design. Although Postel's IANA and the technical community failed to get their way on the gTLD-MoU, they nonetheless played a very significant role in drafting up the

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<sup>1055</sup> Leib, V. (2002). "ICANN – EU can't: Internet governance and Europe's role in the formation of the Internet Corporation for Assigned Names and Numbers." *Telematics and Informatics* 19(2): 159-171.

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<sup>1056</sup> Ibid

specifics of the new organisation, including its Bylaws. NSI likewise had important input into this process; indeed the final proposal that became the blueprint for ICANN became known as the 'IANA/NSI Draft'. The intellectual property lobby also had significant influence at this stage, as evidenced by the proposal for a WIPO study incorporated into White Paper, which later became the basis of the UDRP.

Certain other actors had a voice but were ultimately less significant. The Japanese and Australian governments lent their support to the EU's push to establish a GAC. A great deal of input from the wider public was received in the online discussions that surrounded the IFWP process. The ccTLD registries, the RIRs and other elements of the technical community had input into the IFWP process and Postel's online discussions, but ultimately were shut out of the final phase of the drafting process that produced the IANA / NSI Draft. This was not exactly planned; the organisers of the IFWP had intended to produce a draft based on input from a much wider range of groups. Ultimately, however, the IFWP failed to produce a fully articulated plan for 'NewCo', and the DoC went with the IANA / NSI blueprint. The ccTLD registries did, however, organise their own constituency within ICANN; they were initially incorporated into the DNSO structure, but would later split off to form their own Supporting Organisation as part of the 2002-03 reforms. The other DNSO Constituencies were also essentially self-organising. The RIRs created their own Supporting Organisation, the ASO.

### *Actors in policymaking*

Many of the actors that played a role in regime construction have continued to influence ICANN's operational policymaking processes. However, the US government has not had the same hegemonic dominance over ICANN's ongoing policymaking affairs as it did over initial regime construction. Furthermore, the number of governments actively involved in the GAC is much larger than the handful of governments directly involved in ICANN's formation.<sup>Note 8.1</sup> A much larger number of individual 'supply side' actors are also involved. In 1998, NSI was the sole registry and registrar for gTLDs, whereas today there are a considerable number of independent registries and registrars represented through their respective GNSO Constituencies, though NSI's successor VeriSign arguably remains the biggest and most important of the registries because of its control of the .com namespace. The GNSO structure also provides formalised avenues of representation for various other groups, such as the ISPs Constituency, the Business Constituency and the Non-Commercial Users Constituency. Some individual organisations from these constituencies did participate in the IFWP process but were not organised as coherent blocs at that stage. The general Internet-using public has continued to play only a relatively minor role in practice.

The role of the 'technical community' as a distinct bloc has arguably been less significant in terms of ongoing policy development than in initial regime construction. The technical community provides specialist knowledge and advice about the specifics of policy implementation, through the RSSAC and SSAC as well as links with key technical standards bodies through the Technical Liaison Group and IETF Liaison. However, none of these groups appears to have had much direct involvement in the big 'political' decisions, such as selection criteria for new gTLDs or questions of intellectual property rights in domain names. While there is no single 'technical constituency' organised as a distinct bloc, however, it must be pointed out a great many of the individuals sitting on ICANN's key policy development bodies, up to and including Directors, are drawn from technical backgrounds, and some representatives

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<sup>Note 8.1</sup> Around a hundred governments have currently named representatives to the GAC (see <http://gac.icann.org/gac-representatives>, accessed 18 July 2011). Of these, around forty regularly attend meetings (for details of attendance at any given meeting, see <http://gac.icann.org/communiques>, accessed 18 July 2011).

of technical organisations are recruited to assist in the policy development process, for example the IDNs Committee included members from the IETF and IAB.<sup>1057</sup>

**Table 8.1 Actors in policy development**

<b>Actor(s) / interest group(s)</b>	<b>Main avenue for representation</b>	<b>Relative influence on policy development</b>
Governments	Governmental Advisory Committee (GAC)	High
Regional Internet Registries (RIRs)	Address Supporting Organisation (ASO)	High (within their own sphere of influence)*
gTLD registries	GNSO Registries Constituency	High, particularly regarding gTLDs policy
ccTLD registries	CCNSO	High, particularly regarding ccTLDs policy
Registrars	GNSO Registrars Constituency	High
Intellectual property lobby	GNSO Intellectual Property Constituency (IPC)	Moderate to high
General business interests	GNSO Business Constituency (BC)	Moderate
Non-commercial users	GNSO Non-Commercial Users Constituency (NCUC)	Moderate
Internet Service Providers (ISPs)	GNSO ISP Constituency (ISPCP)	Moderate
Technical community	Root Server System Advisory Committee (RSSAC) and Security and Stability Advisory Committee (SSAC), IETF Liaison, Technical Liaison Group	Low to moderate
Domain name registrants, general Internet-using public	At-Large Advisory Committee (ALAC) Public comments	Low to moderate
Language & cultural groups	Not directly represented	Low

<sup>1057</sup> ICANN (2011). “Internationalized Domain Names (IDN) Committee.” Retrieved 15 July 2011, from <http://www.icann.org/en/committees/idn/>

\* The RIRs, through the ASO, control policymaking with regards to IP addressing. However, this area of ICANN’s work, unlike DNS policy, tends not to be highly politicised for the most part. Though some developing states have, in the past argued that existing IPv4 address allocations tend to favour US interests, this is being gradually made less relevant by the introduction of IPv6, which solves the problem of address scarcity. The ASO is not usually involved in policy relating to domain names.

## Principles and norms

Krasner defines ‘principles’ as ‘beliefs of fact, causation and rectitude’, while ‘norms’ are ‘standards of behaviour defined in terms of rights and obligations.’<sup>1058</sup> Krasner makes a fundamental distinction between principles and norms, which he sees as providing the basic characteristics of a regime, and rules and decisionmaking procedures, which are specific and more detailed arrangements within the context of the principles and norms, and which may be altered without changing the underlying character of the regime.<sup>1059</sup>

### *Principles*

Using Krasner’s definition, the following principles for DNS governance can be derived from the White Paper<sup>1060</sup> of 1998.

Principle 1 - Definition of critical Internet resources - IP addressing and the Domain Name System:

Critical Internet resources are defined as IP addresses and domain names. The IP addressing system is a method for assigning unique numeric identifiers to each computer or device connected to the Internet. Such identifiers are used to distinguish that particular device from any other on the network and facilitate communication by allowing data to be forwarded to and requested from a specific target computer.

Domain names are the familiar and easy-to-remember names for Internet resources (e.g., "www.microsoft.com"). They map to IP numbers that serve as routing addresses on the Internet. The domain

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<sup>1058</sup> Krasner, S. D. (1983). ‘Structural causes and regime consequences: regimes as intervening variables.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press: 2-22. P2

<sup>1059</sup> *Ibid*, P3

<sup>1060</sup> United States Department of Commerce (1998). National Telecommunications and Information Administration Statement of Policy: “Management of Internet Names and Addresses.” (‘White Paper’). 5<sup>th</sup> June 2007. Docket Number: 980212036-8146-02. Retrieved 5 October 2008, from [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

name system (DNS) translates Internet names into the IP numbers needed for transmission of information across the network.

The domain name space is constructed as a hierarchy. It is divided into top-level domains (TLDs), with each TLD then divided into second-level domains, and so on. In terms of organisation and intended use, TLDs are divided into two types: national, or country-code, TLDs (ccTLDs), and a small set of generic TLDs (gTLDs), which do not carry any national identifier, but denote the intended function of that portion of the domain space. DNS relies upon a hierarchical system of interconnected nameservers to which requests for name resolution are forwarded.

Principle 2 - The Internet requires coordinated naming and numbering resource assignment.

There can be no duplicate names or addresses on the network. Furthermore, the system of distributed DNS servers must point to an authoritative and consistent common 'root' to guarantee universal name consistency, without which data could not be routed with any certainty to the intended addresses. This makes necessary a mechanism for coordinated administration and assignment of naming and numbering resources. While day-to-day operational tasks, such as the actual operation and maintenance of the Internet root servers, can be dispersed, overall policy co-ordination and control of the global IP address pool and the DNS root should be vested in a single organisation. This is known as the 'IANA function'.

Below the IANA manager lies a hierarchy of organisations involved in redistributing naming and numbering resources downwards. With regards to IP addressing, large blocks of IP addresses are assigned by the IANA manager to Regional Internet Registries (RIRs), which in turn redistribute smaller blocks of IP addresses to large organisations and Internet Service Providers (ISPs). These organisations are then responsible for assigning individual IP addresses to ordinary users.

With regards to the domain name system, management of each Top Level Domain is delegated to a registry organisation.

Coordination between all of the actors described above requires recognition of the authority of the central 'IANA' manager to set policy and standards pertaining to resource assignment, and to resolve any disputes arising from this.

The four core dimensions of the IANA function are: 1. To set policy for and direct the allocation of IP number blocks; 2. To oversee the operation of the Internet root server system; 3. To oversee policy for determining the circumstances under which new top level domains would be added to the root system; and 4. To coordinate the development of other technical protocol parameters as needed to maintain universal connectivity on the Internet.

Principle 3 - The Internet, and therefore critical Internet resource governance, are global and nonterritorial in scope.

The Internet is essentially a borderless medium that allows data to flow across national boundaries. Allocation of naming and numbering resources (with the exception of ccTLDS) is not tied to physical geography. Governance of this system must therefore also be nonterritorial in scope and allow common standards and policies to be set across the global network.

Principle 4 - Critical Internet resource management is a matter of technical coordination rather than public policy.

Public actors (governments) are not the appropriate governors for the IP addressing and DNS systems, because critical Internet resource management is a technical rather than political matter.

Principle 5 - As the Internet becomes commercial, it becomes less appropriate for US research agencies to direct and fund these functions. Critical Internet resource governance should be managed by private actors through a

‘multistakeholder’ organisation (‘NewCo’) This organisation should be accountable to the ‘Internet community’ and represent stakeholders from all geographic regions.

This belief follows on from Principle 4. As a nonterritorial, technical and apolitical system, critical Internet resource governance is not suited to management by territorial governments. Instead, it should be placed in the hands of those directly involved in managing the system, and those directly affected by its decisions. This should include technical and commercial stakeholders, but also representatives of the global Internet using public.

Principle 6 – ‘NewCo’ should reach decisions in a bottom-up, consensus driven manner.

Critical resource governance involves collective decisionmaking by RIRs, registries, registrars, Internet service providers, the technical community, representatives of Internet end-users including business and private users, and other actors involved in the supply or consumption of critical Internet resources. Decisions should be reached via ‘rough consensus’ among all participating actors, in the same manner as the Internet has been run by the technical community since its inception.

Principle 7 – A mechanism is required for resolution of intellectual property disputes involving domain names.

Principle 8 – ‘NewCo’ should promote competition in domain name registration.

Principle 9 – Technical stability of the system is a prime consideration.

As previous chapters have revealed, however, principles 3, 4, 7 and 6 have been challenged in reality:

- Principle 3 appears to have become somewhat modified, with the concept of geographically based gTLDs (such as .berlin), and growing recognition that territorial sovereign states have rights over their ccTLDs and over the allocation of ‘geographical identifiers’ in gTLDs.
- Principle 4 has been thoroughly discredited. As shown throughout this thesis, ICANN is very much a public policymaker.
- Principle 5 has also been challenged in practice. Although private actors play a crucial role in DNS governance, state actors have proved significant also, while the Internet-using public plays a much lesser role than appears to have been originally envisaged.
- Principle 6 remains in place in theory, but does not describe reality. ICANN policymaking can in no way be said to be based on ‘consensus’ or ‘bottom-up’ policy coordination.

### *Norms*

Like the basic principles from which they flow, the initial ICANN norms developed in 1998 differ in important ways from the norms to which ICANN today adheres in practice, as shown in the following table:

**Table 8.2: ICANN norms**

<b><u>ICANN 1.0 (1998) – Norms</u></b>	<b><u>ICANN 2.0 (ICANN of today) - Norms</u></b>
<b>STABILITY</b>	
Technical stability of the system prime consideration, therefore no changes can be made without thorough technical evaluation and testing	Technical stability of the system prime consideration, therefore no changes can be made without thorough technical evaluation and testing
<b>POLICY CO-ORDINATION</b>	
Private regulatory model; private actors make policy	Public-private model; both public and private actors involved in policymaking
Bottom up policymaking: Board approves or rejects	Top-down policymaking: Board actively involved in shaping specifics
Consensus based decisionmaking	Decisionmaking based on arbitration between competing interests, often at Board level
Broad multistakeholder policymaking. Various sets of interests have the right to participate in policymaking, including both commercial and non-commercial groups and the Internet using public	Narrow multistakeholder policymaking where only a few groups (commercial and governmental) have real influence over policy
<b>COMPETITION</b>	
Strong competition between registries and between registrars (left undecided in the White Paper but became a norm during ICANN’s first year of operation)	Limited competition between registries in practice (though promotion of competition remains a goal and new gTLDs programme likely to increase competition considerably) Strong competition between gTLD registrars
Separation of registry and registrar functions (left undecided in the White Paper but became a norm during ICANN’s first year of operation)	Vertical integration of registries and registrars to be permitted in next round of new gTLDs (under current proposals)
<b>REPRESENTATION</b>	
Equal representation for broad range of interests across all policy areas	Unequal representation. A few types of actor are far better represented, furthermore the policy area under consideration determines which actors are most important
At-Large Constituency main representatives of global public interest	Governments through the GAC main representatives of global public interest
Significant voice for global Internet using public	Token voice for global Internet using public
Significant element of global democracy: one third of the Board elected by global elections	Board wholly selected by SOs + NOMCOM, apart from a single Director selected by the ALAC
Broad geographical representation, especially on the Board	Broad geographical representation, especially on the Board

<b><u>ICANN 1.0 (1998) – Norms</u></b>	<b><u>ICANN 2.0 (ICANN of today) - Norms</u></b>
<b>OTHER</b>	
Strong protection for intellectual property rights	Strong protection for intellectual property rights
‘A’ root server remains under ultimate ownership / control of US Government.	‘A’ root server remains under ultimate ownership / control of US Government.
Global, non-territorially based DNS governance	gTLDs mostly treated as a global resource to be governed without reference to national borders. Some recognition that authority over ccTLDs is tied to territorial sovereigns, and that territorial governments also have some rights over some gTLD applications, particularly ‘geographical identifiers’.
ICANN to be entirely selfregulating by 2000	Oversight body set up under AoC in 2009
Strong, open WHOIS for gTLDs	Strong, open WHOIS for gTLDs remains the status quo for now but has been challenged from various quarters
Funding for ICANN provided from domain name registrations (i.e. ‘taxation’ of registries and registrars)	Funding for ICANN provided from domain name registrations (i.e. ‘taxation’ of registries and registrars). ICANN’s expenditure greatly increased.
Transparency and openness in policy development	Transparency and openness in policy development remains a goal, some groups within ICANN less transparent than others
Mandatory Registry Agreements for gTLD registries, optional for ccTLD registries	Mandatory Registry Agreements for gTLD registries. Remain optional for ccTLD registries; this has been challenged (particularly regarding IDN ccTLDs) but so far upheld
Registrars must be accredited by ICANN	Registrars must be accredited by ICANN; Registrar Accreditation Agreements significantly strengthened

ICANN’s rules and decisionmaking procedures are set out in the organisation’s Bylaws.<sup>1061</sup> For the purposes of this chapter, however, these are less important than the principles and norms, which provide the basic characteristics of the regime. Krasner argues that changes in rules and decision-making procedures are changes within regimes, provided that principles and norms remain unaltered. However, he goes on to argue that changes in principles and norms are changes of the regime itself.<sup>1062</sup> According to this view, then, the ICANN regime has fundamentally changed since its inception, since some of its principles and norms have been modified.

<sup>1061</sup> ICANN (2011). Bylaws for Internet Corporation for Assigned Names and Numbers (As amended 24 June 2011). Retrieved on 26th July 2011, from <http://www.icann.org/en/general/bylaws.htm>

<sup>1062</sup> Krasner, S. D., Ed. (1983). International Regimes. New York, Cornell University Press. P3

Nonetheless, the change has so far taken the form of evolutionary reform rather than revolutionary regime replacement.

The following sections will draw upon various paradigms in regime theory in an attempt to analyse these patterns.

### **Regime theory: ‘rationalist’ approaches**

The regime concept was initially developed in the context of rationalist paradigms on International Relations theory, and this will be the starting point for analysis of the ICANN regime.

#### Overview of ‘rationalist’ regime theory

‘Rationalist’ paradigms encompass realist and neoliberal institutionalist approaches. Both begin from some similar ontological assumptions. They stress the importance of state actors and state power as a basis for the international system structure, and assume conditions of anarchy in the international system; that is, a situation in which there is no overall authority above and beyond that of individual sovereign states. However, whereas realists believe that these conditions lead inevitably to lack of trust, competition and conflict between state actors, with any co-operation being relatively short-term and tactical, neoliberal institutionalists argue that, because of mutual interdependence, there are incentives for actors to build long-term co-operative arrangements.

Though realists tend to view co-operation as tactical and impermanent, they do use the concept of international regimes, which they explain in power-based terms. Regimes may be based upon a balance of power between several dominant state actors, or may be imposed by a single hegemonic actor, as in the model known as ‘hegemonic stability theory.’<sup>1063</sup> Hegemonic stability theory applies concepts originated by scholars such as Charles Kindleberger<sup>1064</sup> to international regimes, and explains

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<sup>1063</sup> Gilpin, R. (1987). *The Political Economy of International Relations*. Princeton: Princeton University Press. P86.

<sup>1064</sup> See Kindleberger, C. P. (1973). *The World in Depression: 1929-1939*. Berkeley, University of California Press and

successful regimes in terms of the imposition of order by a hegemonic state. The hegemon determines the basic principles, norms, rules and decision-making procedures of the system; the strength and prestige of the hegemon are essential prerequisites for other states to accept the regimes it establishes. The hegemon maintains the system and makes maximum profit by exploiting those regimes; at the same time, the regimes provide “public goods” to other countries, and free-riders are tolerated by the hegemon in order to maintain the system. The stability of a regime is dependent upon the persistence of the existing distribution of power in the international system. If the hegemon’s relative capabilities decline, the regime will collapse.<sup>1065</sup>

Neoliberal institutionalism, most closely identified with Robert Keohane and built upon by other scholars, starts from some similar assumptions to realism, including a state-centric world order characterised by anarchy. However, unlike realists, neoliberal institutionalists do not see these conditions as precluding the possibility of genuine long-term cooperation between state actors. Realists, they argue, err by modelling the world using the classic ‘Prisoner’s Dilemma’ or ‘Stag Hunt’ analogies, where conditions make defection a dominant strategy for actors; but these are ‘one shot’ scenarios, where participants do not expect to interact again in the future. In the real-world international system, neoliberal institutionalists argue, states interact continually and there are future consequences for today’s actions. Relations are iterative and defection from agreed arrangements is likely to scupper any chance of further co-operation in the future. Thus, defection is in the long run unrewarding, since any short term gains obtained will normally be outweighed by the punishment that will ensue over the long term.<sup>1066</sup> Actors are rational enough to recognise this and so mostly tend to keep to their agreements. Repeated cooperative interactions lead to the establishment of understandings between actors, a process of ‘convergence of expectations’, which can become crystallised into full-blown international regimes. Neoliberal institutionalists thus explain regime formation in terms of interdependence, reciprocity and convergence of interests among a number of states, rather than necessarily as the unilateral creation of a hegemon.

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Kindleberger, C. P. (1981). "Dominance and Leadership in the International Economy: Exploitation, Public Goods and Free Rides." *International Studies Quarterly* 25(2): 242-254.

<sup>1065</sup> Young, O. R. (1983). ‘Regime dynamics: the rise and fall of international regimes.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press: 93-113. P116

<sup>1066</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. P75, P103

As Keohane explains, cooperation does not imply an absence of conflict. Rather, it reflects partially successful efforts to overcome conflict, real or potential.<sup>1067</sup> He sees regimes as akin to ‘contracts’ between actors with long-term objectives, who seek to structure their relationships in stable and mutually beneficial ways. These arrangements, he asserts, do not preclude further negotiations, but function to establish stable mutual expectations among actors about each others’ patterns of behaviour, and develop working relationships that will allow the parties to cope with new situations;<sup>1068</sup> regimes provide established negotiating frameworks (reducing transaction costs).<sup>1069</sup> An important principle shared by most international regimes, Keohane argues, is ‘reciprocation’, i.e. the mutual belief among participants that, if one helps the other actors or fails to hurt them, even at some opportunity cost to oneself, they will reciprocate when the tables are turned.<sup>1070</sup> Regimes generate the expectation of cooperation among members, by creating iteration and the belief that interaction will continue for the foreseeable future.<sup>1071</sup>

Keohane does, however, recognise that power and hegemony may influence regime formation, although he argues that regimes may be also formed in the absence of a hegemon. He reasons that we can generally expect actors to join regimes when they expect the benefits of membership to outweigh the costs; disadvantaged actors may join regimes even when they receive fewer benefits than other members, provided that they still gain more than they would if they were not part of the regime.<sup>1072</sup> He does, however, also acknowledge that weaker actors’ choices whether or not to join a given regime may be subject to constraints; powerful actors may impose constraints on weaker ones prior to formation of a new regime, or may threaten adverse consequences for refusal to join a hegemonic scheme. Thus, an actor’s decision to join a regime may not always be a purely ‘voluntary’ choice.<sup>1073</sup>

Though neoliberal institutionalists accept that hegemons may often play an important role in initial regime establishment, they argue that stable regimes, once established,

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<sup>1067</sup> Ibid, P53-54

<sup>1068</sup> Ibid, PP146-147

<sup>1069</sup> Ibid, P155

<sup>1070</sup> Keohane, R. O. (1983). ‘The Demand for International Regimes.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press: 141-171. PP158-159

<sup>1071</sup> Ibid, P170

<sup>1072</sup> Ibid, PP147-148

<sup>1073</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. P42

are likely to be enduring and will not necessarily collapse simply due to a change in the relative power position of the hegemon.<sup>1074</sup> Keohane argues that the pattern observable in reality is of regimes tending to endure even in the face of changes in the underlying power structure. This occurs, he argues, because mutual benefits provided by the regime cause actors to redefine their interests in terms of the regime; and because established regimes are easier to maintain than new regimes are to create.<sup>1075</sup>

Krasner, though often described as a realist, is not in fundamental disagreement with most points of Keohane's position. He too recognises that, in many issue-areas, the world is not zero-sum; i.e., in those areas, the objectives sought by states are not affected by the gains made by other states, and there can be opportunities for mutual gain. The creation of effective regimes, he acknowledges, may be the means by which these gains can be realised.<sup>1076</sup> He further agrees that regimes are easier to maintain than to create<sup>1077</sup>, arguing that established regimes generate inertia, if only because of sunk costs and the absence of alternatives. As a consequence, though regimes may closely reflect the underlying power structure when first created, once they are actually in place, the relationship between power and regimes can become more attenuated and, over time, the underlying power structure and the regime principles and norms can drift apart.<sup>1078</sup> However, Krasner goes on to argue, this process can only go so far. If incongruities between regime principles and norms and the underlying power structure become too severe, he asserts, there is likely to be revolutionary change as those with the greatest power capabilities move to change underlying principles and norms. He uses the metaphor of 'tectonic plates' to describe this process, where 'pressure' builds over time through incremental changes in the underlying power structure, until finally there is an 'earthquake' that reshapes the regime in line with the new power realities.<sup>1079</sup> The greater the disparity between the

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<sup>1074</sup> Keohane, R. O. (1983). 'The Demand for International Regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 141-171. P146

<sup>1075</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. P100

<sup>1076</sup> Krasner, S. D. (1983). 'Regimes and the limits of realism: regimes as autonomous variables.' *International Regimes*. S. D. Krasner. New York, Cornell University Press. 355-368. P355

<sup>1077</sup> Krasner, S. D. (1985). *Structural Conflict: The Third World Against Global Liberalism*. Berkeley and Los Angeles, University of California Press. P12

<sup>1078</sup> *Ibid*, P29

<sup>1079</sup> Krasner, S. D. (1983). 'Regimes and the limits of realism: regimes as autonomous variables.' *International Regimes*. S. D. Krasner. New York, Cornell University Press. 355-368. P357

power structure and the regime norms, the greater the probability of a sudden rupture.<sup>1080</sup>

Krasner also goes on to suggest that, aside from lags, once regimes are established, they may feed back on the basic causal variables that gave rise to them in the first place; they may alter the distribution of power, and they may change assessments of interest. Thus, Krasner acknowledges, regimes “may become interactive, not simply intervening, variables”; i.e., they may come to have independent effects on outcomes and behaviour. As a result, basic causal variables may be less important for explaining regime persistence than for explaining regime creation.<sup>1081</sup>

Keohane and Joseph Nye offer a synthesis between realist and neoliberal institutionalist approaches. They see realism as a starting point for analysis and believe that realist explanations work well under some conditions, but less so under conditions of ‘complex interdependence’. Both realism and complex interdependence, they assert, are ideal types rather than true reflections of world political reality; most situations will fall somewhere between these two extremes.<sup>1082</sup> Like Krasner, they argue that regimes function as intermediate factors between the power structure of an international system and the political and economic bargaining that takes place within it.<sup>1083</sup>

### Application to ICANN

A statist perspective on ICANN, such as that taken by Drezner, clearly shares similarities with ‘rationalist’, state based approaches to IR. Obviously, ICANN deviates from some assumptions of classic rationalist regime theory. While rationalist approaches sometimes acknowledge that private actors can play a role in regimes, they are usually assumed to be subordinate to states. Oran Young, for instance, argues that, in formal terms, the members of international regimes are always sovereign states, though the parties carrying out the actions governed by regimes are often

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<sup>1080</sup> Krasner, S. D. (1985). *Structural Conflict: The Third World Against Global Liberalism*. Berkeley and Los Angeles, University of California Press. P29

<sup>1081</sup> Krasner, S. D. (1983). ‘Regimes and the limits of realism: regimes as autonomous variables.’ *International Regimes*. S. D. Krasner. New York, Cornell University Press. 355-368. PP358-359

<sup>1082</sup> Keohane, R. O. and J. S. Nye (2001). *Power and Interdependence*. London, Longman. P21

<sup>1083</sup> *Ibid*, P18

private entities.<sup>1084</sup> Krasner likewise acknowledges that, in a market-oriented regime, states as well as private corporations can be players in the market.<sup>1085</sup> However, he still sees regimes as being primarily constructed by states; the behaviour of other actors, including multinational corporations and international organisations, is conditioned and delimited by state decisions and state power.<sup>1086</sup> This division between state and nonstate actors cannot be so readily applied in the case of ICANN. Although writers such as Drezner identify a pattern of state dominance in the ICANN system, the case studies have demonstrated that ICANN is in fact a regime where both state and nonstate actors may compete to advance their interests, with no guarantee that state preferences will come out on top. In the ICANN system, state and nonstate actors can therefore be regarded in some ways as peers to an extent not normally seen in most international regimes.

Nonetheless, this does not mean that rationalist regime theory has no applicability to the ICANN case. In light of the dominant role played by a state actor, the US, in creating the regime, ICANN would seem to reflect the hegemonic model to a considerable extent. However, this model can only take us so far. The process of regime establishment also involved negotiation and bargaining between various state and nonstate actors. Furthermore, ongoing contests and bargaining between regime participants have continued to reshape its fundamental principles and norms over time, often in directions not initially envisaged by the US. Despite the fact that ownership of the DNS root is still legally claimed by the US Department of Commerce, the US government has not, for the most part, appeared to play a greater role in ICANN's operational policymaking than other major governments (with arguably one or two exceptions, such as the .xxx affair). The remaining vestiges of US control have been considerably reduced with the ending of the JPA. This reduction in direct US influence has not appeared to weaken the regime, and this is more readily explained by neoliberal institutionalist approaches than by realist hegemonic stability theory.

Young identifies three distinct types of regime; spontaneous regimes, negotiated regimes and imposed regimes. Spontaneous regimes are defined as the product of

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<sup>1084</sup> Young, O. R. (1983). 'Regime dynamics: the rise and fall of international regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 93-113. P93

<sup>1085</sup> Krasner, S. D. (1985). *Structural Conflict: The Third World Against Global Liberalism*. Berkeley and Los Angeles, University of California Press. P297

<sup>1086</sup> *Ibid*, P28

interaction without conscious design or coordination; negotiated orders are a product of bargaining among participants; while imposed regimes are products of the kind of hegemonic order discussed by realist analyses.<sup>1087</sup> Arguably, ICANN shows features of all three of Young's regime types. Some of the key underlying elements of the regime emerged 'spontaneously'. For example, the fundamental organisational characteristics of the DNS system itself, such as the way it is split into ccTLDs and gTLDs, are conventions that emerged under the management of the technical community long before ICANN's formal institutionalisation and indeed long before governmental or commercial actors were involved. While there are some underlying 'spontaneous' aspects to the naming and addressing arrangements, however, ICANN in its specific institutional form is to a considerable extent an imposed regime. Finally, some aspects of the regime are negotiated, for example the original Bylaws were created by a process of negotiation and bargaining among key actors in the wake of the White Paper, and important elements such as the existence of the GAC emerged via negotiation.

Neoliberal institutionalist models emphasising interdependence and the rationality of co-operation can therefore readily be applied to ICANN. All actors within the ICANN system, including both states and nonstate entities, have at least two important things in common. Each of them is required to make the system work, and each has an interest in maintaining a working system. The system could not function without the support of governments; it could not function without the registries or the registrars; it could not function without the ISPs or the RIRs; it could not function without the technical community. It requires the support of the business community in order to attract the investment needed to make the Internet a viable commercial proposition; and the intellectual property community must also be kept on board due to its potential ability to disrupt the regime through legal challenges or lobbying of governments. Therefore there is a high degree of interdependence between actors, and a regime to ensure all are kept on board is not only desirable, but essential. While each set of actors may desire to reshape the regime according to its interests, outright defection is not a rational choice. Each actor recognises this and redefines its interests in terms of the regime. Within the context of the regime, however, participants continue to work to advance their own interests and ideals. In doing so, they may seek

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<sup>1087</sup> Young, O. R. (1983). 'Regime dynamics: the rise and fall of international regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 93-113. PP98-100

to reshape or modify the regime norms. This is consistent with Keohane's view of regimes as frameworks for ongoing negotiation; within the regime continued conflicts may continue, but the regime provides a framework for their resolution.<sup>1088</sup> It is also consistent with his assertion that, in view of the difficulties of constructing international regimes, it is rational to seek to modify existing ones, where possible, rather than to abandon unsatisfactory ones and attempt to start over, meaning that regimes tend to evolve rather than to die.<sup>1089</sup>

A number of key ongoing conflicts between sets of interests can be identified, that have manifested themselves in more than one policy development area and that illustrate significant continuing pressures for regime modification from a variety of quarters. Examples of such conflicts include: conflict between ICANN's efforts to centralise policymaking and the registries' efforts to maintain autonomy; conflict between intellectual property interests aiming to restrict opportunities for cybersquatting by limiting the number of TLDs, and those who want to expand the domain name space; conflict between ICANN and national governments over control of ccTLDs; conflict between ICANN and national governments over control of public policy in the gTLD realm; conflict between principles of broad multistakeholderism / public participation and vested interests; conflict for resources between commercial and non-commercial interests; conflict between the need for centralised policy and the need to take into account local sensibilities on issues pertaining to language and culture; and conflict between trademark interests and freedom of expression / identity in domain names.

An interesting question is whether these conflicts should be regarded as cracks in the regime, or just ongoing contests within the regime framework in the manner described by Keohane. What can be said is that some of them have proved powerful enough to reshape the regime norms, particularly those related to the assertion of governmental authority and the reduced influence of the At-Large community. If we take the view that this ongoing evolution of the ICANN governance arrangements in response to contests between regime participants is significant enough to be considered changes in the regime's structure and norms, then this goes significantly beyond Keohane's

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<sup>1088</sup> Keohane, R. O. (1983). 'The Demand for International Regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 141-171. PP146-147

<sup>1089</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. P107

model, where ongoing contests continue between actors but within a relatively stable regime framework. Yet it also represents a steady evolution of the regime, rather than the type of dramatic earthquake event predicted by Krasner.

With regards to state actors, it must be acknowledged that a number of governments are becoming increasingly vocal on the DNS issue, as demonstrated at WSIS and the IGF. Some of these, such as the EU, advocate only formal decoupling of root authority from the US government, with little actual change to the operational arrangements. However, some other states that had little influence on ICANN's initial design advocate much more radical change, such as China and Brazil. These powers are of increasing significance in terms of their growing share of the Internet-using global population and the increased interest of their governments in matters of Internet governance. It remains to be seen whether this changing power balance on the state side will eventually generate forces strong enough to force a fundamental shift, such as an abandonment of the public-private model. At present, such pressures do not seem powerful enough to produce a sudden 'earthquake' event; and despite their statements at venues such as WSIS, those governments calling for change in principle appear willing to continue to work with ICANN in practice for the time being, by, for example, sending representatives to the GAC. Nonetheless, WSIS arguably has played a role in ICANN's evolution, 'emboldening' states by giving them a UN-backed endorsement of their authority in matters of Internet governance as representatives of the public interest. It is telling that the GAC chose to cite the WSIS Declaration in the preamble to its responses to both the new gTLDs process and the IDNs PDP. Yet the reason the GAC is so keen to assert and emphasise its authority could be precisely because it still stands on somewhat uncertain grounds. As Mueller, Mathiason and Klein point out, the final WSIS agenda avoided mentioning ICANN by name and conferred no explicit legitimacy on it.<sup>1090</sup>

In summary, rationalist approaches to regime theory, including concepts drawn from both realist and neoliberal institutionalist paradigms, have revealed some important insights that are readily applicable to the ICANN case study. However, some aspects of the regime may not be handled well by rationalist theory. There is a case for arguing that the need for the ICANN regime was fundamentally a product of the

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<sup>1090</sup> Mueller, M. L., J. Mathiason, et al. (2007). "The Internet and Global Governance: Principles and Norms for a New Regime." *Global Governance* 13(2): 237-254. P242

commercialisation of the Internet. Rationalist approaches to regime theory are not designed to deal with such economic and social forces and thus are not particularly helpful in exploring this very important dimension of the regime. An alternative approach that may reveal deeper insights into the commercial aspects of the regime might instead be found in those paradigms on regime theory sometimes described as ‘neo-Marxist’.

### **ICANN and neo-Marxist / capitalist globalisation models**

#### Overview of theory

An alternative approach to regime theory is drawn from those paradigms on IR that emphasise the economic and social forces of capitalism as the starting point for understanding of global political economy and as the ultimate basis for international regimes and institutions. Some of these approaches are often termed ‘neo-Marxist’, but numerous other writers, who do not necessarily begin from ‘Marxist’ assumptions, also stress the importance of the capitalist system as one of the fundamental underpinnings of the contemporary global socio-political system.

Neo-Marxist approaches focus on the organisation of production, exchange and property, and how governance relates to those economic relations and structures. They view the current global order as an integrated world political economy served by formal and informal governance arrangements and supported by a prevailing set of ideas. The main driving force in this order is the pursuit of capital accumulation, a system under which resources are appropriated and turned into commodities in a market that dictates their exchange value. Within this order, the role of both states and international organisations is to entrench and serve capitalist interests.<sup>1091</sup>

W.H. Sewell sees capitalism as simultaneously dynamic and changeable, yet based on deep and unconscious ‘rules’. He identifies the core schemas of capitalism as those governing the conversion of ‘use value’ into ‘exchange value’, a principle that, he argues, is extremely transposable and knows no limits. The interconvertibility of

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<sup>1091</sup> See, for example, Cox, R. with T. J. Sinclair (1996). *Approaches to World Order*. Cambridge, Cambridge University Press; and Mosco, V. (1996). *The Political Economy of Communication*. London, Sage Publications.

resources by means of capital makes it possible for resources not previously treated as commodities to enter the ‘circuit of monetised exchanges’.<sup>1092</sup> Similarly, Wilhelm Peekhaus offers a model where ‘primitive accumulation motivates efforts by capital to enclose more and more areas of social existence.’<sup>1093</sup> Massimo De Angelis also talks of a process of capitalist ‘enclosure’, whereby capital appropriates new areas of life and social existence in service of its accumulation priorities.<sup>1094</sup>

Robert Cox, a noted neo-Marxist IR scholar, focuses upon a view of power as economic exploitation. He sees institutionalisation as a means of stabilising and perpetuating a particular order, that being, in the current historical period, the capitalist economic order.<sup>1095</sup> He identifies a close connection between institutionalisation and hegemony, where institutions represent mechanisms for dealing with conflicts so as to minimise the use of force.<sup>1096</sup> International regimes are generally initiated by a hegemonic state, which takes care to secure the acquiescence of at least some of the other states.<sup>1097</sup> On the surface, this resembles the realist hegemonic approach to regime theory; the key difference is that, whereas realists take the sovereign state as their starting point for a discussion of hegemony, Cox takes the economic forces of capitalism as his. As he explains, the form of capitalism that has become dominant at the global level seeks to free itself from any form of state control or intervention through deregulation and privatisation; as a result, Cox maintains, the autonomous capacity of states has been reduced (although to a greater degree for some states than for others), and states are largely reduced to the role of adjusting national economies to the dynamics of an unregulated global economy.<sup>1098</sup> States retain a function as enforcers of contracts and as instruments of political leverage to secure access to resources and markets, but the state is mostly subordinate to the economy.<sup>1099</sup> International institutions provide the opportunity for dominant social forces to ‘buy off’ subordinate forces, thus strengthening their hold through a process

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<sup>1092</sup> Sewell, W. H. (1992). "A theory of structure: duality, agency, and transformation." *The American Journal of Sociology* 98(1): 1-29. PP24-26

<sup>1093</sup> Peekhaus, W. (2009). "Primitive Accumulation and Re-appropriation of the Information Commons." Graduate School of Library & Information Science, University of Illinois. Retrieved 30 November 2010, from [http://www.cais-acsi.ca/proceedings/2009/Peekhaus\\_2009.pdf](http://www.cais-acsi.ca/proceedings/2009/Peekhaus_2009.pdf) P3

<sup>1094</sup> De Angelis, M. (2007). *The beginning of history: Value struggles and global capital*. London: Pluto. P139

<sup>1095</sup> Cox, R. with T. J. Sinclair (1996). *Approaches to World Order*. Cambridge, Cambridge University Press. P103

<sup>1096</sup> *Ibid*, P450

<sup>1097</sup> *Ibid*, P138

<sup>1098</sup> *Ibid*, P527

<sup>1099</sup> *Ibid*, P528

of consensus building<sup>1100</sup>; they also perform an ideological role by helping to define policy guidelines for states and legitimating particular behaviour and practices.<sup>1101</sup>

Other scholars, including many recent analysts of globalisation, while not necessarily starting from a neo-Marxist outlook, also focus on capitalism as the key driving force in the contemporary global system. Some have applied this specifically to the issue-area of Internet governance. For instance, Dan Schiller argues that the Internet ‘comprises nothing less than the central production and control apparatus of an increasingly supranational market system’.<sup>1102</sup> Similarly, Stephen J Kobrin views globalisation as a qualitative transformation of the world economy, including a shift away from national markets as meaningful economic units and the emergence of a ‘digitally integrated’ global economy that entails ‘the migration of markets from geographic space to cyberspace’.<sup>1103</sup>

Given the importance of cyberspace in the globalised economic arena, it was perhaps inevitable that the principal identifiers on the Internet, domain names, would themselves become viewed as economic commodities in their own right, particularly considering their perceived association with trademarks and company names. Acknowledging this opens the way for an understanding of the ICANN regime as an institutional framework for capitalist exploitation of the DNS resource.

### Application to ICANN

The influence of commercial actors can be seen at all levels of the regime. Day-to-day administration of the TLDs is delegated to the registries, and actual registrations to the registrars, mostly for-profit entities. Within the ICANN structure itself, the Board is recruited mostly from the business world. Of the three Supporting Organisations, two are dominated by for-profit entities; most (though not all) of the country-code registries represented on the CCNSO are private concerns, while five of the six GNSO constituencies represent corporate interests of various kinds, with only the NCUC

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<sup>1100</sup> Ibid, P11

<sup>1101</sup> Ibid, P138

<sup>1102</sup> Schiller, D. (1999). *Digital Capitalism: Networking the Global Market System*. Cambridge, MA, MIT Press. Pxiv

<sup>1103</sup> Kobrin, S. J. (2007). ‘Economic governance in an electronically networked global economy. The Emergence of Private Authority in Global Governance.’ R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 43-75. P45

representing non-commercial users. Only the ASO is arguably dominated more by technical than commercial considerations.

The policy case studies examined in this dissertation provide further evidence of the influence of commercial actors and interests over ICANN decisionmaking. As Chapter 4 revealed, the general parameters of New gTLDs policy appear to have been shaped largely by commercial actors, particularly those represented within the GNSO. Similarly, as shown in Chapter 5, IDN implementation at the second level was largely controlled by commercial actors; the IDN Committee was dominated by the mostly commercially based 'supply side', and the IDN Guidelines in their several incarnations have been largely the work of the registries. With regard to top-level IDNs, some of the most important significant players have also been the registries, though particularly with regard to the Fast Track process, the GAC has also been an important actor. Chapter 7 showed that the UDRP is designed to meet the needs of a particular set of commercial interests, the intellectual property lobby, and arguably is weighted in their favour to the detriment of other relevant considerations, such as freedom of expression. The GNSO, itself dominated by commercial interests, has not yet made any moves towards reform of the policy, despite some widespread criticisms; and the recommendations of the most recent staff report have led to suggestions that the intellectual property lobby also holds undue influence with ICANN staff.

Clearly, then, commercial actors hold immense influence within ICANN, although equally clearly, there is no single coherent 'commercial interest' dominating the regime, but rather multiple competing sets of commercial interests. The important point is that principles of market capitalism form one of the fundamental cultural bases upon which the ICANN regime is founded, although this can and sometimes does come into conflict with the other fundamental principle of state sovereignty.

There are strong grounds for viewing ICANN as the overseer of a system based on the commodification and marketisation of domain name resources. Commodification of the DNS was, perhaps, a predictable consequence of the Internet's commercialisation and subsequent rapid expansion in the 1990s. The nature of domain names, as strings of text, meant that they were readily seen as corresponding to company names, trademarks and brand names; this also made them qualitatively different from other

kinds of communications identifier, such as telephone numbers. Having the right domain name is an important factor in marketing an online business and making it easy for potential customers to find. As a consequence, particular names acquired high desirability and therefore market value. This led to a shift away from the previous system, whereby domain names were registered with Stanford NIC free of charge, to a system where control is firmly in the hands of an institutionalised chain of private concerns exploiting the DNS resource for profit. The case of DNS could thus be seen as a prime example of how capitalism moves to 'enclose' new areas of social life in the manner described by Peekhaus, de Angelis and Sewell.

Vincent Mosco emphasises the 'institutional circuit' that links, for example, a chain of primary producers to wholesalers, retailers, and consumers. Mosco advises that we examine the set of social relations organised around power or the ability to control people, processes and things, which requires looking at shifting forms of control along the production, distribution, and consumption circuit.<sup>1104</sup> The process of creating exchange value draws an entire complex of social relations into the orbit of commodification, including labour, consumers and capital.<sup>1105</sup> As in Mosco's model, an identifiable 'supply chain' for domain names has been established under the ICANN regime. ICANN grants to registries the right to operate TLDs and to sell SLDs under that namespace. These could be likened to producers in more traditional media industries (such as the movie industry), while registrars, which act as 'middlemen' between the registry and the end-user, could be likened to distributors or retailers. At each stage of the process, a markup is added to the price that the end-user pays for the domain name. However, whereas, for example, the movie industry is based upon production and distribution of a product that takes considerable effort, capital and expertise to create in the first place, domain names do not represent a tangible 'product' in the same way. Ultimately, 'production' of a domain name involves nothing more than adding an entry to an existing database; yet a 'product' that is so trivial to create can command a substantial market value by the time it is sold to the end-user. This markup in price is partly to cover administration costs, but much of it is profit. In this sense, the commodification of the DNS could be seen as an even more extreme example of the capitalist ability to create exchange value by drawing in a complex of producers, distributors and consumers into an institutionalised system of supply and demand.

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<sup>1104</sup> Mosco, V. (1996). *The Political Economy of Communication*. London, Sage Publications. P25

<sup>1105</sup> *Ibid*, PP 146-147

To a considerable extent, therefore, the ICANN regime could be viewed merely as the institutional vehicle for this process of capitalist expansion as it moved to ‘enclose’ the DNS resource. Clearly, much of Cox’s model also appears to fit the ICANN case; ICANN being an institution established by the capitalist hegemonic state power with the acquiescence of at least some other states. Through its control of the DNS root, the US government was able to ensure that the neoliberal market doctrines promoted by the Clinton administration would become the basis for the global domain name regime.

However, notwithstanding this, it is not so clear-cut as to say that ICANN, certainly in the beginning, was founded *solely* on the principles of free-market capitalism. In actual fact, the original vision for the organisation, as set out in the Green and White Papers, seems to have been somewhat fuzzy as to what ICANN’s fundamental ‘cultural’ principles would be. On the one hand there was a desire for the DNS to be run on a ‘privatised’, commercial basis, yet there were also ideals about user representation, which led to the creation of channels for popular participation, particularly the ‘At-Large’ mechanism for popular election of Directors. This stemmed at least in part from some long-standing aspects of US political culture, but also reflected a culture of liberalism and democratic ideals among the pioneer Internet community. The incompatibility of these two principles was perhaps not seen clearly at the time; but in the ensuing contest, the forces of capitalism could be seen as having won out, with the elimination of ‘At-Large’ elections and the general watering down of ideals of popular representation.

Neo-Marxists, of course, would find this predictable. Within states, Cox argues, the principles of liberal democracy are being rendered less and less relevant as the economic sphere is removed from political control; consequently democracy effectively becomes something of a sham or façade, hiding the reality that power is increasingly concentrated in the hands of globalised corporations.<sup>1106</sup> The same process could be said to have occurred within ICANN, which continues to pay lip-service to ideals of representation of and accountability to a global Internet-using public, but this has become more of a façade for public relations purposes than any

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<sup>1106</sup> Cox, R. with T. J. Sinclair (1996). *Approaches to World Order*. Cambridge, Cambridge University Press. P531-532

real check on the influence of commercial interests. De Angelis argues that, whenever capital seeks to 'enclose' a new sphere of social life, it must move to circumvent any opposition or barrier.<sup>1107</sup> ICANN's evolution could be interpreted in terms of the elimination over time of 'barriers' to unbridled capitalist control, including the 'liberal democratic' ideals and the mechanisms for popular representation incorporated into ICANN's original design. In particular, Mosco interprets the elimination of elected Board members in 2002 as a 'neo-liberal stroke' designed to facilitate the unfettered functioning of the organisation along free market lines.<sup>1108</sup>

Corporate capture models, as developed by scholars such as George Stigler and his successors, may help to explain how this shift towards corporate control occurred. In Stigler's view, regulatory capture occurs because groups or individuals with high stakes interests in policy decisions focus their resources and energies in attempting to gain the outcomes they prefer, while members of the public, each with only a tiny individual stake in the outcome, do not possess the will, resources or organisational capability to effectively influence policy.<sup>1109</sup> This describes very well the situation with regards to ICANN. For entities such as registries and registrars, the domain name industry makes up their core business; while for many other large corporations, domain names represent extremely valuable brand names. These organisations therefore have an enormous incentive to try to gain influence over various aspects of ICANN policy, while the millions of globally dispersed individuals who make up the public 'At-Large' do not possess the will, the organisational or the financial resources to even attempt to compete. Certain groups have sometimes attempted to challenge corporate power in the ICANN regime, for example those freedom-of-speech activists who oppose the UDRP, or minority language groups pressing to be accommodated with IDNs. However, such groups have a limited popular base and have tended to have limited success at best.

Despite the removal of these initial obstacles to an ICANN run along purely free-market capitalist principles, however, another challenge to unfettered commercial control has arisen; the increasing willingness of governments to claim sovereign

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<sup>1107</sup> De Angelis, M. 2007. *The beginning of history: Value struggles and global capital*. London: Pluto. P139

<sup>1108</sup> Mosco, V. (2004). *The Digital Sublime: Myth, power and cyberspace*. Cambridge, Massachusetts, MIT Press. P163

<sup>1109</sup> Stigler, G. J. (1971). "The theory of economic regulation." *Bell Journal of Economics and Management Science* 2(1): 3-21. P12

authority over public policy matters relating to the domain name space, mainly through the GAC. Though Cox and other neo-Marxists see the state system as itself ultimately subordinate to the forces of the underlying capitalist world order,<sup>1110</sup> Cox also acknowledges that the global state system and the global political economy, while interdependent, have their own internal dynamics, and contradictions can arise in their interrelationship.<sup>1111</sup> While the GAC has often appeared to be supportive of commercial interests, for example in pressing for strong intellectual property protections for new gTLDs, there is no guarantee that the interests of governments and those of corporate entities will always be in alignment, and the growing influence of the GAC therefore represents a potential check to unrestricted commercial control of the DNS.

In summary, theoretical approaches drawn from Neo-Marxist and ‘capitalist globalisation’ models give us some useful insights into a key aspect of the ICANN regime. At the same time, however, ICANN cannot be understood solely in terms of market capitalism, any more than it can be understood in purely statist, intergovernmental terms.

What is required is an approach that would allow these perspectives to be brought together into a single integrated analysis of the regime. This might be found by applying lessons from another approach to IR theory, namely the ‘social constructivism’ put forward by scholars such as David Dessler and Alexander Wendt. Such approaches include the concept of a global order composed of a multiplicity of social structures, some of which may come into conflict with each other. This concept fits well with the interactions between capitalist, statist and ‘liberal democratic’ cultures within ICANN.

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<sup>1110</sup>Cox, R. W. (1981). ‘Social Forces, States and World Orders: Beyond International Relations Theory.’ Reprinted in Cox, R. and Sinclair, T. J. (1996). *Approaches to World Order*. Cambridge, Cambridge University Press. 85-116. PP100-109

<sup>1111</sup> Cox, R. and Sinclair, T. J. (1996). *Approaches to World Order*. Cambridge, Cambridge University Press. P494-495

## A constructivist view of ICANN

This section will turn to constructivist theory in an attempt to bring together the previously discussed aspects of the ICANN regime, particularly interstate politics and commercialism. Constructivism will also be used to gain further insights into the mechanisms and processes by which the regime's principles and norms have evolved over time.

### Overview of constructivist theory

Constructivist approaches to International Relations challenge the ideas and assumptions taken for granted by other paradigms, arguing that theoretical models are inevitably influenced by the epistemological assumptions of the writer and do not represent an objective view of an independently existing reality, despite the claims of their proponents. Constructivism challenges the concept of an objective material base for the international system structure and instead explores how important aspects of international politics, such as structures and institutions, are based on socially constructed values and assumptions and developed through ongoing processes of discourse, social practice and interaction.

There are various 'degrees' of constructivism, from the 'thin' constructivism of writers such as David Dessler<sup>1112</sup> and Alexander Wendt<sup>1113</sup>, to the more radical 'post-modernist' and 'post-structuralist' approaches offered by scholars such as Richard Devetak.<sup>1114</sup> Post-modernists postulate that there is no single objective reality in international politics, but a multiplicity of experiences and perspectives that defy easy categorisation. States and other institutions are seen as merely conceptual constructions that conceal multiple realities and experiences lying beneath the surface. By contrast, Wendt and Dessler take a more moderate approach, asserting that the international system is partly made up of a material base and partly of ideas. For example, physical geography or the existence of nuclear weapons are real, objective material facts; however, the political structures set up to manage matters such as

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<sup>1112</sup> See Dessler, D. (1989). "What's at Stake in the Agent-Structure Debate?" *International Organisation* 43(3): 441-473.

<sup>1113</sup> See Wendt, A. (1999). *Social Theory of International Politics*. Cambridge, Cambridge University Press.

<sup>1114</sup> See, for example, Devetak, R. (2009). 'Post-Structuralism.' *Theories of International Relations*, fourth edition. Scott Burchill, et al. London: Palgrave Macmillan: 183-211.

international trade or nuclear arms proliferation rely heavily on social conceptions, values and norms developed through discourse.

An early proponent of a cognitive approach to regime theory was Ernst B. Haas, who postulated that the information-generating functions of regimes may alter actors' understandings of their interests. He argued that there is no fixed 'national interest' and no 'optimal regime'; rather, perceptions of national interest are changeable in response to new information or altered values. While regimes are created in response to converging actor perceptions of interest, once in existence they may autonomously feed the process of change by the information and ideas they are able to mobilise.<sup>1115</sup> Haas went on to develop the notion that, if a regime can evolve as its underlying concepts and actor expectations change, then the regime 'structure' may become synonymous with process.<sup>1116</sup>

The concept of cognitive content in international regimes is acknowledged by some 'rationalist' regime theorists. Krasner, for instance, acknowledges that regimes have considerable cognitive content; regime principles may include 'concepts of rectitude and standards of behaviour', while norms are 'prescriptions for conduct based upon value judgements'. He argues that stable regimes are likely to be based on 'consensual knowledge' that provides the basis for agreement on principles, norms, rules and decision-making structures.<sup>1117</sup> Norms become entrenched and behaviour that was once based only on calculations of self-interest becomes buttressed by these widely shared norms.<sup>1118</sup> Keohane puts forward the concept of cognitive 'learning', based on the notion that, as actors interact, they become increasingly aware of the regime's nuances and complexities as well as how other actors are likely to behave. As they learn more about the regime and each other, they adjust their behaviour accordingly.<sup>1119</sup> Young likewise recognises the importance of cognitive elements in underpinning all three of his regime types. Though he assigns a central role to power and domination, he acknowledges that, even in the case of imposed regimes, there is

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<sup>1115</sup> Haas, E. B. (1983). 'Words can hurt you; or, who said what to whom about regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 23-59. P57

<sup>1116</sup> *Ibid*, P58

<sup>1117</sup> Krasner, S. D. (1983). 'Regimes and the limits of realism: regimes as autonomous variables.' *International Regimes*. S. D. Krasner. New York, Cornell University Press. 355-368. P361

<sup>1118</sup> Krasner, S. D. (1983). 'Structural causes and regime consequences: regimes as intervening variables.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 1-21. P19

<sup>1119</sup> Keohane, R. O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, Princeton University Press. P111

no reason to assume that dominant actors must continuously coerce subordinate actors to comply with regime requirements, as 'habits of obedience' can be cultivated, and imposed regimes are often increasingly accepted as legitimate with the passage of time. Indeed, he asserts, most forms of dependence have a strong ideational or cognitive component as well as some structural basis.<sup>1120</sup> Likewise, he maintains, the promulgation of a negotiated order will have little effect unless its concepts and requirements are absorbed into the routine behaviour of the participants.<sup>1121</sup> Young also agrees with Haas that international regimes are not static constructs, but undergo continuous transformations in response to their own inner dynamics as well as to changes in their political, economic, and social environments.<sup>1122</sup> He argues that the way in which regimes take on a 'life of their own' is through 'operative social conventions'.<sup>1123</sup>

There is therefore a certain amount of common ground between rationalist and constructivist perspectives regarding the significance of cognitive elements in regime building and evolution. The difference is mainly one of emphasis; while rationalists, particularly realists, see the role of ideas as secondary to the underlying power structure, constructivists assign a central role to cognitive factors.

Alexander Wendt explicitly tries to build bridges between rationalist and constructivist approaches to IR. His 'moderate' version of constructivism emphasises the role of ideas in constructing identities, interests and international systems, but, unlike more 'radical' forms of constructivism, also concedes important points to materialist perspectives.<sup>1124</sup> In his seminal work *Social Theory of International Politics*, written as a response to Kenneth Waltz's classic realist text *Theory of International Politics*,<sup>1125</sup> Wendt, like Waltz, offers a systems-level analysis of the international system that shares some key assumptions with the rationalist paradigm, including a state-centric international system and the existence of anarchy, defined as an absence of central authority. He further acknowledges that material realities form an important component of the system. Wendt takes issue with the postmodern

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<sup>1120</sup> Young, O. R. (1983). 'Regime dynamics: the rise and fall of international regimes.' *International Regimes*. S. D. Krasner. New York, Cornell University Press: 93-113. PP101-102

<sup>1121</sup> *Ibid*, P102

<sup>1122</sup> *Ibid*, P106

<sup>1123</sup> *Ibid*, P94

<sup>1124</sup> Wendt, A. (1999). *Social Theory of International Politics*. Cambridge, Cambridge University Press. P1-2

<sup>1125</sup> Waltz, K. (1979). *Theory of International Politics*. London, McGraw-Hill.

'relational theory of reference', which claims that 'objective' reality is unknowable and everything we take as reality is the product of our discourse. He argues that the real world resists certain representations: '...whether our discourse says so or not, pigs *can't* fly.'<sup>1126</sup> For Wendt, the 'material base' of the international system consists of the physical properties without which things cannot exist: '...a thing cannot be an ICBM if it cannot fly long distances, nor a garage if it is not big enough to fit a car.'<sup>1127</sup>

However, despite these concessions to materialism, Wendt also attacks a purely materialist ontology. He argues that the *meanings* of ideas, objects, and actors are all given by social interaction; it is only because of their interaction with ideas that material forces have the effects they do. Unlike Waltz, Wendt does not hold that the 'logic of anarchy' leads inevitably to self-help and conflict, but sees these effects as socially constructed institutions based upon a particular culture of international relations. He argues that factors such as 'power' and 'interest' are actually largely formed of ideas and thus are potentially changeable. For Wendt, the meaning of the distribution of power in international politics is constituted in part by the distribution of interests, and interests are in turn constituted in important part by ideas. Power and interest are just as important and determining as before; but power and interest have the effects they do because of the ideas that make them up.<sup>1128</sup> At the same time Wendt acknowledges that, even if constituted by ideas, social kinds still exist and resist denial of that.<sup>1129</sup> Modification of these ideas is difficult because they have become widely internalised. Consequently, the ideas and processes underpinning the social construction of identities and interests form a system structure of their own that impacts upon international actors.

This model, Wendt argues, does not necessarily require us to discard insights from rationalist paradigms. He believes neoliberal institutionalists were on the right lines in the 1980s when they identified the fact that actors redefined their interests in terms of the regime.<sup>1130</sup> Wendt asserts that 'while most Neoliberals in IR do not use the concept of common knowledge as such, their analyses of international regimes

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<sup>1126</sup> Wendt, A. (1999). *Social Theory of International Politics*. Cambridge, Cambridge University Press.

P56

<sup>1127</sup> Ibid, P72

<sup>1128</sup> Ibid, P92-136

<sup>1129</sup> Ibid, P73-75

<sup>1130</sup> Ibid, P160

presume it.’<sup>1131</sup> In other words, he argues that neoliberal institutionalist concepts, such as norms, rules, institutions, common ideologies, customs, and laws, are all ‘specific cultural forms’ made up of ‘common knowledge’ between the actors engaged in regimes. Wendt defines this common knowledge as that which concerns actors’ beliefs about each other’s strategies, preferences, and beliefs, as well as about the states’ world.<sup>1132</sup> While such ‘common knowledge’ is private to the individual actors, there is also a ‘collective knowledge’ that is not reducible to individual belief but is constructed by the group as a whole. This ‘collective knowledge’ is a “communally sustained” and inherently public phenomenon that forms an integral part of the system structure.<sup>1133</sup>

Wendt addresses one of the key discussions in IR theory, the ‘agent-structure debate’; i.e. the question of whether agents and their interests and interactions are shaped by the international socio-political structure, or the structure is shaped by the agents. Wendt believes that both things occur simultaneously; that agency and structure form a reciprocal duality. Collective meanings define the structures which govern actions, and actors acquire their interests and identities by participating in such collective meanings, with the result that the ideational structure is continually recreated and reinforced. Agents continually construct and sustain culture, but in turn culture constructs agents. Agents and structure are thus both ‘mutually constituted’ and ‘co-determined’. Structure is an ongoing effect of process, at the same time that process is an effect of structure.<sup>1134</sup>

In developing this view of the international system structure, Wendt acknowledges a debt to structuration theory as well as symbolic interactionism.<sup>1135</sup> Anthony Giddens, the originator of structuration theory, conceives of ‘structure’ in social systems as being made up of both rules and resources, or ‘rule-resource sets’.<sup>1136</sup> Rules, he maintains, have two aspects, normative elements and ‘codes of signification’. Resources, which are ‘things that can be used to create power’, are also of two kinds: ‘authoritative’ resources, which derive from coordination of human agents, and

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<sup>1131</sup> Ibid, P160

<sup>1132</sup> Ibid, P160

<sup>1133</sup> Ibid, P160-164

<sup>1134</sup> Ibid, P186

<sup>1135</sup> Ibid, P143

<sup>1136</sup> Giddens, A. (1984). *The Constitution of Society: Outline of the Theory of Structuration*. Cambridge, Polity Press. P377

‘allocative’ resources, which stem from control of material products or aspects of the real world.<sup>1137</sup> Like Wendt, Giddens sees structure as having a recursive relationship with agents, in that the structured properties of social activity are constantly recreated out of the very resources that constitute them.<sup>1138</sup> W.H. Sewell, another structuration theorist, proposes a complex view in which “... societies are based on practices that derived from many distinct structures, which exist at different levels, operate in different modalities, and are themselves based on widely varying types and quantities of resources.” In Sewell’s model, structures are characterised by the intricate interactions and interdependencies between these layers. There are hierarchies of rules between these levels and actors apply rules differently in different situations.<sup>1139</sup>

Dessler’s ‘transformational model’ is along the same lines as Wendt’s application of structuration theory, based around the inclusion of social forms in the makeup of international system structure. In this model, as with Wendt’s approach, structure ‘both enables action and constrains its possibilities’ and also ‘is the outcome as well as the medium of action.’<sup>1140</sup> All structure, he asserts, is malleable.<sup>1141</sup> As in Sewell’s model, this international rule structure is stratified, with a hierarchical dependence in which higher-order rules presume the existence of more ‘sedimented’ (lower-order) ones.<sup>1142</sup> As Dessler himself notes, this is essentially covered by Keohane, who notes that institutions are embedded in enduring ‘practices’ of international politics, the most important of which is sovereignty.<sup>1143</sup>

### Application to ICANN

Wendt’s model of social structures relying partly on a material base but also drawing heavily upon social constructions can be readily applied to ICANN. There are some material realities underpinning the ICANN system, particularly the technological base itself, which sets limits to what is and is not possible in terms of governance. For example, the nature of the DNS technology requires a single centralised root, thus

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<sup>1137</sup> Ibid, Pxxxix

<sup>1138</sup> Ibid

<sup>1139</sup> Sewell, W. H. (1992). “A theory of structure: duality, agency, and transformation.” *The American Journal of Sociology*, 98(1): 1-29. PP16-20

<sup>1140</sup> Dessler, D. (1989). "What's at Stake in the Agent-Structure Debate?" *International Organisation* 43(3): 441-473. P441-2

<sup>1141</sup> Ibid, P468

<sup>1142</sup> Ibid, P469

<sup>1143</sup> Ibid, P469

demanding centralised governance. It would not be possible, for example, to create a system based on multiple autonomous roots, at least not without redesigning the underlying technology or sacrificing some degree of interconnectivity. Though material and technological realities set some limits to what is possible, however, this does not mean that the ICANN regime as we know it was inevitable. It rests on social constructs as much as, if not more than, material realities; and it has evolved, and continues to evolve, through the interactions of the actors participating in it.

Drawing upon Sewell's model, it is helpful to see the ICANN regime as sitting upon an intersection between a number of distinct social structures operating at various levels, each with their own 'cultures', norm sets and rules. For example, distinct cultures and norm sets can be associated with global capitalism, with the intergovernmental system and with the technical community of the Internet pioneers, all of which intersect in the ICANN regime. The intersection of these different social structures, each with different fundamental values and norm-sets, produced a degree of dissonance around some basic concepts of how DNS governance should be approached and what the fundamental principles underpinning the regime would be.

This was reflected in the White Paper, which on the one hand envisaged a regime based on free market principles, yet simultaneously promoted 'liberal democratic' ideals, such as representation of and accountability to a global Internet using public. Concerns that ICANN should be legitimised through principles of accountability and representation reflected the ideals of the Internet pioneers, but also the influence of long-standing 'liberal democratic' ideologies deeply entrenched in US political culture. However, such ideals were arguably not compatible with the intention to manage the domain name system along commercial market lines.

At the same time, in line with the deregulatory, 'reflexive government' ideology of Clinton and the 'New Democrats', the White Paper envisaged a 'private' governance organisation with very limited governmental input. This model was arguably incompatible with deeply entrenched (or to use Dessler's phrase, 'sedimented') norms in international politics concerning state sovereignty and the role of governments as the legitimate representatives of the public interest in matters of public policy.

The inherent contradictions brought about by the incompatibility of multiple underlying ideological bases and social structures are not necessarily unique to ICANN. Giddens describes the capitalist state as a ‘contradictory social form’, because of an inherent conflict between the needs of capital and the political demands for de-commodification of public services. The capitalist state is dependent upon taxation of private enterprise and thus has a deep interest in creating the conditions for private accumulation; yet it also faces strong pressure to negate the commodity form in many areas of public service provision.<sup>1144</sup> Giddens sees in this inherent structural contradiction a likely source of conflict.<sup>1145</sup> A similar situation could be said to exist within the ICANN regime. On the one hand, ICANN was intended to fulfil a free-market vision of deregulated, private sector governance. It also depends on commercial entities, particularly the registries and registrars, to make the system work, and is entirely funded from ‘taxation’ of these companies. On the other hand, it faces political pressure to treat the DNS as a ‘public good’ and to make itself accountable to representatives of the public interest.

The conflict generated by these incompatible conceptions of the regime essentially created a power struggle in which both ideas and practical realities mattered. In seeking to advance their own influence, governments potentially possessed some very real leverage in their potential ability to bring down the regime; but they were also able to appeal to the long established, ‘sedimented’ international norms of state sovereignty and the legitimate authority of governments. Similarly, commercial interests possessed real power to disrupt the regime through withdrawal of their co-operation, but also were able to appeal to established principles and norms of international law. For example, intellectual property interests were able to gain widespread recognition that the established principle of trademark protection was applicable in the domain name context. By contrast, proponents of direct user representation possessed neither real positional power to disrupt the regime, nor well established pre-existing international norms and precedents to which they could appeal.

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<sup>1144</sup> Giddens, A. (1984). *The Constitution of Society: Outline of the Theory of Structuration*. Cambridge, Polity Press. PP315-316

<sup>1145</sup> *Ibid*

These interactions caused the regime structure to become modified over time, as various interest groups within it vied for influence. These contests are not merely internal to the regime framework, but have actually altered the framework by causing principles and norms to become modified. To put this in the terms used by Haas, the regime should not be seen so much as a static, fixed 'structure' as an ongoing 'process'. As structuration theory predicts, this process involves a reciprocal interaction between agents and structure. While the regime framework has been shaped and reshaped by the interests and actions of the actors within it, at the same time the actors themselves have had to redefine their interests and modify their actions in terms of the regime framework. One example of this would be the ways in which various actors and groups (such as NSI / VeriSign and various governments) redefined their approach to the ICANN system, so that, from initially being in opposition to the regime, they came to accept the need to work within it, while at the same time still striving to reshape some of its norms from within. This represents a significant change within the agents themselves (a change of perception of their interests and how these are best served).

The continually evolving relationship between the GAC and the Board provides a good illustration of this process in action. The GAC's growing influence within ICANN represents an important change in the regime's principles and norms, but to a large extent this has stemmed from changing understandings of, and attitudes towards, DNS governance and the ICANN regime on the part of the GAC representatives themselves. Participation in the GAC has increased, as more and more governments have come to recognise the importance of Internet governance issues and have developed a perception of a national interest in such matters. The failure of WSIS to produce any alternative to the ICANN arrangements may have helped to convince some governments that working to advance their interests from within ICANN was the only viable way forward in the foreseeable future. At the same time, as the evidence from the case study chapters suggests, the GAC has seemingly become much bolder and more proactive in the policy development process in recent years, something that Weinberg believes was triggered partly by the discussions around WSIS but also by the GAC's apparent success in influencing ICANN policy over issues such as .xxx.<sup>1146</sup> Furthermore, as Maurer's comments suggest, the GAC has

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<sup>1146</sup> Weinberg, J. (2011). "Governments, privatisation, and "privatisation"; ICANN and the GAC." Michigan Telecommunications and Technology Law Review 18 (1): 189-218. P200

learned to speak with one voice; its members see themselves not only as representatives of their national interests but also as sharing a common interest in promoting the rights of governments in matters of DNS public policy.<sup>1147</sup> Thus, the changing norms surrounding the GAC's role stems directly from these shifting attitudes and perceptions on the part of the GAC members towards the ICANN regime and their own role in it, together with changed perceptions of the GAC's proper role on the part of the Board and other regime participants.

In summary, application of concepts drawn from Dessler and Wendt's form of constructivism, including structuration theory, give us a more nuanced understanding of how the ICANN system has evolved, without discarding the lessons taken from rationalist and neo-Marxist theory. ICANN's principles and norms have evolved and been reshaped by the ongoing interactions of actors within the regime, while, at the same time, actors have also been reshaped at a cognitive level; both their interests and expectations of one another have become modified through learning and interaction within the context of the regime. Structuration theory also helps us to recognise that ICANN is more than just a single system; it is, in fact, a structure based on an intersection between several distinct social sub-structures existing at a multiplicity of levels. When these distinct social structures and their individual cultures came together in ICANN, the resulting regime turned out to be different from what anyone could initially predict.

On another level, the development of a hybrid public-private regime like ICANN both reflects and informs changing conceptions of legitimate public authority. In this respect ICANN is not an isolated case. Whereas public authority was once seen firmly as the preserve of sovereign states, numerous writers have in recent years identified an increasing trend towards authority wielded by private or semi-private entities, reflecting the fact that conventional notions about authority and governance are themselves socially constructed and subject to evolution and revision. Such developments have the potential to challenge many of the conceptual underpinnings of previous International Relations and regime theories. The next section will further explore some of these developments.

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<sup>1147</sup> Email from Andrew Maurer to Paul White, 20 January 2012

## **Private regimes and private authority**

### Overview

In recent years, there has been a growing literature focusing upon the phenomenon of private governance and the concept of private authority. Much of this literature both draws concepts from and poses challenges to existing International Relations theories. It identifies an increasing trend towards authoritative decisionmaking by nongovernmental actors at the global level, particularly in areas traditionally seen as lying within the jurisdiction of sovereign states. Such a trend towards ‘privatised’ governance has been identified in many aspects of global political economy, including, for example: standards setting in areas as diverse as technical product specifications, social standards, and health and consumer safety standards<sup>1148</sup>; intellectual property<sup>1149</sup>; global environmental governance; energy supply<sup>1150</sup>; global financial regulation<sup>1151</sup>; and genetic resources management<sup>1152</sup>; as well as Internet governance.<sup>1153</sup>

The rise of ‘privatised’ governance is strongly linked with the phenomenon of globalisation. Almost two decades ago, Susan Strange identified a shift towards the ‘internationalisation of production’ brought about mainly through rapid technological advancement,<sup>1154</sup> and predicted that this would bring about a fundamental shift in the economic base and the power of the state.<sup>1155</sup> Governments would be obliged to bargain with corporations to an unprecedented extent, and these corporations would become partners (or protagonists) in a ‘trilateral system of international diplomacy’

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<sup>1148</sup> Wouters, J., Marx, A., and Hachez, N. (2008). "Private Standards, Global Governance and Transatlantic Co-operation: The Case of Global Food Safety Governance." Leuven Centre for Governance Studies. Retrieved 4 February, 2011, from [http://www.transatlantic.be/publications/wouters-marx-hachez\\_final.pdf](http://www.transatlantic.be/publications/wouters-marx-hachez_final.pdf) P3

<sup>1149</sup> Sell, S. (2003). *Private power, public law: the globalisation of intellectual property rights*. Cambridge, Cambridge University Press. PP96-120

<sup>1150</sup> Andreas Goldthou and Jan Martin Witte (2009). "Back to the future or forward to the past? Strengthening markets and rules for effective global energy governance." *International Affairs* 85(2): 373–390.

<sup>1151</sup> Backer, L. C. (2011). "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order." *Indiana Journal of Global Legal Studies* 18(2): 101-155.

<sup>1152</sup> Raustiala, K. and D. G. Victor (2004). "The Regime Complex for Plant Genetic Resources." *International Organization* 32(2): 147-154.

<sup>1153</sup> Mathiason, J. (2009). *Internet Governance: The new frontier of global institutions*. New York, Routledge.

<sup>1154</sup> Strange, S. (1994). "Wake up, Krasner! The world *has* changed." *Review of International Political Economy* 1(2): 209-219. P210

<sup>1155</sup> *Ibid*, P210-211

involving interactions between governments and corporations, and between corporations and other corporations.<sup>1156</sup> As a consequence, state sovereignty and autonomy would be challenged and fundamentally modified.<sup>1157</sup>

Many scholars would argue that Strange's predictions have been fulfilled over the course of the last ten to fifteen years. Jessica T. Matthews identifies a 'power shift' away from the Westphalian concentration of power in the hands of states, and towards a multifaceted global system where governments share power with business, international organisations and NGOs.<sup>1158</sup> Like Strange, Mathews identifies the information technology revolution as the core engine of change, due to its ability to break governments' monopoly on the collection and management of information and its role in reducing the significance of geographical proximity.

While Keohane and Nye describe 'globalisation' as merely an intensification of the phenomenon of interdependence<sup>1159</sup>, authors such as Wolfgang Reinicke differentiate between the two.<sup>1160</sup> Whereas interdependence focused upon links and cross-dependencies between national economies, Reinicke asserts, globalisation entails their fusion into a single whole. This phenomenon creates a global public sphere and a requirement for global public policy that territorial nation states are unable to meet. Reinicke argues that, in the absence of a global government, the most promising strategy for global public policy is for policymakers to delegate tasks to actors and institutions in a better position to implement them, not only to intergovernmental organisations, but also business, labour, and NGOs.<sup>1161</sup>

Some authors have focused particularly on the concept of private authority and private rulemaking. Rodney Bruce Hall and Thomas J. Biersteker argue that private actors, particularly NGOs, are taking on authoritative roles and responsibilities that states no longer wish to bear, not only in the international economy, but also in areas such as establishment of standards, provision of social welfare, enforcement of contracts, and

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<sup>1156</sup> Ibid, P211

<sup>1157</sup> Ibid, P212

<sup>1158</sup> Matthews, J. T. (1997). "Power Shift." *Foreign Affairs* 76(1): 50-66. P50

<sup>1159</sup> Keohane, R. O. and J. S. Nye (2001). *Power and Interdependence*. London, Longman. P xv

<sup>1160</sup> Reinicke, W. H. (1997). "Global Public Policy." *Foreign Affairs* 76(6): 127-138.

P132

<sup>1161</sup> Ibid

maintenance of security.<sup>1162</sup> Authority, they assert, is accruing to these NGOs on the basis of their technical expertise, or what Kratochwil termed ‘consensual knowledge’.<sup>1163</sup> The notion that the ‘privatisation’ of some areas of public policy is due to an active policy of withdrawal by governments was suggested by Strange, who felt that the transfer of power from the US government to ‘the market’ was ‘largely self-inflicted’ as successive US governments worked to break down national and international regulatory barriers to foreign investment and capital mobility in order to facilitate the expansion of American capitalism.<sup>1164</sup> Other authors, such as Cutler, similarly point out that the conditions for private authority were created by state policies of deregulation<sup>1165</sup> while some scholars, such as Saskia Sassen, have suggested that a shift towards private regulation is not just an unintended consequence of deregulation but that governments have often actively participated in the construction of private actors as authoritative.<sup>1166</sup> Sassen identifies the formation of a ‘hybrid’ authority that is neither fully private nor fully public, based on a ‘partial denationalization of what had been constructed historically as national’.<sup>1167</sup>

John G. Ruggie defines the ‘new global public domain’ as ‘an institutionalized arena of discourse, contestation, and action organized around the production of global public goods’ that is constituted by interactions among non-state actors as well as states.<sup>1168</sup> The effect of this global public domain, Ruggie asserts, is not to replace states, but ‘to embed systems of governance in broader global frameworks of social capacity and agency that did not previously exist.’<sup>1169</sup> In a similar vein, Tanja Börzel and Thomas Risse talk of governance through transnational public-private partnerships, which they define as institutionalised cooperative relationships between public actors (both governments and international organisations) and private ones for ‘the making and implementation of norms and rules for the provision of goods and

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<sup>1162</sup> Hall, R. B. and T. J. Biersteker (2007). ‘Private authority as global governance.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 203-222. P203

<sup>1163</sup> *Ibid*, P209

<sup>1164</sup> Strange, S. (1994). "Wake up, Krasner! The world *has* changed." *Review of International Political Economy* 1(2): 209-219. P213

<sup>1165</sup> Cutler, A. C. (2007). ‘Private international regimes and interfirm cooperation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 24-41. P23

<sup>1166</sup> Sassen, S. (2007). ‘The state and globalisation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 91-113. P99

<sup>1167</sup> *Ibid*, P91

<sup>1168</sup> Ruggie, J. G. (2004). "Reconstituting the Global Public Domain - Issues, Actors, and Practices." *European Journal of International Relations* 10(4): 499-533. P519

<sup>1169</sup> *Ibid*, P519

services'.<sup>1170</sup> Similarly, Larry Catá Backer talks of the possibility of fusion between public and private governance systems to produce 'co-ordinated meta-governance' constituted through frameworks of institutional communication<sup>1171</sup>. Such a set of arrangements, he suggests, might comprise amalgamations of the most powerful states and private regulatory bodies asserting authority once reserved to states alone; this might entail the weakening of the border between 'hard' and 'soft' law even within public sector governance.<sup>1172</sup> While nonstate governance entities possess the power to set rules affecting their particular community only, Backer asserts, the 'narrowness' of their authority does not detract from the effectiveness of that regulation.<sup>1173</sup> He suggests that individual state entities may play a role within global public-private governance, but a distinctly secondary one. States working together via international organisations, however, play a larger role in the generation of norms that may bind these 'economic selfregulators'.<sup>1174</sup>

Ronnie D. Lipschutz and Cathleen Fogel describe an emergent, presently highly diffuse 'globalising heteronomy' in which regulatory authority is distributed among actors focused upon specific issues and problems.<sup>1175</sup> This occurs in a range of forms on a spectrum from conventional interstate organisations that have begun to 'bring in' nonstate actors, to wholly private regulatory arrangements.<sup>1176</sup> Similarly, Diane Stone identifies 'multilevel polycentric forms of public policy' in which a plethora of institutions and networks negotiate and interact, and private regimes have emerged as pragmatic responses in the absence of formal global governance.<sup>1177</sup> In attempting to define the concept of 'global public policy', Stone uses the concept of the 'agora', a 'growing global public space of fluid, dynamic, and intermeshed relations of politics,

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<sup>1170</sup> Börzel, T. and T. Risse. (2005). 'Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance.' *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century*. E. Grande and L. W. Pauly. Toronto, University of Toronto Press: 195-216. P198

<sup>1171</sup> Backer, L. C. (2011). "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order." *Indiana Journal of Global Legal Studies* 18(2): 101-155. P108

<sup>1172</sup> *Ibid*, P109

<sup>1173</sup> *Ibid*, P120

<sup>1174</sup> *Ibid*, P120

<sup>1175</sup> Lipschutz, R. D. and C. Fogel (2007). 'Regulation for the rest of us? Global civil society and the privatization of transnational regulation.' *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 115-139. P124

<sup>1176</sup> *Ibid*, P125

<sup>1177</sup> Stone, D. (2008). "Global Public Policy, Transnational Policy Communities, and Their Networks." *The Policy Studies Journal* 36(1): 19-38. P24

markets, culture, and society.<sup>1178</sup> The global agora, she asserts, is a domain of relative disorder and uncertainty where institutions are underdeveloped and political authority unclear, and dispersed through multiplying institutions and networks.<sup>1179</sup>

This notion of governance through 'networks' has been increasingly utilised by numerous scholars. The concept of the global governance network, or global public policy network (GPPN) focuses on governance through decentralised and flexible networks of actors as opposed to traditional hierarchical modes of organisation. Mathews points to the telecommunications revolution as the main factor favouring the emergence of decentralised networks over more conventional hierarchical modes of organisation.<sup>1180</sup> This development, coupled with the financial resources and expertise of nonstate organisations, has, she argues, resulted in multifaceted power sharing arrangements involving corporations, governments, international organisations and NGOs.<sup>1181</sup> Similarly, Wolfgang Reinicke describes global public policy networks as loose alliances linking various actors such as government agencies, intergovernmental organisations, NGOs, professional associations and corporations. They utilise modern communications technology to share and disseminate information and enhance power and reach through their linkages. Such a network, Reinicke asserts, can enable its participants to sort through competing perspectives, forge a consensus, and translate that consensus into actions its members will be more inclined to support and implement.<sup>1182</sup>

Petra Dobner defines GPPNs as multi-sectoral networks comprising actors from civil society, governmental agencies and industry, engaging in a range of activities from agenda setting to policy formulation, negotiation and rulemaking, coordination, implementation and evaluation.<sup>1183</sup> Dobner identifies several reasons for the promotion of GPPNs, including a need to deal with technical complexities that go beyond the capacities of governments and international organisations; a better representation of otherwise marginalised groups; and higher efficiency in problem

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<sup>1178</sup> Stone, D. (2008). "Global Public Policy, Transnational Policy Communities, and Their Networks." *The Policy Studies Journal* 36(1): 19-38. P21

<sup>1179</sup> *Ibid*

<sup>1180</sup> Mathews, J. T. (1997). "Power Shift." *Foreign Affairs* 76(1): 50-66. P52

<sup>1181</sup> *Ibid* P50-53

<sup>1182</sup> Reinicke, W. (1999). "The Other World Wide Web: Global Public Policy Networks." *Foreign Policy* 117 (Winter): 44-57. P47

<sup>1183</sup> Dobner, P. (2009). "On the Constitutionability of Global Public Policy Networks." *Indiana Journal of Global Legal Studies* 16(2): 605-619. P605

solving, producing better policy results.<sup>1184</sup> Jan Martin Witte, Wolfgang H. Reinicke and Thorsten Benner see GPPNs, which they also describe as ‘trisectional networks’, as an answer to the ‘growing organisational vacuum’ at the global level.<sup>1185</sup> Such networks, they believe, seek to complement rather than replace traditional governance mechanisms, helping to develop standards and norms, provide global public goods and implement agreements.<sup>1186</sup> They see trisectional networks as providing a response to an operational gap in governance (as policymakers often lack the information, knowledge and resources to tackle emerging global issues) as well as a participatory gap (as individuals and private organisations increasingly perceive themselves as excluded from policy decision-making in a globalised arena).<sup>1187</sup> The major strength of networks as opposed to conventional hierarchies, they assert, lies in their diversity and flexibility; GPPNs are ‘dynamic in both process and structure’.<sup>1188</sup>

While these writers emphasise the effectiveness of governance through loose networks, Backer, on the other hand, argues that effective non-state regulatory systems are dependent upon the creation of entities (either a single aggregation or a group of actors) distinguished along functional lines.<sup>1189</sup> He seems to be describing a tighter, more well defined entity than the loose governance networks envisaged by other authors, and this appears to more closely describe the ICANN model. Such entities, Backer asserts, derive authority from the community they govern and, within their own governance area, their rules are binding; they are effectively the ‘law system’ of the governance community.<sup>1190</sup> While such rules may be ‘soft as law’, within their particular community, this ‘soft law’ is ‘hard’.<sup>1191</sup>

Keohane and David G. Victor identify a ‘continuum’ between highly integrated and comprehensive international regulatory institutions on the one hand and highly

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<sup>1184</sup> Ibid, P607

<sup>1185</sup> Ibid, P176

<sup>1186</sup> Benner, T., W. H. Reinicke, et al. (2004). "Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability." *Government and Opposition* 39(2): 191-210. P196

<sup>1187</sup> Dobner, P. (2009). "On the Constitutionality of Global Public Policy Networks." *Indiana Journal of Global Legal Studies* 16(2): 605-619. P178

<sup>1188</sup> Ibid

<sup>1189</sup> Backer, L. C. (2011). "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order." *Indiana Journal of Global Legal Studies* 18(2): 101-155. P132

<sup>1190</sup> Ibid

<sup>1191</sup> Ibid, P136

fragmented arrangements at the other.<sup>1192</sup> In a similar vein, Stone draws a contrast between regimes and looser global public policy networks.<sup>1193</sup> Keohane and Victor also identify, in the middle of the spectrum, a phenomenon they refer to as ‘nested regimes’ and ‘regime complexes’, which are defined as loosely coupled sets of specific regimes.<sup>1194</sup> Victor and Kal Raustiala define a regime complex as ‘an array of partially overlapping institutions governing a particular issue-area’.<sup>1195</sup> Similarly, Karen J. Alter and Sophie Meunier refer to ‘international regime complexity’, which they define as the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered.<sup>1196</sup> They differentiate between parallel regimes (where there is no formal or direct substantive overlap), overlapping regimes (where multiple institutions have authority over an issue, but agreements are not mutually exclusive or subsidiary to another) and nested regimes (where institutions are ‘embedded within each other in concentric circles, like Russian dolls’).<sup>1197</sup>

### Private authority and IR theory

From a realist viewpoint, the ultimate source of legitimate authority is derived from state sovereignty. To constructivists, however, concepts of authority and legitimacy are not static, and sources of legitimate authority are dependent upon socially constructed norms. Hall and Biersteker define authority as ‘...the normative belief by an actor that a rule or institution ought to be obeyed’<sup>1198</sup>, and acknowledge that this consent to authority is socially constructed.<sup>1199</sup> While the concept of legitimate authority has, in the Westphalian era, been exclusively linked to the state, Hall and Biersteker contend that trends in globalisation may demand a re-evaluation of these traditional conceptions of authority.<sup>1200</sup> The state, they assert, is no longer the sole, or

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<sup>1192</sup> Keohane, R. O. and D. G. Victor (2011). "The Regime Complex for Climate Change." *Perspectives on Politics* 9(1): 7-23.

<sup>1193</sup> Stone, D. (2008). "Global Public Policy, Transnational Policy Communities, and Their Networks." *The Policy Studies Journal* 36(1): 19-38. P28

<sup>1194</sup> Keohane, R. O. and D. G. Victor (2011). "The Regime Complex for Climate Change." *Perspectives on Politics* 9(1): 7-23.

<sup>1195</sup> Raustiala, K. and D. G. Victor (2004). "The Regime Complex for Plant Genetic Resources." *International Organization* 32(2): 147-154.

<sup>1196</sup> Alter, K. J. and S. Meunier (2009). "The Politics of International Regime Complexity." *Perspectives on Politics* 7(1): 13-24. P13

<sup>1197</sup> *Ibid*, P15

<sup>1198</sup> Hall, R. B. and T. J. Biersteker (2007). 'The emergence of private authority in the international system.' *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 3-8. P5

<sup>1199</sup> *Ibid*, P6

<sup>1200</sup> *Ibid*, PP 3-6

in some instances even the principal, source of authority, in either the domestic arena or the international system; many locations and sources of authority have emerged or are emerging that are neither states, state-based, nor state-created.<sup>1201</sup>

Some scholars are unconvinced by claims that power and authority are draining away from states, and continue to view the international sphere in essentially rationalist terms. Miles Kahler and David A. Lake, while acknowledging that globalisation has resulted in a new and intricate fabric of global governance, are sceptical of claims that these developments have eclipsed the power of the territorial state.<sup>1202</sup> Similarly, Keohane and Nye argue that to exchange realism for an 'equally simple view' of states being supplanted by nonterritorial actors 'would condemn one to equally grave, though different, errors.'<sup>1203</sup> Drezner, while acknowledging that the existence of nested and overlapping regimes creates a new style of global bargaining, maintains that the underlying causal determinants of international cooperation remain the distribution of power and interest among states.<sup>1204</sup> Indeed, Drezner asserts, increasing complexity in the international sphere may mean that certainty is diluted, with the paradoxical result of a return to power politics, where great-power states have the strongest advantage.<sup>1205</sup>

Hall and Biersteker suggest that more empirical data is required on the extent to which sovereign authority of states is being supplanted by new forms of authority.<sup>1206</sup> ICANN may represent one useful case study for exploring some of these questions.

### Public-private international regimes and ICANN

The concept of a new emerging model of global governance via partnerships involving governmental and private actors clearly underpins interpretations of ICANN as a 'public-private partnership' as put forward by writers such as Kleinwaechter and

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<sup>1201</sup> Ibid

<sup>1202</sup> Kahler, M. and D. A. Lake (2003). 'Globalization and Changing Patterns of Political Authority.' Governance in a Global Economy: Political Authority in Transition. M. Kahler and D. A. Lake. Princeton, Princeton University Press: 412-435.

<sup>1203</sup> Keohane, R. O. and J. S. Nye (2001). Power and Interdependence. London, Longman. P272

<sup>1204</sup> Drezner, D. (1999). "The Power and Peril of International Regime Complexity." Perspectives on Politics 7(1): 65-70. PP65-66

<sup>1205</sup> Ibid, P67

<sup>1206</sup> Hall, R. B. and T. J. Biersteker (2007). 'The emergence of private authority in the international system.' The Emergence of Private Authority in Global Governance. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 3-8. P8

Knill and Lehmukl (see Chapter 3). These writers clearly see ICANN as an example of a trend towards an emerging governance system where an alliance between governmental and private actors is coming to complement or partially supplant the old approach to international governance rooted in the concept of the sovereign state.

While ICANN is far more formalised and institutionalised than the public policy network concept, it does share some of the features of that model, particularly the use of communications technology to allow linkages at multiple levels between a range of actor types. However, in terms of Keohane and Victor's model of a 'continuum' of regulatory regimes, ICANN would be placed towards the highly integrated end of the spectrum. Keohane and Victor argue that we should expect highly integrated, comprehensive regimes when the interests of all crucial powerful actors (states and non-states) are sufficiently similar, across a broad issue area, that they demand a singular international institution.<sup>1207</sup> In the case of ICANN, as discussed, while governmental and private actors may have a range of often competing interests, they all share a fundamental common interest in a working domain name system, something that requires a single integrated regulatory body.

While this fundamental common interest is sufficient to keep both governmental and private actors on board, however, at the same time ICANN represents an arena where private authority of the type discussed by Hall and Biersteker is often in direct competition with traditional intergovernmental authority. Within the ICANN regime, governments continue to lay claim to be the ultimate source of legitimate authority over public policy aspects of DNS governance, a claim encapsulated in the WSIS Declaration repeatedly referred to by the GAC. Yet, while the Board gives some measure of recognition to the GAC's claims to public policy authority, in practice the GAC does not have the final word on these matters. Ultimate decisionmaking power rests with the Board, and the GAC must compete with other stakeholders for influence over the Board's final decisions; therefore, the sovereign authority of states is neither final nor absolute within the ICANN regime. At the same time, there is a strong case to be made that ICANN ultimately depends upon the consent and recognition of governments for its authority to govern the DNS. This is partly a matter of social

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<sup>1207</sup> Keohane, R. O. and D. G. Victor (2011). "The Regime Complex for Climate Change." *Perspectives on Politics* 9(1): 7-23. PP8-9

construction; the widely accepted norm that authority must be endorsed by states to be legitimate. However, it is not just a matter of formal legitimisation; in the final analysis, governments do potentially retain the very real power to force regime change if ever they chose to use it. Thus, ICANN represents a source of non-state global authority in one respect, but nonetheless has not completely supplanted state authority in another respect; ultimately its own authority is arguably underpinned by that of governments in the final analysis.

The balance between intergovernmental and private authority in the ICANN system is issue-specific; as discussed, governments appear to be particularly concerned with ccTLDs and geographic identifiers and much less interested in areas such as the UDRP. Depending upon the issue area in question, various sets of private actors also have more or less influence and involvement. This calls to mind Keohane and Victor's concept of the 'nested regime'. Although Keohane and Victor used the concept to refer to rather more loosely coupled sets of regimes, ICANN, while highly institutionalised, is also a highly complex regime with multiple facets, to the extent that it could be interpreted as a set of interconnected regimes within a regime, with the Board acting as an overall co-ordinating umbrella. In this sense it resembles the 'Russian doll' type of nested regime described by Alter and Meunier. Some of these 'sub-regimes', such as the UDRP, are largely private with little governmental involvement. Thus, while ICANN as a whole is a part-public and part-private regime rather than a wholly private regime of the type discussed by scholars such as Cutler, some of its 'sub-regimes' can be interpreted effectively as privatised governance arrangements.

The UDRP is also an excellent example of a concept explored by Cutler, that of the public-private legal order. Cutler argues that merchant autonomy over matters such as international commercial arbitration is creating a 'highly privatised legal order'. ICANN's UDRP provides an example of a 'privatised legal order' more autonomous than most, since ICANN does not need to rely on national courts for its enforcement. In this respect, the UDRP is also a good example of Backer's contention that private 'soft' law can be 'hard' in practice. Nonetheless, Cutler goes on to add that states remain intimately involved in the enforcement of international commercial

agreements, resulting in a ‘curious mix of public and private authority’.<sup>1208</sup> The option to appeal UDRP decisions to national courts means that the UDRP also ultimately falls into this ‘public-private’ classification to some degree.

Cutler explores three sets of explanations for the emergence of private regimes, including market-based explanations, based upon efficiency and transaction cost incentives; power-based explanations, focusing upon the regulatory influence of firms dominating markets and issue-areas; and historical explanations focusing upon the significance of trends like globalisation and rapid technological change.<sup>1209</sup> All three of these factors could be said to have played a role in the creation of the UDRP. It can, in part, be explained as a response to historical trends of globalisation; the emergence of a single global domain naming system requires a single uniform dispute resolution policy at the global level. It can be partly interpreted using market-based explanations; the stated purpose of the policy is to provide a low-cost and rapid alternative to expensive and long-drawn out court proceedings. Finally, power-based explanations focusing upon the influence held by intellectual property interests, both with the United States government and within the ICANN system, are also very pertinent.

While ICANN could be seen as being comprised of a nested set of sub-regimes, it also forms part of a wider regime complex for Internet governance that also includes standards setting bodies such as the IETF and IAB as well as, to some extent, the ITU and IGF. Other sets of intergovernmental and private organisations also partially overlap with the ICANN regime, such as the Arab Team for Domain Names and Internet Issues, or registries’ associations such as the APTLD. In the intellectual property area, ICANN interacts with organisations such as WIPO as well as various private bodies such as the International Trademark Association or the Internet Commerce Association. Thus, ICANN does not operate in isolation; it is part of the dense web of public and private regimes that has grown up in recent decades.

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<sup>1208</sup> Cutler, A. C. (2007). ‘Private international regimes and interfirm cooperation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 24-41. P31

<sup>1209</sup> Ibid

## Private governance, legitimacy and democratic deficit

While some writers, such as Witte, Reinicke and Benner, see innovations such as trisectoral networks as helping to close a participatory gap,<sup>1210</sup> others, such as Lipschutz and Fogel, point out that such systems of public-private globalised governance, lacking democratic institutions, are not particularly representative, transparent, or democratic.<sup>1211</sup> Mathews similarly believes that the shift towards globalised decisionmaking will exacerbate the democratic deficit, as decisionmaking shifts to unelected international bodies.<sup>1212</sup> Cutler finds the normative implications of private authority ‘profoundly disturbing’, particularly because the legal formalism that associates authority with the state obscures the growing authority of private actors and removes it from public scrutiny and review.<sup>1213</sup>

This normative concern with the legitimacy and accountability of authoritative private actors echoes the doubts about ICANN’s legitimacy expressed by analysts such as Hunter<sup>1214</sup>, Weinberg<sup>1215</sup>, Froomkin<sup>1216</sup>, Koppell<sup>1217</sup> and Fuller<sup>1218</sup> (see Chapter 3). The discussion surrounding standards by which global governance organisations may be considered to be legitimate or not is a significant debate in its own right and is beyond the scope of this thesis. Yet the legitimacy question is relevant when discussing ICANN’s evolution as an organisation, simply because (some of) the actors in the regime have perceived it as important and consequently it has shaped how they have approached the regime.

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<sup>1210</sup> Witte, J. M., W. H. Reinicke, et al. (2000). “Beyond Multilateralism: Global Public Policy Networks.” *International Politics and Society* 2(2000): 176-188. P178

<sup>1211</sup> Lipschutz, R. D. and C. Fogel (2007). ‘Regulation for the rest of us? Global civil society and the privatization of transnational regulation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. P123

<sup>1212</sup> Mathews, J. T. (1997). "Power Shift." *Foreign Affairs* 76(1): 50-66. P65

<sup>1213</sup> Cutler, A. C. (2007). ‘Private international regimes and interfirm cooperation.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 24-41. P24

<sup>1214</sup> Hunter, D. (2003). "ICANN and the Concept of Democratic Deficit." *Loyola of Los Angeles Law Review* 36(3): 1152-1181. P1155

<sup>1215</sup> See Weinberg, J. (2000). "ICANN and the Problem of Legitimacy." *Duke Law Journal* 50(1): 187-260.

<sup>1216</sup> See Froomkin, A. M. (2000). "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution." *Duke Law Journal* 50(1): 178-184.

<sup>1217</sup> See Koppell, J. G. (2005). "Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”." *Public Administration Review* 65(1): 94-108.

<sup>1218</sup> Fuller, K. E. (2001). "ICANN: The debate over governing the Internet." *Duke Law and Technology Review* 2(1). Online journal. Retrieved 12 February 2010, from <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html>

ICANN's founders saw it as important that the organisation be seen to be legitimate. The exact criteria that confer legitimacy, or the 'right to rule'.<sup>1219</sup> are widely debated, but one of the most commonly cited is accountability. Grant and Keohane identify two potential approaches to accountability: a 'participation' model (where an organisation is accountable to those affected by its decisions), and a 'delegation' model (where it is accountable to those who entrusted it with authority).<sup>1220</sup> Both models were incorporated into the ICANN design. 'Representation' was expressed as one of the core founding principles for the organisation. This was the basis of the 'multistakeholder' model, with representation for all significant stakeholders as well as mechanisms intended to ensure a strong element of representation of and accountability to a global Internet using public, particularly the system for popular election of 'At-Large' directors. At the same time, ICANN also remained accountable to the US Government through its contractual obligations to manage the IANA function and through the MoU with Commerce (though the MoU was, of course, always intended to be temporary). Grant and Keohane also argue that attempts to institute democratic accountability at the global level on the basis of an analogy with domestic democracy will founder on the absence of a coherent and well-defined global public.<sup>1221</sup> This is precisely the problem that ICANN encountered when attempting to implement 'At-Large' elections in practice; there was no agreement on how to define the relevant public and qualification criteria for voting.<sup>1222</sup>

Arguably, it is the failure of attempts to confer legitimacy through direct democratic representation that has strengthened the hand of the GAC, as governments moved to emphasise their own role as legitimate representatives of the public interest. As Grant and Keohane argue, the norm of supervisory accountability, where multilateral organisations are held accountable to states, is a strong one in the international order.<sup>1223</sup> Arguably, the failure of the direct democracy experiment encouraged a return to this well-established norm. Hall and Biersteker raise an interesting

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<sup>1219</sup> Buchanan, A. and R. O. Keohane (2006). "The Legitimacy of Global Governance Institutions." *Ethics & International Affairs* 20(4): 405-541. P405

<sup>1220</sup> Grant, R. W. and R. O. Keohane (2005). "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99(1): 29-43. P31

<sup>1221</sup> *Ibid*, P33

<sup>1222</sup> ICANN (2001). At-Large Study Committee: Final Report. 5 November 2001. Retrieved 30 September 2011, from <http://www.icann.org/en/committees/at-large/final-report-05nov01.htm>

<sup>1223</sup> Grant, R. W. and R. O. Keohane (2005). "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99(1): 29-43. P33

contention that authority might revert away from private actors back to public ones in the event of a ‘normative delegitimation’ of the private actor.<sup>1224</sup> There may be an argument to suggest that something along these lines occurred in the ICANN case, as the failure of the direct democracy approach caused the original model to become delegitimised.

A degree of formal recognition of the role of governments in legitimating ICANN can be found in the Affirmation of Commitments, which emphasises the importance of GAC input into ICANN decisionmaking as well as giving the GAC a major role in the tri-annual organisational review mechanism. ICANN therefore arguably provides a concrete example to support a contention by Börzel and Risse, who argue that, by working in conjunction with public authorities, private actors can overcome any legitimacy deficit. They argue that public-private partnerships increase both the effectiveness and legitimacy of global governance by combining the resources available to private actors with the legitimacy offered by public authorities.<sup>1225</sup>

Ultimately, these changing conceptions about ICANN’s legitimacy and how it should best be achieved once again link back to constructivism and provide an example of how regime norms become modified through discourse, interaction and practical experience.

### **Conclusion to Chapter 8**

In conclusion, this chapter has shown that ICANN is a (sometimes uneasy) hybrid between the traditional intergovernmental model and the type of private international regime discussed by scholars such as Cutler. The potential for governance through public-private arrangements has been addressed by numerous scholars, but ICANN is unique in its particular institutional arrangements. It is more highly formalised and institutionalised than many other examples of public-private governance; it also features a greater level of conflict than public-private models often allow for,

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<sup>1224</sup> Hall, R. B. and T. J. Biersteker (2007). ‘Private authority as global governance.’ *The Emergence of Private Authority in Global Governance*. R. B. Hall and T. J. Biersteker. Cambridge, Cambridge University Press: 203-222. P215

<sup>1225</sup> Börzel, T. and T. Risse. (2005). ‘Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance.’ *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century*. E. Grande and L. W. Pauly. Toronto, University of Toronto Press: 195-216. P195

including conflict between governmental and private interests, and conflict between private interests of various kinds.

Within the ICANN regime, governments and powerful private interests can be seen as peers to a very great extent. To a significant degree, the regime was created in the first instance through the hegemony of a single state, but the importance of great-power state hegemony in underpinning the regime appears to have greatly diminished as ICANN has become an established institution in its own right. Furthermore, while ultimately underpinned by US policy preferences, ICANN was always intended to be a regime controlled by private actors at an operational level. This principle has become very much modified and the traditional intergovernmental approach has become a much more significant aspect of the regime with the rising importance of the GAC. However, the GAC, while highly influential, must vie with private actors for influence over policy and must often accept compromise.

These factors obviously make ICANN substantially different from the predominantly interstate regimes envisaged by Krasner and Keohane in the 1980s. Nonetheless, ICANN can usefully be understood as a regime using Krasner's definition. It has identifiable principles, norms, rules and decisionmaking procedures around which actors' expectations converge. Both governments and powerful commercial actors of various kinds have the potential to break up the regime or at least seriously disrupt its operation, but all are kept on board by a mutual interest in maintaining a working DNS. In the absence of a viable alternative, defection from the regime would not be a rational choice; and creating a new regime from scratch would be difficult task. It also seems fair to say that ICANN has become internalised by all actors as the established governor of the Internet's naming and numbering systems. While all actors have learned to work with the regime, however, this does not mean that the regime has eliminated all conflicts of interest. Rather, the regime acts as an institutionalised framework within which conflicts of interest can be contested in a managed way.

It is through these very contests and conflicts of interest that the regime has evolved, and continues to evolve. Lessons taken from Wendt and Dessler's social constructivism and structuration theory help us to understand how this has occurred. ICANN's norms and principles are being continually created and recreated, and over time modified, by the interactions of the regime participants. These contests, though

played out through individual actors within the regime, also reflect the fact that the regime sits on a 'fault line' between larger, pre-existing social structures, most importantly the Westphalian-style intergovernmental system and the logic of free-market global capitalism.

In the final chapter, the question will be explored of whether the patterns observed in the ICANN case study may have broader implications for the future of global governance and the continued relevance of the international regime concept.

# **Chapter 9**

## **Conclusion**

In Chapter 1, the overall purpose of this dissertation was set out as being to examine the hypothesis that ICANN represents a new type of hybrid political entity, one that both challenges established concepts in international regime theory, and that may be representative of emerging trends in other areas of global issue management. The aim was to understand ICANN's nature as a governance organisation, how it relates to broader patterns in global governance, and the extent to which it represents a fundamentally new approach to global issue-management, or whether it can in fact be understood in terms of established models of global governance as represented by existing international regime theories.

This was refined into four interconnected objectives for the project:

- 1) To explore the extent to which ICANN has changed as an organisation compared to the model set out in 1998, and to explain why such change has occurred;
- 2) To explore ICANN's internal dynamics and how it makes policy in practice, and to explore whether the 'consensus based decisionmaking' ideal is adhered to in reality;
- 3) To understand the extent to which ICANN diverges from conventional models of issue-management at the global level, as described by various paradigms on regime theory;
- 4) To explore what lessons ICANN can offer about the continuing applicability of the international regime concept, and whether and in what ways regime theory may need to be modified to deal with emerging new models of global governance as exemplified by the ICANN case.

This final chapter will attempt to draw together some conclusions on these questions.

### **Summary of findings**

At an empirical level, this dissertation has been based around an investigation into ICANN's history and three in-depth case studies of its policymaking processes in

action. The findings from these investigations were utilised in an attempt to contribute to the debates around competing interpretations of ICANN's basic nature and fundamental organisational principles.

At a theoretical level, the study has attempted to analyse ICANN from the perspectives offered by several approaches to international regime theory, in an effort to develop an understanding of how the organisation relates to broader patterns in global governance, to explore whether existing regime theories provide adequate conceptual tools to deal with the ICANN case, and also to examine whether regime theories could help to explain why ICANN has diverged from the original model set up in 1998.

Chapter 2 set out the history of ICANN's development from its inception under the Clinton administration to the present day. It demonstrated how ICANN has undergone a major shift from the original vision set out in the Green and White Papers of 1998, which set out a model based around governance by private stakeholders, with strong direct representation of the global Internet using public and an advisory role only for governments. Over time, and particularly during the reform process of 2002-03, that vision has been supplanted by a model in which the role of direct public representation has been very much diminished and the role of governments enhanced. Increased governmental participation and influence has occurred through the strengthening of ICANN's own GAC; however, the intergovernmental system in the form of the UN has so far failed to significantly impose itself on the issue-area, despite discussions on the matter at WSIS and the IGF.

Chapter 3 examined various interpretations of ICANN put forward by a number of scholars. These included the notion that ICANN is a technical caretaker only, as claimed by writers such as Solum; the 'liberal democratic' governance model put forward by analysts such as Weinberg, Fuller and Koppell; the view of ICANN as essentially a corporate animal or even as a cartel of influential commercial actors, taken by scholars such as Komaitis, Froomkin and Lemley; the more traditional statist, 'rationalist' view taken by writers such as Drezner and Goldsmith and Wu; and the intermediate position between statist and commercialist interpretations taken by scholars such as Kleinwachter and Antonova, who describe ICANN as a 'public-

private partnership' utilising important governance contributions from both states and nonstate actors.

Chapters 4-6 explored these competing interpretations in more depth by examining three case studies of ICANN policy development in action, and then using the findings to make inferences about the organisation's internal dynamics. These case studies comprised New gTLDs Policy, Internationalised Domain Names Policy and the Uniform Domain-Name Disputes Resolution Policy. All of these case studies produced some similar patterns. They showed that, while the ideal of consensus-based decisionmaking with fair representation for all affected parties continues to be promoted as the official line, it does not reflect reality. ICANN policy is created by a narrow set of powerful stakeholders through a process of bargaining, which often ultimately requires Board-level arbitration between competing interests. The 'supply side' actors, the registries and registrars, are particularly influential, and intellectual property interests exert considerable influence also. Other commercial influences include ISPs and other business interests acting through the Business Constituency. The exact balance between governmental and private actors, and between private actors of various kinds, is issue specific, with, for example, the GAC playing an important role in New gTLDs policy and IDNs policy but no major role in UDRP policy, while intellectual property interests were highly influential with regards to the UDRP and New gTLDs policy, but less so with regards to IDNs. By contrast, the Internet-using public, despite having access to several avenues for representation, such as the At-Large system, public comments facilities and public meetings, do not appear to have much overall influence on the policymaking process. The GAC therefore forms the main counterweight to the influence of commercial interests, in contrast to the original vision for the organisation where this role would be played by direct representation for the global online public. The GAC tends to intervene mostly on particular issues identified by governments as falling within their 'public policy' remit, such as matters relating to sovereignty over ccTLDs, language, and use of place-names and territories as identifiers. The GAC is keen to reinforce and extend recognition of its 'public policy' authority and has had considerable success in doing so. However, while governments acting via the GAC carry substantial weight, they do not necessarily have the final word on 'public policy' matters, and have to bargain with powerful commercial interests. Ultimately, the Board acts as arbiter and is the

final authority within ICANN; the Board itself is made up of individuals drawn from a self-perpetuating elite, mostly of a technical and / or commercial background.

Chapter 7 drew upon these findings to look again at the competing perspectives on ICANN discussed in Chapter 3. It found that the evidence refutes some of these interpretations of the organisation, including the notion that ICANN is an apolitical technical agency, and the ‘broad multistakeholder’ and ‘liberal democratic’ models that include meaningful influence for civil society and the general Internet using public. There was more evidence to support both the statist and commercial views of ICANN, but each of these focuses on only one dimension of the regime while neglecting the other. The chapter found that conceptions of ICANN as a ‘public-private partnership’ came closest to fitting the evidence, but that this phrase was nonetheless not entirely satisfactory, in that it implied a wholly co-operative relationship, whereas in reality, the interests of governments and corporations can clash. ICANN is a mechanism for managing these disputes between governmental and private actors, and between private actors of various kinds, via a process of negotiation, bargaining and arbitration.

Chapter 8 showed that, despite its nature as a hybrid public-private organisation, ICANN can be usefully understood as a regime using Krasner’s definition, since it has identifiable principles, norms, rules and decisionmaking procedures around which actors’ expectations converge. Of course, it differs in significant ways from a conventional ‘inter-national’ regime, in that governmental and private actors are to a very considerable extent peers within the organisation. Governments must compete with private actors for influence and there is no guarantee that governmental preferences will win out over private ones in any given area of policy. In terms of power relationships, both governmental and powerful commercial actors have similar amounts of underlying leverage in the sense that each type of actor ultimately possesses the power to break up or at least seriously disrupt the regime. If they became sufficiently unhappy with the ICANN regime, governments could, for example, work collaboratively to create a new alternative root managed by an intergovernmental organisation, and could potentially use their legislative power to force ISPs to recognise this alternative root as the authoritative one. ISPs also potentially possess the ability to create an alternative root, while the registries and registrars are responsible for actual operational management of the DNS system

below root level and also provide most of ICANN's funding. Intellectual property interests potentially possess the ability to seriously disrupt the regime if their interests are not accommodated, for example through legal challenges. However, while all of these actor types have the potential to wreck or at least seriously damage the regime through withdrawal of their co-operation, the costs to each of them would be very high, making withdrawal an irrational option so long as the regime continues to accommodate the majority of their interests. Each is kept on board by a mutual interest in a working and stable DNS. This does not mean that there are no conflicts within the regime, but the regime acts as a framework within which conflicts can be managed through bargaining and compromise. In this sense, while not an intergovernmental regime per se, ICANN resembles the neoliberal institutionalist model based on the rationality of co-operation and bargaining between interdependent actors.

Moreover, the interactions between the various governmental and nongovernmental actors, as they vie to exert and extend their influence, are not merely contained by the regime framework; they actually cause the framework to be modified over time through a process of continual creation and recreation of ICANN's principles, norms, rules and decisionmaking procedures. Some examples of this phenomenon in action include the continually evolving relationship between the GAC and the Board via their interactions on policy areas such as New gTLDs; the evolution of the relationship between ICANN and the ccTLD registries over questions such as registry agreements and financial payments and whether or not these should be made mandatory; the evolving relationship between ICANN and the gTLD registries and registrars, as ICANN attempts to extend its authority over these actors, sometimes in the face of resistance from them; and the ongoing issue of whether to change the rules prohibiting vertical integration of registries and registrars, both for new gTLDs and for existing ones. Consideration of these continually evolving relationships and norms from the perspective of social constructivism and structuration theory revealed how ICANN is not so much a fixed, unchanging institution as an ongoing process.

Thus, ICANN can be usefully understood in terms of concepts drawn both from traditional neoliberal institutionalist regime theory and from Dessler and Wendt's social constructivism. However, insights from alternative paradigms on regime theory also have some applicability. The realist hegemonic approach has a strong resonance

when considering the role played by the United States government in creating the ICANN regime, while neo-Marxist type approaches offer insights into the commercial dimensions of the regime.

### Lessons for regime theory

As numerous scholars have pointed out, the increasing significance of private actors and public-private partnerships in global governance challenges some of our traditional conceptions about authority and governance. When Stephen Krasner first put forward his definition of international regimes back in 1983, it made sense to envision regimes in statist terms. Even at that time, it was recognised by Krasner and others that private actors could become participants in some regimes, but the role they played was seen as being very much subordinate to the roles played by states. States, the basic actors in the international system, constructed the regime framework through multilateral agreements, and nonstate actors then operated within those parameters. While private actors may have played significant roles, ultimately the final authority lay with governments. In at least some areas of modern global politics, however, regimes have emerged or are emerging that do not fit this model.

ICANN is at the cutting edge of the shift towards public-private governance; it is perhaps the most highly developed and formalised example of a hybrid global institution, where governments and private interests are in many ways peers. Though constructed largely at the behest of a hegemonic state, as the organisation has evolved, the US role has receded, and ICANN has become increasingly accepted as possessing authority in its own right to govern DNS and IP addressing resources. To some degree, that authority is still legitimised through governmental recognition. States play a role in regime oversight under the Affirmation of Commitments, and governmental claims to public policy authority give them considerable weight and influence within the regime. Furthermore, ICANN's legal right to manage the root still rests ultimately on the IANA contract with Commerce; in this sense the regime is still underpinned ultimately by a hegemonic state. But the supreme operational authority of ICANN is wielded by the Board of Directors, a nongovernmental body; and the necessity to have the co-operation of various types of nonstate actor gives those actors leverage in some ways equal to that of governments.

Nonetheless, one of the key findings of this study is that the regime concept is still relevant when considering new types of governance arrangement such as ICANN. So long as we take ‘actors’ to include entities other than just states, Krasner’s definition of regimes remains useful. It still makes sense to define regimes in terms of principles, norms, rules and decisionmaking procedures around which actors’ expectations converge. Of course, the hybrid nature of an organisation like ICANN means that the term ‘inter-national regime’ may not be entirely appropriate; ‘global governance regime’ would be better. Furthermore, the project has shown that some of the older approaches to regime theory, including those drawn from ‘rationalist’ paradigms, are still useful; some concepts originally developed in the context of interstate regimes continue to apply equally well to a complex public-private hybrid regime like ICANN. These include both the hegemonic model and the neoliberal institutionalist conceptualisation of regimes as forums for bargaining among interdependent actors.

However, the study has also provided a good demonstration that, while concepts drawn from the traditional rationalist approach to regime theory can be a useful starting point, our understanding of how global governance regimes evolve can be deepened by the application of models taken from social constructivism and structuration theory. Regimes should be seen as arrangements set up to manage specific sets of issues that may rely partly on a ‘material base’ (such as the DNS technology and infrastructure itself in the case of ICANN) but which also rely heavily on social conceptions, values and norms developed through discourse. Furthermore, ICANN’s evolution bears out the social constructivist view of regimes as dynamic, continually evolving processes rather than static, rigid structures. Regimes evolve continuously through their own internal dynamics, and obviously those dynamics will be different depending on the nature of the issue-area and the identities of the actors. As the ICANN case demonstrates, even within a regime, the distribution of interests and power across the various actors depends on the particular policy area in hand; the ways in which they interact and the policy outcomes will also vary as a result.

Older approaches to regime theory have tended to focus upon a single type of structure, such as the distribution of power among states, as in structural realism, or the logic of the global capitalist system, as in structural neo-Marxism. Hybrid regimes such as ICANN cannot be properly understood in such narrow terms. The interaction between the interstate system and the commercial sphere needs to be taken into

account to properly understand ICANN's organisational dynamics. In this sense, ICANN sits on a 'fault line' between two approaches to governance; the traditional intergovernmental approach and the privatised self-regulatory approach. From a social constructivist point of view this can be seen as a clash between two competing cultures or social structures, the Westphalian state system and the logic of globalised, borderless capitalism. ICANN is on the one hand a demonstration of the difficulties of trying to apply concepts such as the sovereignty of territorial states to an issue-area that is inherently global and highly commercially driven, yet it also shows the persistence of the intergovernmental approach.

This is not to say, of course, that governmental and commercial actors are invariably in conflict. The case study chapters have shown that, on many points of policy, the GAC and corporate players are often in agreement. However, sometimes their interests do conflict, and this then raises questions of legitimate authority. Do governments, as the GAC claims, have the right to the final word on matters of public policy, or should the private approach to governance upon which ICANN was founded prevail? On the one hand, therefore, ICANN demonstrates the dissonance between intergovernmental and private approaches to governance and thus exposes the fault-line between the statist and global capitalist social structures that public-private regimes must straddle. Yet on the other hand, it also demonstrates that the gap can be bridged in practice to produce coherent policy and working governance, via a process of bargaining and compromise.

The extent to which the model and patterns observed in the ICANN case will be replicated in other areas of global governance remains an open one. While the phenomenon of public-private governance is undoubtedly growing across a wide range of global issue-areas, ICANN as an institution remains fairly unique. As Keohane and Victor argue, we can expect public-private governance arrangements to take a wide range of forms, from loose networks to highly institutionalised organisations. ICANN may therefore represent something of a prototype of what is possible at the highly institutionalised end of the spectrum. However, it is unclear whether such highly integrated and authoritative public-private regimes can be constructed without the imposition of order by a hegemonic power, as was the case with ICANN.

To illustrate the difficulties of constructing a strong public-private regime, capable of setting authoritative global policy, in the absence of an imposed hegemonic order, it may be instructive to consider two other examples of issue areas involving both governmental and private actors; intellectual property and wireless 3G telecommunications standards. In the case of intellectual property, a strong and sophisticated regime emerged out of the lobbying efforts of private intellectual property interests in the context of a hegemonic power. This regime is based around the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated at the end of the Uruguay Round of GATT in 1994.<sup>1226</sup> There is also a UN intellectual property agency dedicated to the administration of relevant treaties and to promote global compliance with intellectual property rights, the World Intellectual Property Organisation (WIPO).<sup>1227</sup> As demonstrated by scholars such as John Braithwaite, Peter Drahos and Susan Sell, the global intellectual property regime was primarily imposed by great-power hegemony and particularly the US,<sup>1228</sup> in response to pressures from the IP lobby.<sup>1229</sup>

A contrasting example is provided by the case of wireless 3G standards for third-generation wide area mobile telephone and networking technology. In October 1996, the ITU set out a process and a time plan for the definition of a global 3G standard, but this foundered in the face of conflict between US and European manufacturers promoting their own incompatible standards and squabbling over intellectual property rights.<sup>1230</sup> In May 2000, the ITU formally adopted an initiative designated IMT-2000, which set forth the technical requirements for a global standard<sup>1231</sup>; but, by this time, continuing lack of agreement on a single standard and increasing market pressures to implement 3G meant that governments had already begun to allow implementation of

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<sup>1226</sup> WTO (1994). Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization. Signed in Marrakesh, Morocco. 15 April 1994. Retrieved 14th February 2011, from [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

<sup>1227</sup> WIPO (2011). WIPO Overview. Retrieved 8th February 2011, from [http://www.wipo.int/export/sites/www/freepublications/en/general/1007/wipo\\_pub\\_1007\\_2011.pdf](http://www.wipo.int/export/sites/www/freepublications/en/general/1007/wipo_pub_1007_2011.pdf)

<sup>1228</sup> Braithwaite, J. and P. Drahos (2000). *Global Business Regulation*. Cambridge, Cambridge University Press. PP63-80

<sup>1229</sup> Sell, S. (2003). *Private power, public law: the globalisation of intellectual property rights*. Cambridge, Cambridge University Press. PP96-120

<sup>1230</sup> Cowhey, P., J. Aronson, and J. Richards. (2003). 'The peculiar evolution of 3G wireless networks: Institutional logic, politics, and property rights.' E. Wilson and W. Drake (eds.), *Governing global electronic networks*. Cambridge, MA: MIT Press: 149-186

<sup>1231</sup> ITU (2000). Press Release: 'ITU gives final approval to IMT-2000 radio interface specifications.' Retrieved 4th February 2011, from [http://www.itu.int/newsarchive/press\\_releases/2000/10.html](http://www.itu.int/newsarchive/press_releases/2000/10.html)

various standards on a national and regional basis,<sup>1232</sup> ultimately undermining the ITU's efforts at global standardisation. Unlike issue-areas such as DNS and the intellectual property regime, in this case no hegemonic power was able to impose standards on all the rest; as a consequence, different bargaining positions emerged out of regional dynamics, resulting in not one but multiple standards.

Like ICANN, these examples illustrate that the emergence of strong authoritative public-private regimes is aided by the existence of a hegemonic state power able and willing to impose an order over an issue-area. The circumstances that brought ICANN into being were fairly unusual and resulted from an accident of history that placed the US government in a position to be able to impose its own policy preferences over the issue-area. Therefore, we should not necessarily assume that similar regimes will or can appear elsewhere in the absence of such circumstances.

On the other hand, neither should we assume that ICANN will remain entirely unique. Despite some concerns over matters such as the extent to which it meets 'liberal democratic' standards of accountability, legitimacy and representation, ICANN essentially 'works'; it keeps all of the essential actors on board and it manages to produce coherent policy decisions out of what otherwise could be a logjam of competing interests. The ICANN model may therefore provide a useful template that could be fruitfully copied elsewhere, though perhaps with modifications to address accountability and legitimacy concerns. The types of issue-area that might benefit from an ICANN-type model would presumably share some characteristics with DNS governance. They would require a high degree of co-ordination and coherent policymaking at a global level, and would depend on the co-operation of multiple types of actor, both governmental and commercial, whose interests are not necessarily always in harmony. Of course, each issue-area will involve different sets of actors and interests; consequently each regime will develop its own individual characteristics as it evolves over time, as was the case with ICANN.

If ICANN is anything to go by, however, we should not expect such regimes to be without conflict and inherent tensions between governmental and private actors as

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<sup>1232</sup>See Sill, W. J. and C. L. Lin (2000). "Fence-Mending on the Frontier." *Wireless Review*. 29 Feb 2000. Retrieved 5th February 2011, from [http://connectedplanetonline.com/wireless/mag/wireless\\_fencemending\\_frontier/](http://connectedplanetonline.com/wireless/mag/wireless_fencemending_frontier/) P3

well as between competing private interests. As was the case with their interstate forebears, the function of public-private global governance regimes is not to eliminate conflict but to manage it. This lesson was perhaps not well understood in 1998 by some of the more optimistic of ICANN's founders, who rather idealistically envisaged that the organisation could be made to operate along 'consensus'-based lines. However, where competing interests are involved, there can be no consensus-based policy, only politics. While some of the participants and the details of the game may have changed, outcomes in global politics are ultimately decided by power and interest as much as was ever the case, and ICANN illustrates that truth well.

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***PROTOCOLS OF POWER: LESSONS FROM ICANN FOR  
INTERNATIONAL REGIME THEORY***

***PAUL ANTONY WHITE***

***APPENDIX***

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# **Appendix to Chapter 1**

**Appendix 1.1: Sample of initial contact email for potential ICANN interviewees**

Dear <NAME>

Sorry to bother you, but I was wondering if you might be able to assist me.

I am a PhD student at the University of Huddersfield (UK), working on a thesis based around ICANN's role in Internet governance in the context of international regime theory. I am currently looking at ICANN's policy development process regarding <POLICY AREA>

I understand that you served on <NAME OF COMMITTEE / WORKING GROUP> in the period <DATE>.

Would it be possible to ask you a few questions regarding this?

The record of any email correspondence between us would be used solely for this study. Upon your request, your name would not be revealed. If you would prefer to discuss via telephone rather than email, please let me know.

Many thanks for your time.

Yours faithfully,

Paul Antony White

PhD Student, University of Huddersfield

**Appendix 1.2 List of individuals from ICANN contacted / interviewed**

<b>Name</b>	<b>Role within ICANN</b>	<b>Mode of interview</b>	<b>Date of initial contact</b>
Mark Carvell	UK GAC representative	Email	20 May 2008
William Dee	European Commission GAC representative	Telephone and email	22 May 2008
Philip Sheppard	Business Constituency / New gTLDs Committee	Telephone	9 February 2009
Bruce Tonkin	GNSO Council Chair / New gTLDs Committee Chair	Email	12 February 2009
Hiro Hotta	ccNSO .jp registry representative / IDNC Working Group member	Email	8 July 2009
Patrik Faltstrom	IETF /IDNs Committee + IDNC Working Group member	Email	7 July 2009
John Klensin	IAB Chair / IDNs Committee member	Email	5 July 2009
Cheryl Langdon-Orr	Former ALAC Chair	Email	5 December 2011
Olivier Crépin-Leblond	ALAC Chair	Email	7 January 2011
Andrew Maurer	Australian GAC representative	Email	8 January 2012
Vera Sveinbjörnsdótti	Icelandic GAC representative	Email	9 January 2012
Maria Häll	Swedish GAC representative	Email	9 January 2012
Wolf Ludwig	EURALO Chair	Email	13 February 2012

Copies of email correspondence with the above individuals have been retained and can be examined on request.

**Appendix 1.3: Sample of an email conversation with an ICANN respondent**

(Respondent – John Klensin (IDNs Committee member))

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PhD research on IDNs

P.A.White U9502832

Sent: 04 July 2009 18:45

To: john-ietf@jck.com

Dear John,

Sorry to bother you, but I was wondering if you might be able to assist me. My name is Paul White and I am a PhD student at the University of Huddersfield (UK), working on a thesis based around ICANN's role in Internet governance. I am currently looking at ICANN's policy development process regarding Internationalised Domain Names in the period 2000-2009. I understand that you served on ICANN's IDN Committee in the period 2001-2005.

Would it be possible to ask you a few questions regarding this?

The record of any email correspondence between us would be used solely for this study. Upon your request, your name would not be revealed. If you would prefer to discuss via telephone rather than email, please let me know.

Many thanks for your time.

Best regards

Paul White

\*\*\*\*\*

Re: PhD research on IDNs

John C Klensin [john-ietf@jck.com]

You replied on 07/07/2009 19:35.

Sent: 05 July 2009 10:25

To:

P.A.White U9502832

--On Saturday, July 04, 2009 18:45 +0100 "P.A.White U9502832"

<H9502832@hud.ac.uk> wrote:

> Dear John,

>

> Sorry to bother you, but I was wondering if you might be able  
> to assist me. My name is Paul White and I am a PhD student at  
> the Univeristy of Huddersfield (UK), working on a thesis based  
> around ICANN's role in Internet governance.

In what department? And who is advising you?

> I am currently

> looking at ICANN's policy development process regarding  
> Internationalised Domain Names in the period 2000-2009. I  
> understand that you served on ICANN's IDN Committee in the  
> period 2001-2005.

Yes. And on and off before and since. I've also advised  
several countries in that area, participate actively in regional  
working groups on Arabic and CJK languages, etc.

> Would it be possible to ask you a few  
> questions regarding this?

Yes, I suppose so. How would you like to do this? Email?

Voice?

Background, FYI. I've been involved in what would now be called Internet Internationalization issues since the 80s by one way of counting and the early 70s by another. I helped shape the policies that led up to RFC 1591 and effectively co-authored that document. I was active in the original IDN definition work, ended up leading the effort to get the IAB's critique in RFC 4690 together, etc. I was also active in the "IANA transition" effort that was one of the major contributors to ICANN's original design.

My primary professional background is in international political communications and political and organizational behavior.

Where that introduction is leading is that I'm a poor candidate for "sound bite" answers. If you have well-thought-out questions and are interested in understanding the history and answers in all of their complexity, I'm happy to talk with you. If you are trying, as have several of your predecessors in this general area, to divide things into a couple of neat categories about which you can make sweeping statements, talking with me is likely to be very frustrating.

john

\*\*\*\*\*

RE: PhD research on IDNs

P.A.White U9502832

Sent: 07 July 2009 19:35

To: John C Klensin [john-ietf@jck.com]

Hi John,

Many thanks for your reply. I'm working in the School of Human and Health Sciences, Division of Politics. My PhD supervisors are Graham Gibbs, John Craig and Derek Lynch. My academic background is in political science, but I've worked in IT (mostly network administration) over the last eight years, and the PhD is an attempt to fuse these two interests.

I understand that this is a complex area and difficult to pin down to a few generalisations. Perhaps it would be best if I start by explaining where I'm trying to go with the PhD. I'm ultimately trying to apply international regime theory to the issue-area of Internet governance. I very quickly realised that Internet governance as a whole is far too broad an area for a PhD, so I narrowed the thesis down to a study of ICANN (which is obviously still a huge topic). I'm basically trying to find out what 'type' of organisation ICANN is, and ultimately attempt to draw some lessons from the study for international regime theory.

From what I've read of the academic literature so far, ICANN is most often analysed in 'liberal' terms; i.e. debates have focused around questions such as ICANN's legitimacy, whether or not it should be regarded as a public policymaker, its record in providing representation to various interests and so on. I'm interested in exploring these questions, but I also want to try to analyse ICANN in terms of alternative theoretical paradigms. For example, I want to look at the extent to which governments have had an influence on ICANN policymaking, which might lend weight to a more 'realist' interpretation of the organisation, and the extent to which ICANN is dominated by commercial interests, which might provide a basis for a neo-Marxian type analysis.

In order to try to get to grips with some of these questions, I've tried to pick out three or four policy development areas to act as case studies of how the ICANN system works in practice, IDNs being one of these. I'm trying to understand the relative contribution made to the policy development process by various types of actors in order to get some perspective on the ways in which each type of actor has been able to influence the policymaking process. Basically, I'm trying to understand if – and how – 'multistakeholderism' has worked in practice.

Clearly your background on this is very substantial indeed, and I'd be keen to get your insights on some of these issues. I was thinking of corresponding by email, unless you would prefer to do things by phone?

Once again, many thanks for your time.

Best regards,

Paul

\*\*\*\*\*

RE: PhD research on ICANN

John C Klensin [klensin@jck.com]

You replied on 10/07/2009 17:02.

Sent: 07 July 2009 20:41

To:

P.A.White U9502832

--On Tuesday, July 07, 2009 19:35 +0100 "P.A.White U9502832"

<H9502832@hud.ac.uk> wrote:

> Hi John,

>

> Many thanks for your reply. I'm working in the School of Human

> and Health Sciences, Division of Politics. My PhD supervisors

> are Graham Gibbs, John Craig and Derek Lynch. My academic

> background is in political science, but I've worked in IT

> (mostly network administration) over the last eight years, and

> the PhD is an attempt to fuse these two interests.

If it makes you feel better, mine says "in Computer Applications

in the Social and Policy Sciences" on it -- special committee

consisting of one Architect (of the building variety, but a

major contributor to Geographical Information Systems and their

use in Architecture and Urban and Regional Planning), one

meteorologist turned urban planner, two political scientists

(one a specialist on models of political systems, the other an expert on political communications and the co-inventor of contact networks and distance measures on them as well as the use of content analysis as a formal analysis method (Hayward Alker and Ithiel de Sola Pool respectively if you have read in those literatures), and one cognitive psychologist turned computer scientist (and the godfather of the ARPANET and other things -- JCR Licklider).

Always happy to see others in the area. Indeed, if your institution uses external readers and could tolerate one with no present academic affiliation, we might discuss that when you are a bit further along.

- > I understand that this is a complex area and difficult to pin
- > down to a few generalisations. Perhaps it would be best if I
- > start by explaining where I'm trying to go with the PhD.
- > I'm ultimately trying to apply international regime theory
- > to the issue-area of Internet governance. I very quickly
- > realised that Internet governance as a whole is far too broad
- > an area for a PhD, so I narrowed the thesis down to a study of
- > ICANN (which is obviously still a huge topic). I'm basically
- > trying to find out what 'type' of organisation ICANN is,
- > and ultimately attempt to draw some lessons from the study for
- > international regime theory.

There was a PhD completed at Syracuse about a year ago that

started from regime theory but that looked primarily at ccTLD-ICANN and ccTLD-government relationships. It is a fertile, but very frustrating, area and one in which you risk having the proverbial rug pulled out from under you partway through the research work. You will probably also want to talk with Paul Twomey, who considers himself a regime theory expert, but I suspect that is better done after he steps down from ICANN.

- > From what I've read of the academic literature so far, ICANN
- > is most often analysed in 'liberal' terms; i.e. debates
- > have focused around questions such as ICANN's legitimacy,
- > whether or not it should be regarded as a public policymaker,
- > its record in providing representation to various interests
- > and so on. I'm interested in exploring these questions, but
- > I also want to try to analyse ICANN in terms of alternative
- > theoretical paradigms. For example, I want to look at the
- > extent to which governments have had an influence on ICANN
- > policymaking, which might lend weight to a more 'realist'
- > interpretation of the organisation, and the extent to which
- > ICANN is dominated by commercial interests, which might
- > provide a basis for a neo-Marxian type analysis.

Good. While I have strong opinions about some of the answers, very little analysis has been done ("liberal" or otherwise) that would really stand careful and rigorous academic scrutiny.

- > In order to try to get to grips with some of these questions,

- > I've tried to pick out three or four policy development
- > areas to act as case studies of how the ICANN system works in
- > practice, IDNs being one of these. I'm trying to
- > understand the relative contribution made to the policy
- > development process by various types of actors in order to get
- > some perspective on the ways in which each type of actor has
- > been able to influence the policymaking process. Basically,
- > I'm trying to understand if – and how –
- > 'multistakeholderism' has worked in practice.

Clearly a key question, if not the key question.

To identify my bias at this stage, the terms that are used in certain contexts include comments about gluttonous multisteakholders and references to multisnakeholders. So, while I may have useful things to say, you need to be careful to assume that I just represent one of many perspectives on the situation until and unless you get enough confirmation to form your own opinions and conclusions. As well as looking at how the interests of various constituencies play themselves out within ICANN, you need to try to identify the materially concerned or affected communities who are not represented at all and figure out what the implications of that are.

- > Clearly your background on this is very substantial indeed,
- > and I'd be keen to get your insights on some of these
- > issues. I was thinking of corresponding by email, unless you

> would prefer to do things by phone?

Email should be fine unless one of us decides we need a more conversational interaction mode. Let's deal with that if and when we get to it.

Please use the email address from which this message comes -- it reaches me more quickly and reliably, while the other one risks getting tied up with the considerable IETF noise.

> Once again, many thanks for your time.

This should be fun. And potentially very useful to the community.

best regards,

john

\*\*\*\*\*

RE: PhD research on IDNs

P.A.White U9502832

Sent: 10 July 2009 16:59

To:

John C Klensin [klensin@jck.com]

Hello John,

Thanks again, I appreciate your interest. We don't have a formal system of external readers at Huddersfield, but I ran the suggestion past my supervisors yesterday and they thought it was a great idea - so if you are willing to have a read through my thesis at some stage, that would be much appreciated and potentially very useful.

I realise that this is a fast moving area and that there is always a danger of the 'rug being pulled' - but i suppose that's an inherent risk of working in this area!

I wasn't aware that Paul Twomey had expertise in regime theory - that's useful to know. I was planning to contact him (and also Vint Cerf) at some stage but as you say, that's probably best left until he steps down.

As you suggest, one of the first steps in my analysis needs to be to work out who the main players are, but also which potentially affected parties are excluded from the policymaking process. I get the feeling that this may be dependent on the particular policy area under dscussion? However, I also get the overall impression that ICANN seems to be dominated by the 'supply' side of the industry, with the registries carrying a huge amount of weight in most policy discussions (I believe that the registries and registrars constituencies carry double votes in the GNSO?) I'm also trying to explore the roles played by the technical communities within ICANN. Obviously, the techies are the people who are ultimately called upon to make any solution work, but what seems less clear is the extent to which the technical communities have 'interests' of their own, what those interests might be, and how this plays out within the ICANN system.

I think another key question is the extent to which the kind of issues dealt with by ICANN are resolvable by consensus. I understand that the IETF works by 'rough consensus', but it seems to me that this is made possible by the more purely technical nature of the IETF's work, whereas ICANN, despite all the claims of it being a technical co-ordinator only, seems in many instances to be dealing with public policy issues, in that it arbitrates between competing claims of right - and I'm not sure that resolution by consensus is possible in such cases.

With regard to IDNs, I've gained a fairly good grasp of the major events and chronology from the documentation available on the ICANN website, but I've initially identified a number of questions / issues that I want to explore further.

My first impressions of the IDNs policy development area are that it seems both more complex and arguably more 'multistakeholder' than New gTLDs policy (the only other policy development area I've looked at in any depth to date). Whereas New gTLDs policy seems to have been mostly the remit of the GNSO, IDNs policy seems to have involved most of the major ICANN organs together with outside agencies. Partly, I suppose, this is due to IDNs involving new technology, and ICANN has had to depend on other agencies such as the IETF to develop a standard, software manufacturers to supply IDN-compatible applications, organisations such as UNESCO to supply linguistic expertise and so on. However, I also wondered if the inclusion of a broader range of parties and the much greater complexity of the issue was partly due to the potentially politically sensitive nature of a policy development area that deals with recognition and codification of languages and scripts.

Certainly I've noticed that GAC has appeared to play a very pro-active role with IDNs, particularly (in conjunction with the ccNSO) in initiating the Fast Track process. I'm trying to figure out what the main drivers were for getting the fast track process underway. I understand that the process is intended to move forward IDN ccTLD implementation in 'unproblematic' cases, as opposed to all progress becoming stalled because of the 'problem' cases, but I'm not quite clear as to whether the difficult cases were problematic due to mainly technical, linguistic or political reasons. I also wondered if the pressure to move forward with fast track tended to come from mainly from governments and ccTLD managers (as might be suggested by the fact that the ccNSO and GAC were instrumental in getting the process underway) or whether there might be other factors involved - perhaps even the discussions at the IGF? (I note that ICANN has been involved in several IDN-related meetings and workshops at the IGF).

I understand that IDN second-level domains are currently supported in 350 languages, out of something like 6000 currently recognised by UNESCO. This raises the question of why these particular languages? I was wondering if this was simply due to the difficulties involved in even getting a language defined and drawing up relevant Unicode tables etc, or whether commercial factors may have also played a part. Obviously, since the registries are commercial companies, it would make sense to suggest that they would be most interested in supporting the profitable languages, i.e. the ones that would return a decent amount of registrations, but would be less interested in supporting languages for which there is no big market. I was wondering whether this might prove an interesting 'test' of the ICANN system

as to whether the market ultimately decides, or whether smaller noncommercial groups such as minority language communities will be able to press their interests strongly enough within the ICANN system to ensure that their needs are met also.

With regards to the IDN Guidelines, I get the impression that some of the registries, particularly Verisign, initially resisted centralisation of IDN policy in a single set of Guidelines. Is this just a symptom of a wider contest / power struggle being played out, particularly in ICANN's early days, between ICANN's efforts to establish its authority and Verisign's determination to retain as much autonomy as possible? Also, I wondered to what extent the registries are still interpreting the Guidelines differently, and whether they are still doing independent policy setting beyond that contained in the Guidelines.

Anyway, these are some of my initial thoughts, though no doubt there will be many other questions as I get deeper into the issue-area. Would be interested in any thoughts you have on any of these points.

I'll be away over the next few days and won't have Internet access, but I should be back on Tuesday.

Best regards,

Paul

\*\*\*\*\*

RE: PhD research on IDNs

John C Klensin [klensin@jck.com]

You replied on 16/07/2009 19:49.

Sent: 13 July 2009 12:55

To:

P.A.White U9502832

--On Friday, July 10, 2009 16:59 +0100 "P.A.White U9502832"

<H9502832@hud.ac.uk> wrote:

> Hello John,

>

> Thanks again, I appreciate your interest. We don't have a  
> formal system of external readers at Huddersfield, but I ran  
> the suggestion past my supervisors yesterday and they thought  
> it was a great idea - so if you are willing to have a read  
> through my thesis at some stage, that would be much  
> appreciated and potentially very useful.

>

> I realise that this is a fast moving area and that there is  
> always a danger of the 'rug being pulled' - but i suppose  
> that's an inherent risk of working in this area!

Yes. Tradeoff between timeliness and good perspective.

> I wasn't aware that Paul Twomey had expertise in regime theory

> - that's useful to know.

I don't know how much expertise he actually has, but he does talk in those terms and has clearly read into at least some of the literature.

> As you suggest, one of the first steps in my analysis needs to  
> be to work out who the main players are, but also which  
> potentially affected parties are excluded from the  
> policymaking process. I get the feeling that this may be  
> dependent on the particular policy area under discussion?

Somewhat, although I believe there are some general patterns. For example, ICANN processes tend to drag out through many meetings and other interactions. The costs of that are high, so the greatest participation tends to come from those who can and will make large investments and, at the other extreme, those who (to paraphrase a staff member) have too much time on their hands and who may be able to find subsidies. To the extent to which you can identify populations who fit into neither group, you will find that they are consistently underrepresented or not represented at all.

The situation is also clouded somewhat by ICANN's having a surplus of folks who are willing to claim to speak for constituencies with whom they have no actual contact: speakers of obscure minority languages, future users of the Internet, the

occasional Martian or Klingon,...

- > However, I also get the overall impression that ICANN seems to
- > be dominated by the 'supply' side of the industry, with the
- > registries carrying a huge amount of weight in most policy
- > discussions (I believe that the registries and registrars
- > constituencies carry double votes in the GNSO?)

This may or may not be separate from my comments about resources above. If one's livelihood depends on ICANN decisions, then investments in representation and participation at ICANN can easily be justified in bottom-line terms. There are also overlaps in constituencies. For example, on many issues, "business" and "intellectual property" interests have overlapped enough, sometimes being represented by the same people, that they are another voting block.

- > I'm also
- > trying to explore the roles played by the technical
- > communities within ICANN. Obviously, the techies are the
- > people who are ultimately called upon to make any solution
- > work, but what seems less clear is the extent to which the
- > technical communities have 'interests' of their own, what
- > those interests might be, and how this plays out within the
- > ICANN system.

My biases, and experience, on that subject are strong enough

that I should let you get to the point of asking specific questions before burying you in opinions.

> I think another key question is the extent to which the kind  
> of issues dealt with by ICANN are resolvable by consensus. I  
> understand that the IETF works by 'rough consensus', but it  
> seems to me that this is made possible by the more purely  
> technical nature of the IETF's work, whereas ICANN, despite  
> all the claims of it being a technical co-ordinator only,  
> seems in many instances to be dealing with public policy  
> issues, in that it arbitrates between competing claims of  
> right - and I'm not sure that resolution by consensus is  
> possible in such cases.

Yes. A different way to put it is that there is consensus in the IETF community about general objectives and how to measure success. Arguably, without that, one cannot have even a good debate, much less meaningful consensus. ICANN doesn't have that advantage.

> With regard to IDNs, I've gained a fairly good grasp of the  
> major events and chronology from the documentation available  
> on the ICANN website, but I've initially identified a number  
> of questions / issues that I want to explore further.

The material on the ICANN website is reasonably good as far as it goes. It is also highly biased toward ICANN concerns and

ignores the issues that ICANN doesn't want to deal with or hear about.

- > My first impressions of the IDNs policy development area are
- > that it seems both more complex and arguably more
- > 'multistakeholder' than New gTLDs policy (the only other
- > policy development area I've looked at in any depth to date).
- > Whereas New gTLDs policy seems to have been mostly the remit
- > of the GNSO, IDNs policy seems to have involved most of the
- > major ICANN organs together with outside agencies. Partly, I
- > suppose, this is due to IDNs involving new technology, and
- > ICANN has had to depend on other agencies such as the IETF to
- > develop a standard, software manufacturers to supply
- > IDN-compatible applications, organisations such as UNESCO to
- > supply linguistic expertise and so on.

UNESCO has not been involved except to occasionally pop up, say something that most people know already or explain how important language preservation is, and then claim credit.

- > However, I also
- > wondered if the inclusion of a broader range of parties and
- > the much greater complexity of the issue was partly due to the
- > potentially politically sensitive nature of a policy
- > development area that deals with recognition and codification
- > of languages and scripts.

Yes. Other pieces of that puzzle may be relevant:

(1) Passions run very high around language and culture, including issues of making the Internet more accessible to populations with low familiarity with Latin-based scripts generally and English in particular. IDNs have, several times, become a vehicle for expressing frustrations with the US Govt that cannot be as safely expressed in other contexts.

(2) While they will make formal statements, most of the GAC doesn't really care about most issues that affect gTLDs only. Partially for the reasons above, they care a lot about IDNs.

(3) When I was working on food composition databases, we discovered that the number of people who had opinions on the subject was roughly equal to the number of people who eat food. Expertise not required -- if one is food consumer, one feels entitled to opinions on relatively complex questions about food identification, classification, health concerns, etc. IDNs are like that too -- immensely complex problems complicated by equally complex coding issues (e.g., Unicode is good for many things, but several aspects of its design come close to pessimal for IDN purposes) -- but everyone has an opinion. And many of those opinions would make sense if one were trying to write novels in DNS labels... but that is not possible and many of the issues it motivates are not interesting.

- > Certainly I've noticed that GAC has appeared to play a very
- > pro-active role with IDNs, particularly (in conjunction with
- > the ccNSO) in initiating the Fast Track process. I'm trying to
- > figure out what the main drivers were for getting the fast
- > track process underway. I understand that the process is
- > intended to move forward IDN ccTLD implementation in
- > 'unproblematic' cases, as opposed to all progress becoming
- > stalled because of the 'problem' cases, but I'm not quite
- > clear as to whether the difficult cases were problematic due
- > to mainly technical, linguistic or political reasons.

Also test the "greed" hypothesis, note that some of the ccTLD operators have tense relationships with the associated governments, and note too that the "fast track" gives additional domains to the established operators rather than letting others propose to compete in-country.

- > I also
- > wondered if the pressure to move forward with fast track
- > tended to come from mainly from governments and ccTLD managers
- > (as might be suggested by the fact that the ccNSO and GAC were
- > instrumental in getting the process underway) or whether there
- > might be other factors involved - perhaps even the discussions
- > at the IGF? (I note that ICANN has been involved in several
- > IDN-related meetings and workshops at the IGF).

See above. Also note that some of the IGF discussions have been

characterized by "IDNs as excuse", e.g., "we don't have good Internet penetration in our country despite significant investment because we don't have IDNs (or, more recently, top-level IDNs). Note that both China and Brazil have made essentially that claim, despite China's simultaneous claim that they have more Internet users than anyone else and a huge number of domain registrations and Brazil's lack of interest in indigenous languages (Portuguese doesn't need IDNs much more than English does).

- > I understand that IDN second-level domains are currently
- > supported in 350 languages, out of something like 6000
- > currently recognised by UNESCO. This raises the question of
- > why these particular languages? I was wondering if this was
- > simply due to the difficulties involved in even getting a
- > language defined and drawing up relevant Unicode tables etc,
- > or whether commercial factors may have also played a part.

Multiply those 350 (and I'm surprised the number is that high) by the number of primary-language speakers for each, add them up, and then compare the number you get to the world's literate population and you will have most of your answer. If you use the population that is both literate and who, for economic or technological reasons, have reasonable odds of being able to be connected as the denominator, you will get an even more interesting number. Contrary to some of the claims at IGF and elsewhere, having or not having IDNs doesn't connect people to

the Internet or make them able to deal with systems based on written text. And, if they can connect but not read and write, the solutions they need don't have a lot to do with IDNs.

> Obviously, since the registries are commercial companies,

Some, perhaps many, of the ccTLD registries are not. And some of the ccTLD registries have been slow about deploying IDNs at the second level to give them more leverage on getting TLDs.

> it

> would make sense to suggest that they would be most interested

> in supporting the profitable languages, i.e. the ones that

> would return a decent amount of registrations, but would be

> less interested in supporting languages for which there is no

> big market. I was wondering whether this might prove an

> interesting 'test' of the ICANN system as to whether the

> market ultimately decides, or whether smaller noncommercial

> groups such as minority language communities will be able to

> press their interests strongly enough within the ICANN system

> to ensure that their needs are met also.

If they need TLDs, the USD 185K (and rising) application fee will be more than enough to keep them out. That topic has been discussed extensively in ICANN; you might learn a good deal about how the politics actually work by looking at the alignment of interests around either reduced fees for minority language

groups or national applications for them. There will probably be IDN TLDs for "minority" languages in, e.g., India, but the only "minority" ones that are getting any attention are constitutionally mandated and hence really don't count that way.

- > With regards to the IDN Guidelines, I get the impression that
- > some of the registries, particularly Verisign, initially
- > resisted centralisation of IDN policy in a single set of
- > Guidelines.

Yes. More generally, Verisign's initial position was that they weren't required to do anything the protocol didn't specify, i.e., that ICANN could not impose registration or other rules. That really stopped only after it became clear that someone would hold them responsible for registrations that went outside accepted best practices and encouraged phishing and other crimes... and that the enforcer would more likely be courts in the US than ICANN.

- > Is this just a symptom of a wider contest / power
- > struggle being played out, particularly in ICANN's early days,
- > between ICANN's efforts to establish its authority and
- > Verisign's determination to retain as much autonomy as
- > possible?

In large part, probably yes.

- > Also, I wondered to what extent the registries are
- > still interpreting the Guidelines differently, and whether
- > they are still doing independent policy setting beyond that
- > contained in the Guidelines.

Long story. You've also got to consider ICANN's track record for enforcing their Guidelines and other policies. An interesting case to look at involves those gTLDs who can in with particular proposals and models on application, were awarded the TLDs on that basis, discovered that they couldn't meet financial target expectations, and came back to ICANN looking for permission for entirely different models --models that almost certainly would not have gotten them the domains if asked for initially-- and got that permission. NAME and PRO are the two best examples, with TRAVEL probably not a lot behind.

- > Anyway, these are some of my initial thoughts, though no doubt
- > there will be many other questions as I get deeper into the
- > issue-area. Would be interested in any thoughts you have on
- > any of these points.
- >
- > I'll be away over the next few days and won't have Internet
- > access, but I should be back on Tuesday.

I'm intermittent for the rest of the summer (gone the rest of today and tomorrow), at IETF most of the last two weeks of the month, in China late August), but will respond to whatever you

have as quickly as possible.

best,

john

\*\*\*\*\*

RE: PhD research on IDNs

P.A.White U9502832

Sent: 16 July 2009 19:49

To:

John C Klensin [klensin@jck.com]

Hello John,

Thanks, that's very illuminating stuff.

I'm currently assembling my data on IDNs into some sort of coherent writeup, so I expect further questions to arise as I go along. I realise you're a busy man and I really appreciate your finding the time to help me out with this.

Just a few quick thoughts for now:

From what you're saying, it sounds like the principle of representation within ICANN doesn't apply particularly well in practice, at least not if we're talking about broader representation than just industry insiders and governments.

In terms of excluded groups, the biggest and most obvious ones that spring to mind are the ordinary users and domain name owners (though plainly these aren't single homogenous groups with one common set of interests as far as I can see). I'm aware of the experiment with 'At-Large' elections for the ICANN Board back in the early days, and some of the reasons why it was deemed a failure. I get the impression that the elections were widely seen at the time as one of the main keys to legitimising ICANN by transforming the organisation into something akin to a global democracy (at least by some idealists). After the failure of the elections, the ideal of making ICANN directly accountable to the global Internet-using public seems to have largely fallen by the wayside? I know the ALAC provides one channel for input, and that public comments are usually invited at numerous stages in any policy development process, but from what I've seen of the public comments boards, the only people who tend to comment are usually industry insiders.

I'm not saying that direct accountability to the global public is necessary feasible given the problems that have been experienced, but what I'm wondering is whether the failure of the direct democracy approach makes it more desirable for governments to have a greater role in ICANN's governance, since governments can at least claim to represent their citizens indirectly. I'm wondering if that could be used as a justification for moving towards a more traditional intergovernmental approach, and whether ICANN could be evolving in that direction with the apparently growing role of the GAC – which would lend weight to a more realist theoretical interpretation. On the other hand, though, again I get the feeling that this could be issue specific, since you suggest that the GAC isn't particularly interested in gTLD issues – so my initial feeling that ICANN is evolving towards an intergovernmentalist model could be far too simplistic / only true in certain issue areas?

On a (sort of) related note, I was actually wondering just how representatives are chosen for the GNSO constituencies? If, for example, the business constituency is supposed to represent the interests of 'business' worldwide (obviously a pretty impossible task anyway), it would suggest there should be some mechanism for large and small corporate entities worldwide to have some voice in choosing their representatives. I suspect there is no such arrangement?

In terms of the interplay between IDN issues and wider political forces (such as frustration with the US government), I can see me having something of a dilemma on how to handle this when I come to write up. On the one hand, to keep the PhD from becoming too broad and unfocused, I want to focus specifically on ICANN without getting too deeply involved in wider political issues, but I'm also coming to appreciate that ICANN politics can't really be studied in isolation from the broader political arena. I'm not quite sure how I'll handle that at this stage, but it's clearly an important thing to keep in mind.

Anyway, thanks again.

Best regards,

Paul

\*\*\*\*\*

RE: PhD research on IDNs

John C Klensin [klensin@jck.com]

You replied on 26/08/2009 17:31.

Sent: 17 July 2009 17:16

To:

P.A.White U9502832

--On Thursday, July 16, 2009 19:49 +0100 "P.A.White U9502832"

<H9502832@hud.ac.uk> wrote:

> Hello John,

>

> Thanks, that's very illuminating stuff.

> I'm currently assembling my data on IDNs into some sort of

> coherent writeup, so I expect further questions to arise as I

> go along. I realise you're a busy man and I really

> appreciate your finding the time to help me out with this.

>

> Just a few quick thoughts for now:

>

> From what you're saying, it sounds like the principle of

> representation within ICANN doesn't apply particularly well

> in practice, at least not if we're talking about broader

> representation than just industry insiders and governments.

Opinions differ on this, but I don't think it is working.

> In terms of excluded groups, the biggest and most obvious ones

> that spring to mind are the ordinary users and domain name

> owners (though plainly these aren't single homogenous groups

> with one common set of interests as far as I can see).

Right. And many of the domain name owners are represented via GNSO constituencies. Of course, the largest population of domain name owners --by domain count on any given day-- are the spammers and phishers, but there is a case to be made that the registrars represent their interests rather effectively.

> I'm

- > aware of the experiment with 'At-Large' elections for the
- > ICANN Board back in the early days, and some of the reasons
- > why it was deemed a failure. I get the impression that the
- > elections were widely seen at the time as one of the main keys
- > to legitimising ICANN by transforming the organisation into
- > something akin to a global democracy (at least by some
- > idealists).

Some idealists and a bunch of folks who were happy to present themselves as representatives of the world's users, who were not consulted in the matter (in large measure because they have never heard of ICANN and wouldn't want to).

- > After the failure of the elections, the ideal of
- > making ICANN directly accountable to the global Internet-using
- > public seems to have largely fallen by the wayside? I know the
- > ALAC provides one channel for input, and that public comments
- > are usually invited at numerous stages in any policy
- > development process, but from what I've seen of the public

- > comments boards, the only people who tend to comment are
- > usually industry insiders.

Yes. And the ALAC is more of the above --some utopian idealists and a lot of folks who like the travel, fine lunches and dinners, academic reputations, attention, perceived power... or who just have too much time on their hands.

- > I'm not saying that direct accountability to the global
- > public is necessary feasible given the problems that have been
- > experienced, but what I'm wondering is whether the failure
- > of the direct democracy approach makes it more desirable for
- > governments to have a greater role in ICANN's governance,
- > since governments can at least claim to represent their
- > citizens indirectly. I'm wondering if that could be used as
- > a justification for moving towards a more traditional
- > intergovernmental approach,

certainly that argument has been made.

- > and whether ICANN could be
- > evolving in that direction with the apparently growing role of
- > the GAC – which would lend weight to a more realist
- > theoretical interpretation. On the other hand, though, again I
- > get the feeling that this could be issue specific, since you
- > suggest that the GAC isn't particularly interested in gTLD
- > issues – so my initial feeling that ICANN is evolving

- > towards an intergovernmentalist model could be far too
- > simplistic / only true in certain issue areas?

Probably.

- > On a (sort of) related note, I was actually wondering just how
- > representatives are chosen for the GNSO constituencies? If,
- > for example, the business constituency is supposed to
- > represent the interests of 'business' worldwide (obviously
- > a pretty impossible task anyway), it would suggest there
- > should be some mechanism for large and small corporate
- > entities worldwide to have some voice in choosing their
- > representatives. I suspect there is no such arrangement?

The GNSO Council representatives are chosen by the participants in the relevant constituency at ICANN. The constituencies make their own rules for who can become a member and, of course, there is a meta-rule associated with having, and being willing to invest, the resources needed to participate by attending ICANN meetings, interim constituency meetings, and any other barriers the leaders and incumbent members of the constituency choose to set up.

That has become the primary mechanism for capture: some group of people who are typically very homogeneous define themselves as a constituency and write a charter for it that, in one way or another, includes their friends and supporters and excludes

everyone else. They then give the constituency a sufficiently broad name and sweeping definition of who they are representing to prevent people from the same general community who disagree with them (or constitute a different point of view) from either having a significant voice in "their" constituency or forming a separate one. So we have something called a "Business Constituency" that is really the "Joe Bloggs and Friends" constituency but that, since it succeeded in being called the "Business Constituency", manages to exclude most of those "large and small corporate entities worldwide" from participation or at least from an effective vote and voice in policy development and GNSO Council representation.

That strategy is pervasive -- the so-called Non-commercial Domain Names constituency is arguably even more guilty of it than the Business one.

It may also be instructive for you to look at the new constituency proposals. Most of them are from narrow lobbying groups for specific interests -- City TLDs, non-ASCII TLDs, etc.

- > In terms of the interplay between IDN issues and wider
- > political forces (such as frustration with the US government),
- > I can see me having something of a dilemma on how to handle
- > this when I come to write up. On the one hand, to keep the PhD
- > from becoming too broad and unfocused, I want to focus
- > specifically on ICANN without getting too deeply involved in

- > wider political issues, but I'm also coming to appreciate
- > that ICANN politics can't really be studied in isolation
- > from the broader political arena.

That is correct. I hope things will get better over time, but the distinction was particularly difficult under the former US administration where "bash ICANN" was a useful, and very safe, surrogate for "bash the US Govt".

- > I'm not quite sure how
- > I'll handle that at this stage, but it's clearly an
- > important thing to keep in mind.

Yes.

best,  
john

\*\*\*\*\*

RE: PhD research on IDNs

P.A.White U9502832

Sent: 26 August 2009 17:27

To:

John C Klensin [klensin@jck.com]

Hello John,

Hope you are well. Sorry I haven't been in touch for a while, had an unplanned last-minute holiday over the last couple of weeks. Are you still over in China?

I've put together a rough draft of my IDNs chapter and wanted to run past you a very brief summary / outline of the major points of the story as I understand them (I'm aware this is a massive simplification):

- Initially, ICANN seems to have been quite slow to take any action on IDNs. The early development work and initial testbeds were set up by ccTLD registries and Verisign, with little official input from ICANN. (Maybe that says something about the weakness of the ICANN system, at least in the early days). However, these early multilingual testbeds proved the technical feasibility of IDNs and put the issue on the agenda. The Verisign testbed and the controversy it generated seems to have been the spark that motivated ICANN to begin study of the issue, principally by the IDN WG and later the IDN Committee. However, there was still no concrete policymaking at this stage.
- The publication of the IETF's IDNA standard in 2003 put pressure on ICANN to begin implementing IDNs, and this was the catalyst for the creation of the IDN Guidelines version 1.0. The initial Guidelines were created by the IDN Committee, which on the surface appeared to be a multistakeholder body, but in reality the registries were mostly responsible for producing the Guidelines. The creation of the Guidelines allowed the implementation of second-level IDNs for those registries that wished to apply to operate them. The Guidelines themselves were fairly minimalist in nature, stating that registries must: comply with RFCs 3490, 3491, and 3492; identify permissible Unicode code points and block non-compliant registrations; associate registration with one or more languages and employ language-specific registration rules (e.g., reservation of domain names associated with character variants); and provide informational resources and services in all languages for which they offer IDN registrations. Later revisions to the Guidelines restricted the mixing of visually confusable characters from different scripts in a single set of code points, due to concerns over spoofing.
- There was initial resistance from Verisign to adoption of the Guidelines. Verisign argued that ICANN had no authority to add additional rules and restrictions beyond those specified in the relevant RFCs. Verisign eventually conceded, but received (what could be interpreted as) concessions, particularly the transfer of their 'testbed' registrations to the permanent IDN environment. Although all the registries have adopted the Guidelines, both gTLD and (especially) ccTLD registries have continued to emphasise their links with local language groups and sought maximum freedom of action. In many ways ICANN's role has been more that of a co-ordinator allowing the registries to agree a minimum set of rules among themselves.
- Revision of the Guidelines (versions 2.0, 2.1 and 2.2) was carried out solely by the registries. At this stage ccTLD and gTLD registries worked collaboratively, although there

were some rumblings from some of the ccTLD registries that they should not be bound by the same rules as the gTLD registries.

- The issue of IDN TLDs came to the fore from around 2005 onwards and ultimately resulted in a split between the gTLD and ccTLD IDN tracks with the emergence of the ‘Fast Track’ for IDN ccTLDs. IDN gTLDs became part of the New gTLDs programme. The Fast Track was the result of an alliance between the CCNSO and GAC and was prompted by the likelihood of the whole process otherwise becoming indefinitely stalled due to almost insurmountable problems with some languages (sometimes technical or linguistic, but often political). Creation of language tables is a highly complex matter and requires intimate knowledge of a particular language. Particular difficulties are likely to arise when there is no agreement on how to define a language (especially for cross-border languages) and no clear or uncontested orthographic authority to produce a definitive codification for that language.
- Some commentators have asserted that the pressure for Fast Track came largely from language communities at the local level, and that the ccNSO and GAC were acting simply as conduits for advancing those interests within ICANN in a ‘bottom-up’ model. However, this view ignores other likely motives. For the cc registries, there was the prospect of acquiring additional TLDs, and for many, commercial gain. For the states represented on the GAC, despite their claims to merely be representing the claims of local language communities, IDNs were often a pawn in a wider political game, particularly in the context of perceived US hegemony over the Internet.
- The IDNs case study has revealed a quite different pattern to the policy development process compared with new gTLDs. This is partly the result of the fact that gTLDs, unlike IDNs, can be added easily using known technology, and therefore ICANN has had only public policy issues, not technical ones, to deal with when considering TLD expansion. By contrast, IDN implementation has been uncharted territory, both in terms of technology and public policy. ICANN has found itself heavily reliant on other organisations in developing IDN technology. It has relied on the IETF for a standard, ISO and the Unicode Consortium for character tables, and software developers such as Microsoft and the Mozilla Foundation to provide IDNA compatible applications. Nonetheless, as with gTLDs, it has been the public policy issues, not the technical ones, that have seemed the most difficult to solve.
- The study has shown that IDNs, like gTLDs, are very much a public policy issue, in spite of ICANN’s claim to co-ordinate technical issues only. Overall, the appearance of a multistakeholder approach to IDNs is an illusion. While a wide variety of groups have had the opportunity to have a voice through IDN workshops, public comments etc, the actual policymaking has really been the preserve of the registries. The main forces shaping IDNs

policy have been commercial (particularly the gTLD and some ccTLD registries) and political (the GAC and some of the ccTLD registries). ‘Political’ factors have been more evident here than some other policy development areas (such as new gTLDs). The GAC’s influence in IDNs, particularly with regard to the ccTLD Fast track, both gives an indication of their real priorities and shows that they are a major force in ICANN on the issues they choose to be involved in. The case study produces clues that, as far as governments are concerned, ICANN politics cannot be regarded as isolated from the wider global political arena.

As I say, I know this is a huge simplification, but is there anything I’ve fundamentally misunderstood here?

There are various other pieces of the puzzle I’m still trying to understand and interpret.

With regard to intellectual property issues, I note that, at several workshops and public comments periods, representatives of intellectual property interests have proposed measures such as sunrise periods or modification of the UDRP to give additional IP protection for IDNs. Since these were not implemented, it seems like this could be interpreted as a defeat for the intellectual property lobby, and an indication that they failed to significantly influence the IDN process? I also get the impression that the UDRP is widely regarded within ICANN as a complete solution to the intellectual property issue and that further ‘concessions’ to the IP lobby are seen as unnecessary. I want to explore this further in my next chapter, which will be specifically on the UDRP.

Turning to issues surrounding the creation of language tables, I’m struggling to get to grips with the detailed politics and complexities of all this, and how the issue is being tackled on the ground. Are the registries effectively being left to their own devices to create their own language tables, in co-ordination with whatever groups they see fit? I also came across RFC4690, (September 2006), which I understand was a framework for the discussions leading to revision of Unicode to version 5.0. I interpreted this RFC as mandating that decisions on acceptable code points would in future be made by the IETF and therefore effectively be taken out of the hands of ICANN and the registries. However, this doesn’t seem to be the case?

I’m also unsure as to the extent to which Fast Track represents a split between gTLD and ccTLD IDN policy. Are there likely to be two sets of Guidelines? Also, is it the case that only the existing ccTLD registries will get the opportunity to apply for an IDN ccTLD? If so, that seems to have implications for competition, given that IDN gTLDs look as though they could be delayed. Also, I’m wondering if there is any potential for governments to object to IDN gTLDs in ‘their’ languages being allocated to foreign companies, or are they less worried about this provided they have ‘sovereignty’ over their ccTLDs?

Looking at IDNs has also prompted some broader questions about ICANN's authority and 'confidence' in itself as an institution, and the extent to which it is propped up by the US. You mentioned that Verisign's decision to comply with the IDN Guidelines was likely more due to fear of the US courts than fear of ICANN. This suggests that ICANN's own authority was relatively weak and propped up by the US legal system rather than standing on its own. Has respect for ICANN's authority grown since that time among the registries? (I realise that this is a somewhat subjective question). I know that certain registrars have had their ICANN accreditation revoked, but I'm unsure whether ICANN can (or would be willing to) use similar sanctions against registries?

I'm aware of course that the issue of ICANN's relationship with the US is about to come to the fore again with the JPA renewal due next month. I'm intrigued to see how this will turn out. I've come across articles that suggest the Obama administration might be looking to 're-nationalise' the DNS (and that there is also pressure from a strong lobby within Congress to do this), while the EU wants to take things the opposite way – I note that the European Commission issued a statement in May advocating full ICANN privatisation under the oversight of a G12 style council of states. I'm also wondering how ICANN itself would react to any 're-nationalisation' attempt and whether we could end up seeing a standoff of some kind between ICANN and the US government. It will be fascinating to see how this is going to develop and of course it could have major implications for my work.....

Anyway, would be interested to hear your thoughts when you get a chance – I know you're a busy man.

Best regards,

Paul

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RE: PhD research on IDNs

John C Klensin [klensin@jck.com]

You replied on 08/09/2009 19:33.

Sent: 26 August 2009 21:05

To:

P.A.White U9502832

Hi. Yes, I'm still in China --leaving later today (Beijing "today"). I'll try to get back to you on this as soon as I get back but, if you don't hear from me by early next week, please remind me.

John

\*\*\*\*\*

RE: PhD research on IDNs

P.A.White U9502832

Sent: 08 September 2009 19:31

To:

John C Klensin [klensin@jck.com]

Hi John,

Hope you are well. Just wondered if you'd yet had a chance to look at the stuff I sent you the other week - you asked me to remind you if I didn't hear from you.

Best regards,

Paul

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# Appendix to Chapter 4

## **Appendix 4.1 The .xxx affair - summary**

The 2003 gTLD application round saw the beginning of the long-running saga surrounding the proposed .xxx domain. A .xxx TLD for ‘adult’ material had initially been proposed during the first new TLDs round in 2000 by ICM Registry Inc. The proposal had generated some controversy on that occasion, gaining support from some major online safety groups such as the Internet Content Rating Association<sup>1</sup> Wired Safety<sup>2</sup> and Wired Kids<sup>3</sup> on the grounds that it would make it easier for authorities and parents to police the Internet, by placing adult content under a single TLD. However, critics argued that it would legitimise pornography and make it even easier to find. The proposal was also opposed by some operators of pornographic Web sites, who felt that the domain would segregate adult content and lead to governmental regulation. If the use of .xxx names for porn was made mandatory, there would be a likelihood of legal conflicts, for example over the definition of ‘sexually explicit’ and jurisdiction.<sup>4</sup>

In the event, the .xxx proposal was not accepted as one of the seven new TLDs approved in 2000. With the announcement of a second round of new TLDs in October 2003, ICM Registry renewed its application to operate .xxx. After protracted deliberations, the Board accepted the application in principle on 1 June 2005, authorising the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms.<sup>5</sup>

The Board’s provisional approval of a .xxx TLD also brought governments into the debate, most significantly the US Department of Commerce. In August 2005, Michael Gallagher, Department of Commerce Assistant Secretary for Communications & Information, wrote to ICANN President Vint Cerf, urging ICANN to delay final approval of the contract with ICM to allow for an extensive global consultation. Gallagher stated that the DoC had received 6,000 complaints over the proposed .xxx TLD.<sup>6</sup>

The matter was taken up by the GAC in its March 2006 meeting. The subsequent GAC Communiqué stated that the ICM application was flawed, and also that several member governments were ‘emphatically opposed’ to a .xxx domain on public policy grounds.<sup>7</sup> Though the GAC did not disclose which of its members took this line, reported comments by ICANN CEO Paul Twomey suggest they included the US, UK, Denmark, Sweden, Brazil

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<sup>1</sup> Attwell, M (2005). ‘Support for .xxx’. Email from Meredith Attwell (NTIA), to Cathy Handley; Robin Layton; Suzanne Sene. 16 June 2005. Released under FOIA. Retrieved 10 September 2005, from <http://www.internetgovernance.org/pdf/xxx-foiainpage.pdf> p7

<sup>2</sup> Wired Safety (2000), . ‘xxx White Paper.’ Retrieved 10 September 2010, from [http://www.wiredsafety.org/resources/documents/xxx\\_whitepaper.doc](http://www.wiredsafety.org/resources/documents/xxx_whitepaper.doc) P29

<sup>3</sup> Attwell, M (2005). ‘Support for .xxx’. Email from Meredith Attwell (NTIA), to Cathy Handley; Robin Layton; Suzanne Sene. 16 June 2005. Released under FOIA. Retrieved 10 September 2010, from <http://www.internetgovernance.org/pdf/xxx-foiainpage.pdf> p7

<sup>4</sup> For examples of the debates, see comments posted at ICANN Public Comments Forums on .xxx and on the .xxx-icm-agreement. Available at <http://forum.icann.org/lists/xxx-icm-agreement/> and <http://forum.icann.org/lists/xxx-icm-agreement/> Accessed 10 September 2010.

<sup>5</sup> ICANN (2005). Minutes of Special Meeting of the Board. 1 June 2005. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/minutes-01jun05.htm>

<sup>6</sup> Gallagher, M.D. (2005). Letter from Michael D. Gallagher, Assistant Secretary for Communications and Information, US Department of Commerce, to Vint Cerf, Chair of ICANN Board, 15 August 2005. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>

<sup>7</sup> ICANN (2006) GAC Communiqué XXVIII - Wellington, New Zealand, 28 March 2006. Retrieved 10 September 2010, from <http://www.icann.org/en/committees/gac/communique-28mar06.pdf>

and Australia.<sup>8</sup> Besides the correspondence already noted from the US Department of Commerce, it is a matter of record that the governments of Sweden<sup>9</sup> and Australia<sup>10</sup> later went on to state their opposition to .xxx in formal correspondence with ICANN. The UK government also addressed formal correspondence to ICANN on the matter, in which it did not express outright opposition, and recognised ICANN's authority to authorise such a domain, but urged careful safeguards and compliance monitoring in the agreement with ICM.<sup>11</sup>

The .xxx proposal also generated an unprecedented amount of public comment, with over 1300 separate comments received in the public comment forums, including 946 comments against the establishment of .xxx.<sup>12</sup> These fell into two categories: comments that considered the domain would see an increase in adult content on the Internet, and those contending that there was little support for the creation of the domain amongst the sponsoring community. However, there were also comments in favour.<sup>13</sup> In addition, some 200,000 emails had been received by ICANN regarding the matter.<sup>14</sup>

On May 10 2006, the Board voted 9 to 5 to reject ICM's proposed version of the .xxx Registry Agreement.<sup>15</sup> On March 30, 2007, a revised application was rejected by the Board by nine votes to five with one abstention. The resolution stated that ICM's application and the revised agreement had failed to meet, among other things, the sponsored community criteria of the RFP specification. However, it also stated that approval of the ICM application was not appropriate in the light of the GAC's public policy concerns.<sup>16</sup>

Following the vote, ICM Registry, among other commentators, claimed that the real cause for the

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<sup>8</sup> Waters, R. (2006). 'Dispute over porn domain name veto'. Financial Times, May 12, 2006. Retrieved 10 September 2010, from <http://www.ft.com/cms/s/2/91eab4dc-e13e-11da-90ad-0000779e2340.html>

<sup>9</sup> Bjelfvenstam, J (2005). Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Paul Twomey, ICANN CEO, 23 November 2005. Retrieved 11 September 2010, from <http://www.icann.org/en/correspondence/bjelfvenstam-to-twomey-23nov05.htm>

<sup>10</sup> Coonan, H. (2007). Letter from Helen Coonan, Australian Minister for Communications, Information Technology and the Arts, to Vint Cerf, Chair of ICANN Board, 28 February 2007. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/coonan-to-cerf-28feb2007.pdf>

<sup>11</sup> Boyle, M (2006). Letter from Martin Boyle, UK Representative to GAC, to Vint Cerf, Chair of ICANN Board, 9 May 2006. Retrieved 10 September 2010, from <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>

<sup>12</sup> ICANN (2007). Quoted by John Jeffrey and Kurt Pritz at meeting of the ICANN Board. Minutes of special meeting of the Board, 13<sup>th</sup> March 2007. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/minutes-13mar07.htm>

<sup>13</sup> Ibid

<sup>14</sup> ICANN (2007). Quoted by John Jeffrey at meeting of the ICANN Board, 13<sup>th</sup> March 2007. Minutes of special meeting of the Board, 13<sup>th</sup> March 2007. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/minutes-13mar07.htm>

<sup>15</sup> ICANN (2006) Minutes of special meeting of the Board. 10 May 2006. <http://www.icann.org/en/minutes/minutes-10may06.htm>

<sup>16</sup> ICANN (2007). Transcript of special meeting of the Board. 30 March 2007. <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>

decision's reversal was political pressure from the US Government.<sup>17</sup> There is some evidence to support this charge. ICANN Board member Susan Crawford, who voted in favour of .xxx, suggested both in her blog<sup>18</sup> and in her statement at the Board meeting<sup>19</sup> that ICANN had in fact given in to governmental pressure. Other Board members, however, resisted the suggestion that their decision was swayed by governmental pressure, including Raimundo Beca, Vanda Scartezini, Demi Getshko and Alejandro Pisanty.<sup>20</sup> A spokesman for European Commissioner Viviane Reding also accused the US government of interfering in the matter<sup>21 22</sup>; however ICANN CEO Paul Twomey rejected this accusation as completely ill-founded.<sup>23</sup>

ICM subsequently made public emails (obtained under a Freedom of Information Act request) between members of the Department of Commerce, various other branches of the federal government and ICANN. ICM claimed these emails showed that the DoC was subjected in mid-2005 to intense pressure to intervene on behalf of lobbying organisations, including the Family Research Council and Focus on the Family. These included letters and emails to ICANN protesting the .xxx domain, followed by meetings between ICANN and concerned groups.<sup>24</sup> ICM argued that these documents show how the DoC's position was altered by the lobbying pressures it found itself under, and that the DoC's opposition, communicated to ICANN both informally and through formal letters, influenced the Board's decision to reverse its approval for .xxx.<sup>25</sup>

The Board's decision to reverse its previous approval for .xxx thus raised questions over the extent to which the US government continued to exert influence over ICANN policy from behind the scenes; though the objections raised by the GAC and in public comment mean that the US government was far from the only actor applying pressure on ICANN over the issue. Whether or not the DoC's intervention influenced the outcome, it seems clear from discussion at the Board meeting and the resultant Board resolution, that pressure from the GAC played a key part in deciding the matter. The

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<sup>17</sup> Geist, M (2006). 'The rights and wrongs of .xxx'. BBC News, 22 May 2006. Retrieved 11 September 2010, from <http://news.bbc.co.uk/1/hi/technology/5003920.stm>

<sup>18</sup> Crawford, S (2006). 'Why I voted for .xxx'. Retrieved 10 September 2010, from [http://www.circleid.com/posts/why\\_i\\_voted\\_for\\_xxx/](http://www.circleid.com/posts/why_i_voted_for_xxx/)

<sup>19</sup> ICANN (2007). Transcript of regular meeting of the Board. 30 March 2007. Retrieved 10 September 2010, from <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>

<sup>20</sup> Ibid

<sup>21</sup> Waters, R. (2006). 'Dispute over porn domain name veto', Financial Times, May 12, 2006. Retrieved 10 September 2010, from <http://www.ft.com/cms/s/2/91eab4dc-e13e-11da-90ad-0000779e2340.html>

<sup>22</sup> Geist, M (2006). 'The rights and wrongs of .xxx'. BBC News, 22 May 2006. Retrieved 11 September 2010, from <http://news.bbc.co.uk/1/hi/technology/5003920.stm>

<sup>23</sup> Waters, R. (2006). 'Dispute over porn domain name veto', Financial Times, May 12, 2006. Retrieved 10 September 2010, from <http://www.ft.com/cms/s/2/91eab4dc-e13e-11da-90ad-0000779e2340.html>

<sup>24</sup> Documents released by ICM Registry pertaining to .xxx TLD application, obtained from US Department of Commerce under Freedom of Information Act, May 19, 2006. Retrieved 10 September 2010, from <http://www.internetgovernance.org/pdf/xxx-foiapage.pdf>

<sup>25</sup> Lawley, S. (2009). Witness Statement of Stuart Lawley. In the matter of an independent review process before the International Centre for Dispute Resolution. ICM Registry, LLC, v Internet Corporation for Assigned Names and Numbers. 14th June 2009. ICDR Case no. 50 117 T 00224 08. Retrieved 10 September 2010, from <http://www.icmregistry.com/irp/StuartLawley.pdf> P37

specific opposition of the Brazilian, Australian and US governments was also discussed at the meeting.<sup>26</sup>

However, this was far from being the end of the matter. Following the decision, ICM exercised its right under Article IV, Section 3 of the ICANN Bylaws<sup>27</sup> to request arbitration of the decision by an Independent Review Process. The International Center for Dispute Resolution acted as arbiter, with the case being considered by a panel consisting of three retired judges. The panel delivered its verdict in February 2010, ruling in favour of ICM, on the grounds that application for the .xxx sTLD met the required sponsorship criteria, and that the Board's reconsideration of that finding was 'not consistent with the application of neutral, objective and fair documented policy'.<sup>28</sup>

In June 2010, the Board passed a resolution accepting the review panel's verdict and directing ICANN staff to proceed into draft contract negotiations with ICM for a revised .xxx Registry Agreement.<sup>29</sup> On 5 August 2010, the Board directed staff, upon receipt of ICM's application documentation, to post ICM's supporting documents and proposed registry agreement for public comment.<sup>30</sup> Once again, the public comments period generated significant controversy, with both opposition and support being expressed.<sup>31</sup> Again, critics included those opposed to pornography on moral and religious grounds, as well as some adult webmasters who feared that the .xxx domain might be made mandatory for their sites.

On 16 March 2011, the GAC forwarded a letter of the Board stating that there was no active GAC support for the ICM application and that some GAC members opposed it on public policy grounds.<sup>32</sup> It also stated that there had been no clarification regarding the GAC's concerns as to whether the application met sponsorship criteria; and expressed concern that ICANN could be moving into a content regulation role.<sup>33</sup> On 17 March, the Board and the GAC completed a formal Bylaws consultation on the matter; the details of this meeting are not on public record.

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<sup>26</sup> ICANN (2007). Transcript of regular meeting of the Board. 30 March 2007. Retrieved 10 September 2010, from <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>

<sup>27</sup> Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 20 March 2009. Retrieved 10 September 2010, from <http://www.icann.org/en/general/archive-bylaws/bylaws-20mar09.htm>

<sup>28</sup> IDCR (2010). Panel Declaration, ICDR Case No. 50 117 T 00224 08. In the Matter of an Independent Review Process: ICM REGISTRY, LLC, Claimant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN"). 19 February 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>

<sup>29</sup> ICANN (2010). Adopted Board Resolutions. 25 June 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#5>

<sup>30</sup> ICANN (2010). Adopted Board Resolutions, 5 August 2010. Retrieved 10 September 2010, from <http://www.icann.org/en/minutes/resolutions-05aug10-en.htm#9>.

<sup>31</sup> For examples, see ICANN Public Comments Forum on ..xxx –Revised ICM Agreement. Retrieved 10 September 2010, from <http://forum.icann.org/lists/xxx-revised-icm-agreement/>

<sup>32</sup> Dryden, H (2011). Letter from Heather Dryden, Chair, GAC, to Peter Dengate Thrush, Chair, ICANN Board of Directors. 16 March 2011. Retrieved August 5 2011, from <https://gacweb.icann.org/download/attachments/1540116/20110316+GAC+Advice+on+.xxx.pdf?version=2&modificationDate=1312469527000>

<sup>33</sup> Ibid

On March 18, 2011, ICANN's board approved the execution of the registry agreement with ICM for the .xxx sponsored top level domain. The resolution was passed by nine votes to four, with three abstentions.<sup>34</sup> As the Board and GAC had not reached agreement on all aspects of the application, the Board also set forth a Rationale providing reasons why the GAC advice was not followed, pursuant to ICANN Bylaws, Article XI, Section 2.k.<sup>35</sup>

Overall, the .xxx affair has, in its own right, proved an interesting case study of various aspects of the ICANN regime. It has raised questions over the extent of US governmental influence in ICANN policymaking; it has seen the appeals process invoked under Article IV, Section 3 of the ICANN Bylaws; and it has ultimately resulted in one of the rare occasions where the Board has been prepared to reject GAC advice.

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<sup>34</sup> ICANN (2011). Minutes of Regular Meeting of the Board. 18 March 2011. Retrieved August 5 2011, from <http://www.icann.org/en/minutes/minutes-18mar11-en.htm>

<sup>35</sup> Ibid

## **Appendix 4.2: GNSO New gTLDs Committee – Membership**

(Source: P9, GNSO new TLDs Committee Introduction of New Generic Top-Level Domains Part B: Final Report. 18 June 2007. Retrieved 5 September 2010, from <http://gns0.icann.org/drafts/pdp-dec05-fr-b-18jun07.pdf>)

### Commercial and Business Users' Constituency

Marilyn Cade

Philip Sheppard

Alistair Dixon

Grant Forsyth

### ISPs Constituency

Tony Holmes

Tony Harris

Greg Ruth

Mark McFadden

### Intellectual Property Constituency

Lucy Nichols

Ute Decker

Kiyoshi Tsuru

Steve Metalitz

Maggie Mansourkia

### Non-Commercial Users Constituency

Robin Gross

Mawaki Chango

Norbert Klein

Registrars Constituency

Bruce Tonkin (Chair)

Ross Rader

Tom Keller

Registries Constituency

Cary Karp

Ken Stubbs

June Seo

Nominating Committee

Avri Doria

Sophia Bekele

Maureen Cubberley

ALAC

Bret Fausett

GAC

Suzanne Sene

Observers

Marcus Faure

Chuck Gomes

Werner Staub

Ray Fassett

Elmar Knipp

David Maher

Kristina Rosette

Matthew Embrescia

Danny Younger

Dirk Kirschenowski

Alexander Schubert

Jon Nevett

Philip Grabensee

M. M-Schönherr

Becky Burr

Keith Drazek

Sebastien Bachelot

## **Appendix 4.3: GAC Principles regarding New gTLDs. March 28, 2007**

(Source: Retrieved 26 September 2011, from [https://gacweb.icann.org/download/attachments/1540128/gTLD\\_principles\\_0.pdf?version=1&modificationDate=1312358178000](https://gacweb.icann.org/download/attachments/1540128/gTLD_principles_0.pdf?version=1&modificationDate=1312358178000))

### **GAC PRINCIPLES REGARDING NEW gTLDs**

Presented by the Governmental Advisory Committee

March 28, 2007

#### **1. Preamble**

1.1 The purpose of this document is to identify a set of general public policy principles related to the introduction, delegation and operation of new generic top level domains (gTLDs). They are intended to inform the ICANN Board of the views of the GAC regarding public policy issues concerning new gTLDs and to respond to the provisions of the World Summit on the Information Society (WSIS) process, in particular "the need for farther development of and strengthened cooperation among, stakeholders for public policies for generic top-level domains (gTLDs) " and those related to the management of Internet resources and enunciated in the Geneva and Tunis phases of the WSIS.

1.2 These principles shall not prejudice the application of the principle of national sovereignty. The GAC has previously adopted the general principle that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest. The WSIS Declaration of December 2003 also states that "policy authority for Internet—related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues."

1.3 A gTLD is a top level domain which is not based on the ISO 3166 two—letter country code list. For the purposes and scope of this document, new gTLDs are defined as any gTLDs added to the Top Level Domain name space after the date of the adoption of these principles by the GAC.

1.4 In setting out the following principles, the GAC recalls ICANN's stated core values as set out in its by-laws:

a. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

b. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN Cs activities to those matters within ICANN s mission requiring

or significantly benefiting from global coordination.

c. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

d. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision—making.

e. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

f. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

g. Employing open and transparent policy development mechanisms that i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

h. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

i. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

j. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

k. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

## **2. Public Policy Aspects related to new gTLDs**

When considering the introduction, delegation and operation of new gTLDs, the following public policy principles need to be respected:

### *Introduction of new gTLDs*

2.1 New gTLDs should respect:

a) The provisions of the Universal Declaration of Human Rights which seek to affirm 'fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women'.

b) The sensitivities regarding terms with national, cultural, geographic and religious significance.

2.2 ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.

2.3 The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter—governmental organizations (IGOs).

2.4 In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced.

### *Delegation of new gTLDs*

2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non—discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.

2.7 Applicant registries for new gTLDs should pledge to:

a) Adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD.

b) Ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.

2.8 Applicants should publicly document any support they claim to enjoy from specific communities.

2.9 Applicants should identify how they will limit the need for defensive registrations and minimise cyber—squatting that can result from bad—faith registrations and other abuses of the registration system

#### *Operation of new gTLDs*

2.10 A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity and validity of registry information.

2.11 ICANN and a new gTLD operator/registry should establish clear continuity plans for maintaining the resolution of names in the DNS in the event of registry failure. These plans should be established in coordination with any contingency measures adopted for ICANN as a whole.

2.12 ICANN should continue to ensure that registrants and registrars in new gTLDs have access to an independent appeals process in relation to registry decisions related to pricing changes, renewal procedures, service levels, or the unilateral and significant change of contract conditions.

2.13 ICANN should ensure that any material changes to the new gTLD operations, policies or contract obligations be made in an open and transparent manner allowing for adequate public comment.

2.14 The GAC WHOIS principles are relevant to new gTLDs.

### **3. Implementation of these Public Policy Principles**

3.1 The GAC recalls Article XI, section 2, no. 1 h) of the ICANN Bylaws, which state that the ICANN Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues. Insofar, therefore, as these principles provide guidance on GAC views on the implementation of new gTLDs, they are not intended to substitute for the normal requirement for the ICANN Board to notify the GAC of any proposals for new gTLDs which raise public policy issues.

3.2 ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the interpretation of these principles.

3.3 If individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them.

3.4 The evaluation procedures and criteria for introduction, delegation and operation of new TLDs should be developed and implemented with the participation of all stakeholders.

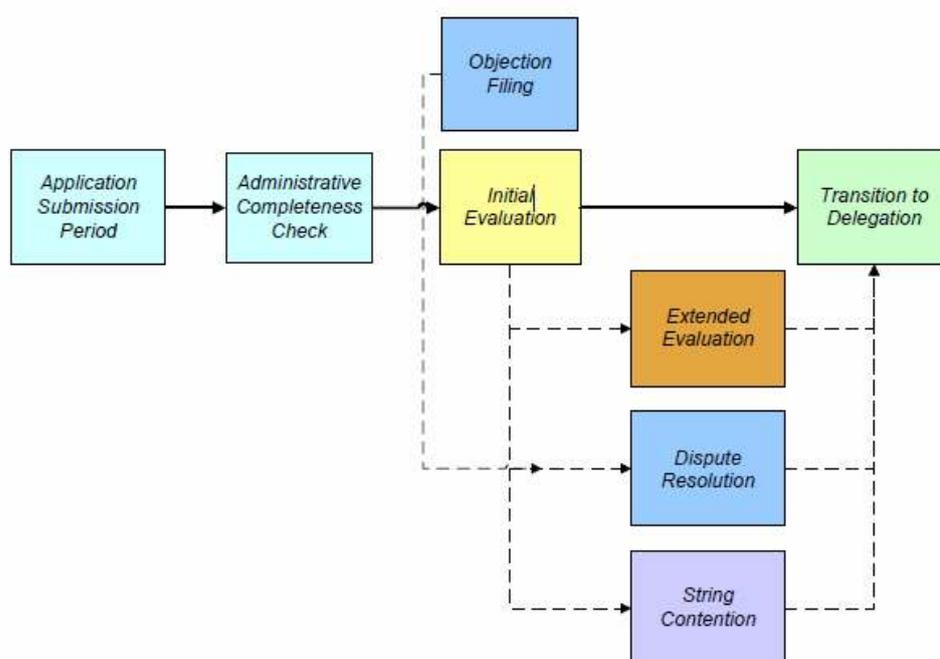
*NB. The public policy priorities for GAC members in relation to the introduction of Internationalised Domain Name TLDs (IDN TLDs) will be addressed separately by the GAC.*

#### **Appendix 4.4 Draft Application process for New gTLDs (as set out in Draft Applicant Guidebook version 1)**

(Source: ICANN (2008). PP 1.1-1.23, New gTLD Program. Draft Applicant Guidebook (Draft RFP). 24th October 2008. Retrieved 25 September 2011, from <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>)

Applications will be submitted in rounds or application submission periods. Applications are to be submitted electronically through ICANN's online application system. An evaluation fee of \$185,000 is payable on submission.

Once submitted to ICANN, the application will undergo several stages in processing:



The administrative completeness check is intended to ensure all required information and documentation have been submitted as well as fees paid. This will be followed by an initial evaluation, including string reviews (concerning the applied-for gTLD string); and applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Panels of 'independent evaluators' will perform these reviews (no information given on how these panellists will be selected). The string review will check the applied-for TLD name (string) to ascertain whether the applied-for gTLD string is similar to others and would cause user confusion; whether the applied-for gTLD string might disrupt DNS security or stability; and whether requisite government approval is given in the case of certain geographical names. The applicant review focuses on whether the

applicant has the requisite technical and financial capability; and whether the registry services offered by the applicant might adversely affect DNS security or stability.

Formal objections to applications can be filed on any of four enumerated grounds by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications. Objectors will file directly with dispute resolution service providers (DRSPs). The objection filing phase will close following the end of the Initial Evaluation period. Objections that have been filed during the objection filing phase will be addressed in the dispute resolution phase.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for one additional round of questions and answers between the applicant and evaluators to clarify information contained in the application.

Dispute resolution applies only to applicants that are the subject of a formal objection. Dispute resolution service providers (DSRPs) provide the fora to adjudicate the proceedings based on the subject matter and the needed expertise. As a result of the proceeding, either the applicant will prevail (in which case the application can proceed to the next stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). A fee will be levied to file a dispute resolution proceeding, estimated to be between \$1000 - \$5000 per party per proceeding. A further fee will be payable to the applicable dispute resolution service provider in accordance with that provider's procedures and schedule of costs. ICANN estimates that the total cost of a proceeding may be anything up to \$122,000.

String contention applies only when there is more than one qualified applicant for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are deemed to be so similar that they create a probability of detrimental user confusion if more than one is delegated. ICANN will resolve cases of string contention either through comparative evaluation or through an 'alternative mechanism for efficient resolution of string contention' (not specified). Applicants prevailing in a string contention resolution procedure will proceed toward delegation of applied-for gTLD strings. A fee (amount unspecified) is payable to the provider appointed to handle comparative evaluations, in the event that the applicant participates in a comparative evaluation.

Applicants that successfully complete all relevant stages are required to carry out a series of concluding steps before delegation of the applied-for gTLD string into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application. Following execution of a registry agreement, the prospective registry operator must complete technical setup and satisfactory performance on technical checks before delegation of the gTLD into the root zone. An annual renewal fee will be levied on each new registry.

## **Appendix 4.5: Summary of initial GNSO Constituency statements on New gTLDs.**

(For original documents, see ‘Input received on the policy development process on new gTLDs’, available at <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>. Accessed 12 July 2011.)

### Term of Reference 1: Whether to introduce new TLDs

None of the constituencies opposed outright the principle of adding further gTLDs to the root. However, the BC<sup>36</sup> and IPC<sup>37</sup> stated a preference that new gTLDs be limited to sponsored and IDN TLDs, while the ISPCP also stated that any new TLDs should be sponsored.<sup>38</sup>

Some constituencies showed a certain amount of caution about the programme at this point. The BC advocated further analysis on the need and demand for new TLDs, including evaluation of the previous rounds of gTLD introduction<sup>39</sup>, while the IPC claimed there was no evidence to substantiate a pressing need for new gTLDs and pointed to statistics suggesting 80% of registrations in the previously introduced new open gTLDs were defensive registrations.<sup>40</sup> The IPC<sup>41</sup> further recommended that any new gTLD programme be carried out in a slow and controlled manner, while the Registrars<sup>42</sup> advocated an upper limit on the total amount of TLDs to be introduced (though they still envisaged a programme that might result in hundreds or possibly thousands of new TLDs, but not tens of thousands or millions). The Registries were strongly in favour of new gTLDs, arguing that the previous application rounds had adequately validated that there was ample demand to operate a TLD.<sup>43</sup> The NCUC was also strongly in favour of new gTLDs.<sup>44</sup>

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<sup>36</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P1

<sup>37</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> PP 2-4

<sup>38</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>39</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P2

<sup>40</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P1

<sup>41</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P2

<sup>42</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> PP2-3

<sup>43</sup> ICANN (2006). gTLD Registry Constituency Comments regarding terms of reference for new gTLDs.30 January 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P3

<sup>44</sup> ICANN (2006). Noncommercial Constituency comments submitted to the GNSO in response to the call for comments on the terms of reference for new gTLDs. January 31 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ncuc-01feb06.pdf>

A related issue concerned whether new TLD introductions should take place in ‘rounds’ as in the past, or on a continuing basis with no fixed application windows. The ISPCP<sup>45</sup> and the Registrars<sup>46</sup> favoured a rounds-based approach while the registries favoured a continuous application process. The BC<sup>47</sup>, IPC<sup>48</sup> and ISPCP<sup>49</sup> all recognised that there was a growing need and demand for IDN TLDs.

#### Term of Reference 2: Selection criteria for new TLDs

With regard to selection criteria, the BC<sup>50</sup>, ISPCP<sup>51</sup> and the IPC<sup>52</sup> all recommended that any new TLDs should be clearly differentiated from existing TLDs rather than trying to duplicate what already existed, and the BC<sup>53</sup> cautioned that strings should not be accepted that were confusingly similar to existing TLDs. The NCUC, however, argued that ICANN's only role in the acceptance process should be to determine whether a gTLD application meets the minimal technical and operational criteria.<sup>54</sup> The Registries similarly stated that selection criteria should be consistent with ICANN's ‘limited technical coordination mission’, but also stated that they should encourage differentiation.<sup>55</sup> The Registrars advocated a move away from ‘generic TLDs with no purpose’ to ‘chartered’ TLDs, but opposed regional specificity in proposals.<sup>56</sup> The BC<sup>57</sup> and ISPCP<sup>58</sup> warned of a need to guard against

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<sup>45</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>46</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> P4

<sup>47</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P1

<sup>48</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P4

<sup>49</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>50</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P5

<sup>51</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>52</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P2

<sup>53</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P5

<sup>54</sup> ICANN (2006). Noncommercial Constituency comments submitted to the GNSO in response to the call for comments on the terms of reference for new gTLDs. January 31 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ncuc-01feb06.pdf> P3

<sup>55</sup> ICANN (2006). gTLD Registry Constituency Comments regarding terms of reference for new gTLDs.30 January 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P3

<sup>56</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> PP2-3

creating opportunities for ‘bad faith entities’ (such as cybersquatters or fraudsters) to misuse TLDs. The BC<sup>59</sup> and IPC<sup>60</sup> advocated that applicants for new TLDs should be required to provide documentation of sufficient financial and administrative resources to ensure the stable operation of the TLD. The BC also recommended that applicants for ‘community’ TLDs should have ‘broad and documented support from the community who would register in the new domain space’<sup>61</sup>, while the registrars stated that a ‘demonstration of community interest’ would be sufficient with no need for ‘proven support’ of the relevant community.<sup>62</sup>

### Term of Reference 3: Allocation criteria for new TLDs

On the question of allocation methods, various constituencies differed significantly. All constituencies stated need for a contention resolution mechanism, but differed on what that should be. The BC<sup>63</sup> & IPC<sup>64</sup> favoured comparative evaluations; the NCUC<sup>65</sup> favoured lotteries or auctions; the Registrars<sup>66</sup> favoured mixture of ballots, auctions and lottery; while the ISPCP<sup>67</sup> proposed that domain names for single companies should be auctioned, and those involving general and/or noncommercial communities should be distributed by lottery. The Registries<sup>68</sup> did not specify a preference for a particular method, except to say that comparative evaluation of applications should be minimised and only in cases where applicants propose duplicate or confusingly similar TLDs should special

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<sup>57</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P5

<sup>58</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>59</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P6

<sup>60</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> P3

<sup>61</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P6

<sup>62</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> P3

<sup>63</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P3

<sup>64</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> PP4-5

<sup>65</sup> ICANN (2006). Noncommercial Constituency comments submitted to the GNSO in response to the call for comments on the terms of reference for new gTLDs. January 31 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ncuc-01feb06.pdf> P4

<sup>66</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> P4

<sup>67</sup> ICANN (2006). ISPCP Position on New gTLD Expansion. 1 February 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ispcp-01feb06.txt> P1

<sup>68</sup> ICANN (2006). gTLD Registry Constituency Comments regarding terms of reference for new gTLDs.30 January 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P6

allocation methods come into play. The Registrars and BC also differed over the issue of application fees to run a TLD, with the Registrars<sup>69</sup> advocating large application fees to ensure the financial capability of the applicant and the BC<sup>70</sup> wishing to keep application fees as low as possible to avoid stifling competition.

#### Term of Reference 4: Contractual conditions for new TLD operators.

On the issue of contractual conditions, the NCUC<sup>71</sup>, the Registries<sup>72</sup> and the Registrars<sup>73</sup> advocated a single standardised contract for all new registries. The IPC<sup>74</sup> argued for strong intellectual property protection mechanisms, and the IPC<sup>75</sup> and the Registrars<sup>76</sup> both favoured a strong WHOIS model. The BC advocated contractual conditions that would ensure ‘fair’ treatment and equal obligations among registries, and also limit the ability of registries to extend their monopoly.<sup>77</sup> The ISPCP made no specific comments on contractual conditions.

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<sup>69</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> P3

<sup>70</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P3

<sup>71</sup> ICANN (2006). Noncommercial Constituency comments submitted to the GNSO in response to the call for comments on the terms of reference for new gTLDs. January 31 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ncuc-01feb06.pdf> P5

<sup>72</sup> <http://gns0.icann.org/issues/new-gtlds/gtld-registry-constituency-01feb06.pdf> P8

<sup>73</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> PP4-5

<sup>74</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> PP5-6

<sup>75</sup> ICANN (2006). Comments of the Intellectual Property Constituency: Terms of Reference for New gTLDs. January 31, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/ipc-01feb06.pdf> PP5-6

<sup>76</sup> ICANN (2006). Registrar Statement on GNSO New gTLD Terms of Reference. January 31, 2006. Revised March 2, 2006. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/registrars-02mar06.pdf> PP4-5

<sup>77</sup> ICANN (2006). Business Constituency Position: The 2006 GNSO policy development process for new generic top-level domain names. Retrieved 15 September 2011, from <http://gns0.icann.org/issues/new-gtlds/CBUC-09mar06.pdf> P4

**Appendix 4.6: Comparison between recommendations of GNSO Final Report – Introduction of New Generic Top-Level Domains<sup>78</sup> and Initial Constituency Statements<sup>79</sup>**

Principles

<b>Principle (Final Report)</b>	<b>Proposed by (initial constituency statements of)</b>	<b>Opposed by (initial constituency statements of)</b>
A New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.	All constituencies favoured some form of new TLD programme. Registries and NCUC spoke of the need for order and predictability	BC supported all new gTLDs being IDN TLDs or sTLDs at this time. IPC also wanted focus to be on sTLDs with strict controls, and IDN TLDs. ISPCP also said any new TLD should be sponsored.
B Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.	Need for IDN TLDs expressed by Business Constituency, Registries, IPC, ISPCP	
C The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.	BC, IPC noted demand for IDN TLDs. Registries, BC, IPC, Registrars stated that new TLDs could increase competition. ISPCP, BC, IPC, NCUC emphasised need for new TLDs to be differentiated from existing ones. Registries also believed new TLDs would add market differentiation.	IPC questioned whether demand for new ASCII TLDs had been demonstrated. BC also advocated further study of the need for new TLDs.  ISPCP felt that competition was already flourishing, but that new differentiated TLDs would add value.

<sup>78</sup> ICANN (2007). GNSO Final Report: Introduction of New Generic Top-Level Domains. Part A. 8 August 2007. Retrieved 14 July 2010, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>

<sup>79</sup> ICANN (2006). 'Input received on the policy development process on new gTLDs'. Retrieved 15 July 2010, from <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

<p>D A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.</p>	<p>BC NCUC Registries Registrars</p>	
<p>E A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN's registry agreement.</p>	<p>BC, IPC stated need to ensure applicants had sufficient financial and administrative resources to run a gTLD</p>	
<p>F A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.</p>	<p>BC IPC NCUC Registries Registrars</p>	
<p>G The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.</p>	<p>Not directly stated in constituency submissions</p>	

Recommendations

<b>Recommendation</b>	<b>Proposed by (initial constituency statements of)</b>	<b>Opposed by (initial constituency statements of)</b>
<p>1 ICANN must implement a process that allows the introduction of new top-level domains.</p> <p>The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.</p> <p>All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.</p>	<p>All constituencies favoured some form of new TLD programme.</p> <p>All suggested a set of objective criteria to be established prior to the start of the process.</p> <p>NCUC and IPC emphasised need for transparency and fairness. Registries emphasised need for predictability.</p>	
<p>2 Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.</p>	<p>Registries, ISPCP and BC stated that strings confusingly similar to existing ones should be avoided.</p> <p>Registries argued that, in the event of confusingly similar strings being proposed, special allocation procedures should come into play.</p>	

<p>3 Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.</p> <p>Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).</p>	<p>BC, IPC, Registrars, ISPCP</p>	
<p>4 Strings must not cause any technical instability.</p>	<p>No constituency statement mentioned possibility of technical instability caused by the string itself; however all talked of the need for technical stability</p>	

<p>5 Strings must not be a Reserved Word</p>	<p>Not directly stated in constituency submissions; however this was part of past application criteria, which BC and IPC argued should form the basis of future application criteria</p>	
<p>6* Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.</p> <p>Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).</p>	<p>Not directly stated in constituency submissions</p>	

7 Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.	BC NCUC Registries Registrars	
8 Applicants must be able to demonstrate their financial and organisational operational capability.	Registrars argued that process should seek large application fees to ensure registries can meet financial requirements. BC stated that documented financial capability must be a requirement.	
9 There must be a clear and pre-published application process using objective and measurable criteria.	All constituency statements	
10 There must be a base contract provided to applicants at the beginning of the application process.	NCUC, Registries, Registrars  Registrars stated that there was a great need for standardisation of contracts.	
11 [Replaced with Recommendation 20 and Implementation Guideline P and inserted into Term of Reference 3 Allocation Methods section]		
12 Dispute resolution and challenge processes must be established prior to the start of the process.	IPC ISPCP NCUC Registries Registrars	

13	Applications must initially be assessed in rounds until the scale of demand is clear.	ISPCP, Registrars	Registries argued that the process should be ongoing.
14	The initial registry agreement term must be of a commercially reasonable length.	BC advocated five-yearly review.	
15	There must be renewal expectancy.	Registries argued for presumptive right of renewal. BC advocated five-yearly review.	BC advocated five-yearly review based on the question “should the existing registry continue to run the gTLD?”
16	Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.	Appeared to be suggested by BC, Registries, NCUC	
7	A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.	Registries stated that a compliance process needed to be established but did not mention specific sanctions. BC mentioned similar.	
18	If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.	Registries	

<p>19 Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.</p>	<p>Not directly stated in constituency submissions</p>	
<p>20* An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.</p>	<p>BC, IPC</p>	<p>Registrars said there should be a demonstration of community interest but no need for ‘proven support’ of the community</p>

Implementation guidelines

<b>Guideline</b>	<b>Proposed by (initial constituency statements of)</b>	<b>Opposed by (initial constituency statements of)</b>
<p>IG A The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.</p>	<p>Not directly stated in constituency submissions, but all submissions proposed to put a well-defined process in place before accepting admissions</p>	
<p>IG B Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants.</p>	<p>The BC ‘supports a managed approach to allocation that has a cost-plus recovery approach on the fees charged to the applicants and urges that costs are kept as low as possible so not to divert funds from start-up innovation.’ Did not specifically mention differentiated fees.</p>	<p>Registrars argued that the process should seek large application fees as the norm to ensure registries can meet financial requirements.</p>
<p>IG C ICANN will provide frequent communications with applicants and the public including comment forums.</p>	<p>BC recommended refinement of the public portion of the consultation.</p>	
<p>IG D A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.</p>	<p>Rounds proposed by ISPCP, Registrars. Ongoing application process proposed by Registries.</p>	

<p>IG E The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.</p>	<p>Not directly stated in constituency submissions</p>	
<p>IG F* If there is contention for strings, applicants may[29]:</p> <p>i) resolve contention between them within a pre-established timeframe</p> <p>ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;</p> <p>iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.</p>	<p>All constituencies stated need for a contention resolution mechanism:</p> <p>-BC &amp; IPC favoured comparative evaluations</p> <p>-Registries did not specify a preference</p> <p>-NCUC favoured ballots</p> <p>-Registrars favoured mixture of ballots, auctions and lottery</p> <p>-ISPCP proposed that domain names for single companies should be auctioned, and those involving general and/or noncommercial communities should be distributed by lottery.</p>	

<p>IG H* Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:</p> <p>(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and</p> <p>(ii) a formal objection process is initiated.</p> <p>Under these exceptions, Staff Evaluators will devise criteria and procedures to investigate the claim.</p>	<p>IPC, Registries asserted that there should be demonstrable and documented support from the relevant community</p>	
<p>IG H External dispute providers will give decisions on objections.</p>	<p>Not directly stated in constituency submissions</p>	
<p>IG I An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.</p>	<p>Not directly stated in constituency submissions</p>	
<p>IG J The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.</p>	<p>Not directly stated in constituency submissions</p>	

<p>IG K ICANN should take a consistent approach to the establishment of registry fees.</p>	<p>The BC ‘supports a managed approach to allocation that has a cost-plus recovery approach on the fees charged to the applicants and urges that costs are kept as low as possible so not to divert funds from start-up innovation.’</p> <p>Registrars seemed to suggest consistently high fees to ensure financial capability of applicant</p>	
<p>IG L The use of personal data must be limited to the purpose for which it is collected.</p>	<p>Not directly stated in constituency submissions</p>	
<p>IG M ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way that no longer requires all participants in the conversation to be able to read and write English.</p>	<p>Registries stated need for local language support</p>	
<p>IG N ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.</p>		<p>The ISPCP argued that “Regional specificity in proposals is inappropriate. Assistance for developing countries and other special interest programs can be accommodated through other means.”</p>

<p>IG O ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.</p>	<p>Registries stated need for local language support</p>	
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<b>Guideline</b>	<b>Proposed by (initial constituency statements of)</b>	<b>Opposed by (initial constituency statements of)</b>
<p>IG P The following process, definitions and guidelines refer to Recommendation 20.</p> <p>Process</p> <p>Opposition must be objection based.</p> <p>Determination will be made by a dispute resolution panel constituted for the purpose.</p> <p>The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).</p> <p>Guidelines</p> <p>The task of the panel is the determination of substantial opposition.</p>	<p>Not directly stated in constituency submissions</p>	

#### **Appendix 4.7 Significant outstanding points of contention between GNSO Constituencies re. New gTLDs Policy (June 2007)**

(As expressed in Constituency Impact Statements included in GNSO New TLDs Committee Final Report on the Introduction of New Generic Top-Level Domains, Part B).

The IPC continued to express reservations on the very principle of a new gTLDs programme, arguing there was little empirical evidence that the introduction of new gTLDs had, in fact, promoted competition, or added to consumer choice or market differentiation, and warning that the addition of new gTLDs will likely result in numerous defensive registrations of otherwise unnecessary domain names by trademark owners.<sup>80</sup> It went on to reiterate that many of these concerns may be minimized by limiting any new gTLDs to those that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with the purposes of a chartered or sponsored TLD.<sup>81</sup>

While the BC did not express opposition to the principle of new gTLDs in overt terms, it warned that a new gTLDs programme had the potential to produce either beneficial effects ('healthy competition and good faith') or negative ones ('increased opportunity for abusive competitive practises and fraud').<sup>82</sup> It went on to recommend that measures be taken to control abusive competitive practices as well as opportunities for consumer and business fraud such as cybersquatting, typo-squatting, phishing and other forms of bad faith activity, including: graduated sanctions for contract compliance by Registries and Registrars; avoiding confusingly similar domain names; avoiding infringement of third party prior rights especially trade mark rights; clear, quick and low-cost procedures for dispute resolution and the removal of bad faith registrations; measures to prevent abuse of personal data or other commercially-valuable data.<sup>83</sup>

The ISPCP opposed the proposal to offer reduced application fees for some applicants, arguing that such a policy 'paves the way for hasty, last minute me-too applications, that have not really developed a solid project, and are simply trying their luck in getting a string'.<sup>84</sup>

The NCUC opposed the MAPO provisions contained in Recommendation 6, arguing that this went beyond ICANN's technical mandate.<sup>85</sup> It also opposed Recommendation 20, that that would allow the showing of a "substantial opposition" to entirely reject an application, arguing that this provision 'swallows up any attempt to limit string criteria to technical, operational, and financial evaluations.....violates internationally recognized freedom of

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<sup>80</sup> ICANN (2007). GNSO New TLDs Committee Final Report on the Introduction of New Generic Top-Level Domains, Part B). June 2007. Retrieved 19 July 2011, from <http://gns0.icann.org/drafts/pdp-dec05-fr-b-18jun07.pdf> PP23-24

<sup>81</sup> Ibid, PP23-24

<sup>82</sup> Ibid, P21

<sup>83</sup> Ibid, P21

<sup>84</sup> Ibid, P32

<sup>85</sup> Ibid, P35

expression guarantees and insures that no controversial string application will ever be granted.’<sup>86</sup>

The NCUC also continued to reject Recommendation 11 and an expanded role of ICANN staff and outside expert panels to evaluate string criteria that were ‘not technical, financial, nor operational’.<sup>87</sup> It also described Recommendations 2 and 3 and potentially providing overbroad protections for trademark holders.<sup>88</sup> With regard to Recommendation 5, the NCUC opposed any attempts to create lists of reserved names.<sup>89</sup>

The Registries Constituency did not express any significant opposition to the recommendations of the Final Report.<sup>90</sup> The Registrars do not appear to have provided an impact statement.

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<sup>86</sup> Ibid, P35

<sup>87</sup> Ibid, P36

<sup>88</sup> Ibid, PP36-37

<sup>89</sup> Ibid, P38

<sup>90</sup> Ibid, PP71-77

**Appendix 4.8: Comparison of GNSO constituency comments on Draft Applicant Guidebooks to policy changes in subsequent versions of the DAG**

Comparison of GNSO Constituency comments on DAG v.1 to policy changes in DAG v.2

<b>Proposal / issue</b>	<b>Raised by</b>	<b>Addressed in DAG v.2?</b>
New gTLD Annual Fees are too high.	Registrars, NCUC	Yes - Annual registry fee reduced
All fees too high	NCUC	Application fee remained at \$185,000  Estimates of dispute resolution fees unchanged  Comparative evaluation fee is now structured as a deposit and returned if criteria are met  Added credit for qualified 2000 round applicants: added refund structure; reduced annual registry fees
Clearer distinction and explanation required between an open and community based TLD.	Registrars, IPC, NCUC	Yes - DAG v2 Added clarification on community vs. open and why these terms are used; added language on intent of community-based category and under what circumstances community claims are evaluated
It should be made clear at the outset that a party filing an LRO objection is not barred from challenging in court ICANN's decision regarding the application that is objected to.	IPC	No
LRO procedure should provide the option for a three-member panel rather than a single panelist.	IPC	Yes - DAG v2 added option for more than one panelist at parties' option for legal rights objections (p68)
ICANN should consider providing an appeal procedure from decisions of the LRO panel.	IPC	No

Under current proposals, if there are multiple applications for a TLD string that will detrimentally impact a single trademark (or family of closely related marks), the mark owner must file (and pay for) a separate objection proceeding for each application, even though the evidence will be almost the same in each case. Consolidation in a single proceeding (for a single fee) should be permitted in such circumstances	IPC	No
Because multiple objections may well be filed (in some cases by the same objector) against the same application on more than one of the grounds provided for (e.g., LRO, community objection, morality/public order), problems of case management will arise. If an application is ultimately disqualified based on one ground, it may be inefficient to require parties to expend resources on a separate objection that may never be heard. ICANN should consider requiring all objections to be filed via a common portal, and empowering a case manager to sequence the consideration of various objections to a single application in order to avoid wasted effort.	IPC	No
A successful objection in the LRO procedure should have some preclusive, or at least precedential, effect on future applications for the same or a highly similar character string.	IPC	No
The DAG is ambiguous about the whether the decision of an LRO (or other dispute resolution) panel will be considered binding. On page 3-10 the decision is described as something to be “considered by ICANN in making a final decision.” However, the chart following page 3-15 suggests that a panel decision for or against an application is dispositive in the objection phase. This should be clarified.	IPC	Language altered but remains somewhat ambiguous as to whether panel decision will be considered binding: ‘The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.’ (P70)
Pre-launch mechanisms are required to prevent abusive registrations	IPC	No – but trademark protection referred to IRT as one of the ‘overarching issues’
Stronger protections are required against abusive registrations post-launch	IPC	No – but trademark protection referred to IRT as one of the ‘overarching issues’

Publication of a revised, more detailed schedule of events/milestones prior to application opening is required	IPC	No
Publication of a timeline showing each of the phases post-submission is required, for example, indicating when the Objection Period opens and closes and how that relates to Initial Evaluation	IPC	Some changes - Clarified that the objection filing period closes after Independent Evaluation results are posted (P9)
Need clarification on how expert panels will be formed, including the Geographical Names Panel and the Registry Services Technical Evaluation Panel. Need clarification as to who will sit on these panels and how their performance will be monitored.	IPC	No
Need to clarify the “Open” vs. “Community-based” question by publishing further examples of types of organizations that would fit in both categories – and then explaining the process of selection if there is string contention between Open and a Community-based applicants.	IPC	No
Need to clarify whether a business application (e.g., an application to run a gTLD for the exclusive use of a single company) could ever be categorised as a Community-based application, and if so, under what circumstances? Similarly, under what circumstances could a corporation qualify as an “established institution” with standing to pursue a Community Objection?	IPC	No – definition of a community based application altered but new definition could still potentially apply to a corporate application: “For purposes of this Applicant Guidebook, a community based gTLD is a gTLD that is operated for the benefit of a defined community consisting of a restricted population.” (P17)
Need to provide more clarity on “String Contention”: will semantic confusion (confusingly similar meanings) be a factor that the String Similarity Examiners take into consideration, or would this only occur at the objection phase? For instance, would .voyage trigger string contention with .travel?  Will the Evaluators take into consideration the purpose of an application? Is “Content Contention” of concern to ICANN? Would ICANN accept two applications with dissimilar character strings but identical purposes?	IPC	No

Auctions should not be used as a mechanism for awarding new gTLDs	IPC	Auctions confirmed as ‘method of last resort’ for resolving string contention in DAG2 (P90)
Need to examine whether an applicant who invests in the process but loses a String Contention should be afforded the opportunity of selecting (or proposing) another character string that is not part of a contention set?	IPC	No
While the draft base agreement with new registries requires that ICANN be notified of changes of ownership or control of the registry, it does not otherwise restrict the ability of a successful applicant to “flip” the registry to a buyer unvetted by ICANN, even immediately after delegation. This needs to be addressed.	IPC	No
The proposed MAPO standards open the door to unacceptable forms of content regulation by ICANN and provide the ability for a “heckler’s veto” over legitimate possible domains	NCUC	No
The recommendations for "communities" favour entrenched institutions at the expense of innovators and start-ups. There needs to be a working definition of "community" in the context of who will have standing to lodge an objection.	NCUC	No
Trademarks and domain names are not the same thing and, under existing and traditional trademark law principles, domain names neither can nor should be equated to trademarks.	NCUC	No
Issue of who has standing to object needs to be resolved	NCUC	No

<p>Term 6 of the Terms and Conditions is unacceptable and should be removed.</p> <p>(“Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application. Applicant acknowledges and accepts that applicant’s non ntitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other start-up costs and any and all profits that applicant may expect to realize from the application of a registry for the TLD.”)</p>	NCUC	No
<p>After the panel makes a decision on the objection proceedings, it is still open to ICANN to approve or deny the domain in question. It is not clear whether such discretion can be based on disagreement with the panel’s findings.</p>	NCUC	Still unclear in DAGv2

Comparison of GNSO Constituency comments on DAG v.2 to policy changes in DAG v.3

<b>Proposal / issue</b>	<b>Raised by</b>	<b>Addressed in DAG v.3</b>
The provisions that applicants must agree to release ICANN from liability for any acts or omissions in any way connected with its consideration of the application are unacceptable and should be removed.	Registries	No
ICANN’s assertion of the unilateral right to change the terms and conditions of the registry agreement is unacceptable and should be removed.	Registries	No
<p>Recommendation for the following definition of a Community-based TLD: “The term “community-based” TLD shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community. The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language.”</p>	Registries	<p>No – some changes to the definition were made but this proposed definition was not adopted.</p> <p>New definition (DAG v3 p23): For purposes of this Applicant Guidebook, a community based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. Any applicant may designate its application as community-based; however, each applicant making this designation designating its application as community-based is asked to substantiate its status as representative of the community it names in the application.</p>

<p>The following requirement as applied to IDN gTLDs should allow for exceptions in Chinese, Japanese and Korean scripts: “Policy Requirements for Generic Top-Level Domains – Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.</p>	<p>Registries</p>	<p>No – but question referred for further study</p>
<p>The continued rejection of the formation of joint ventures seems unreasonable, especially in cases where there are no material changes in applications or need for re-evaluation.</p>	<p>Registries</p>	<p>No</p>
<p>Publication required of a revised, more detailed schedule of events/milestones prior to application opening.</p>	<p>IPC</p>	<p>No</p>
<p>Publication required of a timeline showing each of the phases post-submission: for example, indicating when the Objection Period opens and closes and how that relates to Initial Evaluation</p>	<p>IPC</p>	<p>Yes</p>
<p>Publication required of the ICANN policy for evaluators, other contractors and DRSP’s, making it clear that no person or organisation supplying consultancy services to ICANN during any part of the process can be involved in an application in any way; and providing a means for applicants to learn who will be evaluating their application and to challenge them for cause shown.</p>	<p>IPC</p>	<p>No</p>
<p>Clarification required on how expert panels will be formed, including the Geographical Names Panel. Need clarification on who will sit on these panels and how their performance will be monitored.</p>	<p>IPC</p>	<p>Partially - some coverage of how panels will be formed + qualifications required. No coverage of how their performance will be monitored.</p>
<p>Publication required of a complete table of fees including details of refunds as soon as possible.</p>	<p>IPC</p>	<p>Yes</p>
<p>Clarification required of the “Open” vs. “Community-based” question by publishing further examples of types of organizations that would fit in both categories – and then explaining the process of selection if there is string contention between Open and a Community-based applicants</p>	<p>IPC</p>	<p>No</p>

<p>Auctions should be avoided as a mechanism for awarding new gTLDs</p>	<p>IPC</p>	<p>No</p>
<p>Need to examine whether applicant who invests in the process but loses a String Contention should be afforded the opportunity of selecting (or proposing) another character string that is not part of a contention set</p>	<p>IPC</p>	<p>No</p>
<p>While the draft base agreement with new registries requires that ICANN be notified of changes of ownership or control of the registry, it does not otherwise restrict the ability of a successful applicant to “flip” the registry to a buyer unvetted by ICANN, even immediately after delegation. This should be addressed.</p>	<p>IPC</p>	<p>No</p>
<p>The fees in general are exorbitant for a process that is designed to be more or less automatic and online with hardly any need for much human intervention, except for the dispute resolution, which is outsourced and separately paid for by the applicants/objectors.</p>	<p>NCUC</p>	<p>No</p>
<p>Credit of \$86000 for past failed applicants should be scrapped.</p> <p>If ICANN feels that those past applicants rightly deserve to be re-funded, then they should be refunded outright rather than given “credit” in this unrelated round.</p>	<p>NCUC</p>	<p>No (p40)</p>
<p>Section 1.2.2.1 (regarding community based names) might give rise to inconsistencies and can overlap with the category of strings considered as geographical names (2.1.1.4.1) This can create a great deal of confusion in the whole process and oppose long-standing and traditional international principles. ICANN should add a separate section in the eligibility for the community-based objection section adding “the applicant needs to demonstrate that the community is not opposing and does not contravene accepted principles of international law”.</p>	<p>NCUC</p>	<p>No</p>

<p>2.1.1.1 String Confusion Objection: The GNSO IDN Working Group ( 2 years ago ) after much discussion and debate unanimously concluded in a 100+ page report that ONLY visual could lead to string confusion instead of one arising out of "phonetic or aural or sound" similarity or "meaning" similarity. It was one of the few things that the Report had strong consensus on. This view was further confirmed by the then chairs of ccNSO, gNSO and senior ICANN leadership in different open-mike minuted ICANN meetings. Therefore, the continuing efforts to obfuscate the agreed-to distinctions now in the applicant guidebook through vague wording is very troubling.</p>	<p>NCUC</p>	<p>Unsure this is a correct statement – DAG v.2 stated:</p> <p>The examiners’ task is to identify <b>visual</b> string similarities that would create a probability of detrimental user confusion. String confusion exists where a string so nearly resembles another <b>visually</b> that it is likely to deceive or cause confusion. (P36)</p> <p>DAG v3 states: The String Similarity Panel’s task is to identify <b>visual</b> string similarities that would create a probability of user confusion. (P51)</p> <p>String confusion exists where a string so nearly resembles another <b>visually</b> that it is likely to deceive or cause confusion. (P54)</p>
<p>2.1.1.3.2 String requirements: There are many scripts, like Chinese, Japanese and Korean that use ideographs and pictographs that are information-rich descriptors and not low-information alphabets and restricting strings to 3 or more characters amounts to insisting that only short sentences can be top level domains.</p> <p>The GNSO IDN working Group Report considered this issue at length and came to more or less unanimous agreement (taken together with the Reserved Names Working Group) that for IDN TLDs, there should be no arbitrary restriction at all - i.e. the smallest IDN TLD can be a single character. The first version of the guidebook ignored this strong recommendation. This must be remedied.</p>	<p>NCUC</p>	<p>No</p>

<p>2.1.1.4.1 and 2.1.1.4.2 Geopolitical Names: It might be reasonable to require applicants of names of countries (either official or widely understood or short forms) and possibly larger regional (like continent names) or capital or largest/larger cities to produce non-objection or simple support letters from appropriate authorities. However it is going way too far to make the same requirement for names of any place within a country in any country etc</p>	<p>NCUC</p>	<p>Yes (p62)</p>
<p>NCUC generally believes that the criteria set for the legal rights objection (3.4.2) fail to adhere to the legal particularities, structure and principles of trademark law and neither account for the promotion of a rights-balanced approach.</p> <p>ICANN’s new gTLD proposal opposes both the Paris Convention and the principle of ‘territoriality’. The Domain Name System (DNS) is international in nature, thereby assigning automatically international rights over the uniqueness of the domain name. No such automatic registration system exists for trademarks. What will then be the case if two valid and legitimate trademark owners apply for the same string?</p>	<p>NCUC</p>	<p>No</p>
<p>NCUC believes that the suggested ‘string contention’ procedures (Module 4) do not answer to this particular problem and believes that the proposed ‘auction mechanism’ (4.3), which ICANN considers as a ‘last resort’ will take place more often than not. Considering the nature of the mechanism, NCUC fears that trademark owners with stronger financial basis will prevail over other legitimate mark owners.</p>	<p>NCUC</p>	<p>No</p>
<p>RE: 3.1.3 The language of the DAG is inconsistent, and leaves too much room for multiple interpretation as to what role the expert panels play in the dispute resolution process. Need clarification as to what weight does the expert panel decision carry? Is it a final decision on the objection, or merely advice that ICANN may accept or reject?</p>	<p>NCUC</p>	<p>No</p>

<p>Implementation recommendations for "communities" favour entrenched institutions at the expense of innovators and start-ups. Still no definition of "community".</p>	<p>NCUC</p>	<p>Slight change in community definition but remains vague –</p> <p>(DAG v3 p23): “For purposes of this Applicant Guidebook, a community based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. Any applicant may designate its application as community-based; however, each applicant making this designation designating its application as community-based is asked to substantiate its status as representative of the community it names in the application.”</p> <p>However – removal of limitations on who may file MAPO objections – apart from a “quick look” designed for early conclusion of frivolous objections.</p>
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<p>3.1.1 In the case of IDN string confusion across languages/scripts the current process could lead to a nightmare scenario. As currently specified (see criticisms to 3.4.1 below) an existing ASCII ccTLD operator can successfully block an IDN application for a "similar meaning" and thus in effect own ICANN rights to that meaning in every language.</p>	<p>NCUC</p>	<p>No – no changes to 3.4.1</p>
<p>Clause 6 of the Terms and Conditions is unacceptable and should be changed.</p> <p>(“Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application. Applicant acknowledges and accepts that applicant’s non entitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other start-up costs and any and all profits that applicant may expect to realize from the application of a registry for the TLD.”)</p>	<p>NCUC</p>	<p>No – unchanged</p>
<p>Required fees are substantially too high</p>	<p>NCUC</p>	<p>No – fees unchanged</p>
<p>The MAPO objection should be available to anyone that can show a legitimate interest and harm or potential harm concerning the applied-for string.</p>	<p>NCUC</p>	<p>Yes – removal of limitations on who may file MAPO objections – apart from a “quick look” designed for early conclusion of frivolous objections.</p>

Comparison of GNSO Constituency comments on DAG v.3 to policy changes in DAG v.4

<b>Proposal / issue</b>	<b>Raised by</b>	<b>Addressed in next DAG?</b>
In DAG2 the RyC recommended that “DRSPs should be strongly encouraged if not required to allow for consolidation of objections where possible and to thereby minimize expenses for applicants and objectors”. In DAG3 some minor improvements were made but the decision is still at the discretion of the DRSP. We recommend that DRSPs be required to consolidate objections where feasible.	Registries Constituency	No – remains at discretion of DRSP
Definition of community - recommend that the criteria should ensure 1) a mere customer or subscriber base is not deemed to be a community and 2) to qualify as a community-based gTLD, an applicant must demonstrate that community members would likely self-identify themselves as a member of the community	Registries Constituency	No
The estimate of USD 50,000 for registry services evaluation seems excessive. It would be helpful to see a cost build-up of this estimate.	Registries Constituency	No
The following requirement as applied to IDN gTLDs should allow for exceptions in Chinese, Japanese and Korean scripts: “Policy Requirements for Generic Top-Level Domains – Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.”	Registries Constituency	Yes -2 character IDN strings permitted in DAG v4
Domain names should be registered only through ICANN accredited registrars.	Registrar Stakeholder Group	N/A (p244)
ICANN should maintain the current structural separation requirements between the registry and registrar functions	Registrar Stakeholder Group	No change (p244)
ICANN should maintain the current requirement that registry operators not	Registrar Stakeholder	No change(p244)

discriminate amongst registrars.	Group	
ICANN should not prohibit affiliates of ICANN-accredited registrars to apply to be a New TLD registry operator.	Registrar Stakeholder Group	No
ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator.	Registrar Stakeholder Group	No
ICANN should not prohibit affiliates of ICANN-accredited registrars to provide any types of services to registry operators.	Registrar Stakeholder Group	No
Included in an attachment to Module 5 of DAG V3 is the proposed New gTLD Registry Agreement ("Registry Agreement"). The RSG is very troubled by and is strongly opposed to provisions contained in "Article 7" regarding contract amendments to the Registry Agreement. This section, as it is currently drafted, provides ICANN with overbroad power to unilaterally amend the Registry Agreement without the consent of the registry operator.	Registrar Stakeholder Group	Original article 7 removed. New article 7 states ICANN must give 2 –year notice as opposed to 90 days in the previous DAG of any amendments, which must be approved by the Board. (p257)
The rule that an objector that fully satisfies all other criteria for standing does not benefit from any presumption that granting the gTLD string to the applicant to which it objects constitutes detriment. It fails to give adequate weight to the harm to the community that may result from granting another party exclusivity in the proposed string.	IPC	No (p282)
The “complete defense” provided for an applicant who could hypothetically satisfy the standing requirements is biased much too strongly toward granting the gTLD.	IPC	No
Using auctions as an allocation mechanism is likely to result in strings being awarded to the applicant with the most cash on hand, not necessarily the applicant likely to best operate the registry.	IPC	No
URS should be mandatory rather than a best practice	BC	Yes – p237

<p>Trade Mark Clearinghouse:</p> <ol style="list-style-type: none"> <li>1. Sunrise processes must be standardised and mandatory.</li> <li>2. The definition of identical match should: <ol style="list-style-type: none"> <li>a. At least be the same as IRT;</li> <li>b. should also take into account singular and plural of the Mark; and</li> <li>c. take into account typographical variations (for typosquatting)</li> </ol> </li> </ol>	BC	<ol style="list-style-type: none"> <li>1. The registry operator must implement, at a minimum, either a Sunrise Period or a Trademark Claims service (P237)</li> <li>2. No change to ‘identical match’ definition (p310)</li> </ol>
<p>Trademark notices (IP claims) must be mandatory.</p>	BC	<p>Yes – p310 “New gTLD registries must provide Sunrise or Trademark Claims services for all trademarks in the Trademark Clearinghouse”</p>
<p>Rejection of the Globally Protected Marks List (GPML) leaves open the issue of defensive registrations without any solution being made available to address or remedy this problem related to the launch of new gTLDs.</p>	BC	No
<p>The limitations in scope and effectiveness of the Post Delegation Dispute Resolution Procedure when compared to the IRT Report recommendation raise much concern</p>	BC	No

Comparison of GNSO Constituency comments on DAG v.4 to policy changes in DAG v.5

Comment	Raised by	Addressed in next DAG?
<p>No changes were made to the possible fees for use of the RSEP Process. A 3-person RSEP panel is estimated to cost \$50,000. Costs could be higher for a 5-person panel or for other complexities. This cost estimate seems extremely high.</p>	<p>Registries stakeholder group</p>	<p>No change in RSEP fee (p45)</p>
<p>Strings that may be judged to be similar but in a non-detrimental way should not be eliminated in Initial Evaluation, but in case that does happen, the opportunity for correcting the possible error should be provided. The focus should be on a good user experience; it is very possible that two strings could be similar but not create confusion and instead provide for a better user experience.</p>	<p>Registries stakeholder group</p>	<p>No</p>
<p>The number of panelists for both String Confusion and Community disputes is still restricted to one. There is an option for three panelists for Existing Legal Rights disputes and a requirement for three panelists for a Morality &amp; Public Order objection. Three panelists should be available for all disputes if requested; additional costs could be covered by the party requesting three panelists.</p>	<p>Registries stakeholder group</p>	<p>No change (p178)</p>

Comparison of GNSO Constituency comments on DAG v.5 to policy changes in DAG v.6

Comment	Raised by	Addressed in next DAG?
<p>The URS is not a rapid process and takes nearly as long as using the UDRP with a higher burden of proof. The URS provides little certainty: Even if the trademark owner wins by default, Registrant can seek de novo review up to 2 years after suspension. The suspension is temporary and only takes place for “balance of registration” period with option to extend for one year at commercial rates. The URS places brand owners in a perpetual monitoring situation with no permanent ability to transfer the domain name. With a 5,000 word limit, the URS winds up being a lengthy process with little certainty for brand owners.</p>	BC	No (323)
<p>Trademark Clearinghouse is not a real “remedy” but is essentially just a database. A sunrise Period will encourage defensive registrations at high prices, especially because ICANN fails to impose any price cap on sunrise fees. The optional Trademark Claims service provides a warning notice to a potential domain name registrant, but applies only to “identical marks” so the value of the warning is limited. The service does not notify based on broader matching requirements called for by the BC. Because this service is entirely optional, it is unknown how many new registries would offer any warning service. Moreover, trademark owners wind up bearing all costs associated with the clearinghouse.</p>	BC	No (p305)
<p>The Trademark Post Delegation Dispute Procedure contains unrealistically high burdens of proof at both the first and second level. The levels of proof actually exceed showing bad faith (must show “specific bad faith”) and a pattern or practice of bad faith (must prove “substantial pattern and practice” by clear and convincing evidence. Even if a complainant wins, there are no sanctions against a registry and no corresponding duty by ICANN to investigate or sanction the Registry.</p>	BC	No (p335)

<p>The Guidebook has moved to 'proposed-final' form before delivery of an Economic Study of costs and benefits. This study is required as one of the acknowledged 'overarching issues' for the introduction of new gTLDs. The Guidebook should not be finalised until study results have been adequately considered and commented upon by stakeholders.</p>	<p>BC</p>	<p>No further studies beyond those previously conducted</p>
<p>There should be a fee reduction for additional versions of the applied-for string in IDN scripts and other languages.</p>	<p>BC</p>	<p>No</p>
<p>String Contention Sets shall not include similar strings requested by a single applicant seeking linguistic variations of the applicant's other applied-for string.</p>	<p>BC</p>	<p>No change</p>
<p>Subject to approval from relevant national governments, a single-registrant ('dot brand') TLD should be allowed to register both two-letter abbreviations and full country and regional names at the second level.</p>	<p>BC</p>	<p>3 characters remains minimum string length for ASCII TLDs</p>
<p>In situations where a single-registrant (dot-brand) owns or controls all second level domains, an expiration or termination of the Registry Agreement may lead to the closure of the gTLD or transfer to a new entity by a bankruptcy court or administrator instead of transition to a new operator. In these circumstances, the registry operator has reason to deny transition or transfer of registry data to a new operator designated by ICANN.</p>	<p>BC</p>	<p>Yes: New Clause 6 added to Registry Operator Code of Conduct:</p> <p>“Notwithstanding anything set forth in the foregoing, this Code of Conduct shall not apply to Registry Operator if (i) Registry Operator maintains all registrations in the TLD for its own use and (ii) Registry Operator does not sell, distribute or otherwise make available to any unaffiliated third party any registrations in the TLD. [*Note: This draft Section 6 of the Registry Operator Code of Conduct has been added in response to comments received that suggested that the Code was not necessary for registries in which a single registrant uses the TLD solely for its own operations and does not sell registrations to third parties (e.g. a dot-BRAND)]”</p>

<p>The Code of Conduct should not restrict dot-brands from using an owned or closely affiliated registrar to register and manage names that it controls. (e.g., for divisions, product lines, locations, customers, affiliates, etc. )</p>	<p>BC</p>	<p>Yes: New Clause 6 added to Registry Operator Code of Conduct (see above)</p>
<p>Single registrant gTLDs should not be required to allow unaffiliated registrants to hold registrations in a branded gTLD. Third-party registrations in a single registrant gTLD could cause consumer confusion and in extreme cases be a vehicle for fraud.</p>	<p>BC</p>	<p>Yes: New Clause 6 added to Registry Operator Code of Conduct (see above)</p>
<p>Brand owners will be kept away from the new gTLD process because of the lack of a co-existence mechanism for brands expressed in the top level. The current definition of “similar” is ambiguous and provides no guidance to brand owners who share close brands with other brand owners, all without consumer confusion, e.g. UPS and UBS. Due to the uncertainty, brand owners will be more likely to resolve their problem through the courts rather than participating in the ICANN new gTLD process.</p>	<p>IPC</p>	<p>Partially – see changes to Registry Operator Code of Conduct</p>
<p>Brand owners will be kept away from the new gTLD process because the PAG does not contain mechanisms for winding down &lt;.brand&gt; registries and focuses on a mandatory transition. In the case of brand owners, the risk that its &lt;.brand&gt; registry will be transferred to a third-party presents an unacceptable level of risk for loss of trademark control and corresponding trademark rights. As a result, the current transition contained in the PAG will pose a “chilling” effect on the number of brand owners who are willing to apply for &lt;.brand&gt; registries.</p>	<p>IPC</p>	<p>Partially – see changes to Registry Operator Code of Conduct</p>

<p>The Trademark PDDRP is inadequate in light of elimination of vertical separation. ICANN has attempted to address the issue of vertical integration in PDDRP section of the AGB by adding language in Section 6 stating that a registry operator is defined to include “entities directly or indirectly controlling, controlled by or under common control with a registry operator...” However, a further clarification must be added that such entities include (but are not limited to) any registrar(s) that may be vertically integrated with the registry operator in order to specify that vertically integrated registries may not attempt to shift blame for second-level bad faith actions to the registrar.</p>	<p>IPC</p>	<p>No – no significant changes to this section</p>
<p>In most cases, the Trademark Clearinghouse should build upon the examination undertaken by national trademark offices that evaluate trademark applications and issue registrations. The United States is alone or nearly alone in examining trademark applications for evidence of use of the mark, so requiring for a URS proceeding (URS § 1.2(f)(i)) or for inclusion in the Trademark Clearinghouse (Trademark Clearinghouse § 7.3, 7.4) that the Complainant prove ownership of a registration that has been subjected to substantive evaluation for proof of use excludes registrations from essentially all other jurisdictions.</p>	<p>IPC</p>	<p>No – while there have been some changes to this section, proof of use requirement stands</p>
<p>The malicious conduct measures remain insufficient.</p> <p>Solution: Develop new mechanisms and improve upon existing provisions in the PAG to minimize the ability of malicious actors to exploit the DNS for illicit purpose and financial gain.</p> <p>We urge ICANN to revise the PAG so that information about the protections against maliciousconduct proposed by the new gTLD applicant is explained in enough detail in the application process so the community can comment appropriately on these measures.</p>	<p>IPC</p>	<p>No</p>

<p>The PAG fails to adequately address searchable WHOIS.</p>	<p>IPC</p>	<p>Debateable. Requirement for searchable WHOIS explicitly added (A-20) but ‘adequacy’ of this provision is subjective.</p>
<p>Independent Objector (IO) process is ripe for abuse and harmful to the global public interest. The IO was a staff created policy that was never discussed let alone approved by the GNSO.</p>	<p>NCUC</p>	<p>IO provisions stand. However, qualification added: “In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.”</p>
<p>Important safeguards to prevent abuse and “gaming” are lacking from the current IO design. For example, there is no requirement that an objection brought by the IO be tied to at least one specific party who claims it will be harmed if the TLD goes forward. Such a requirement is necessary to achieve accountability in the new TLD process.</p>	<p>NCUC</p>	<p>Yes - qualification added: “In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.”</p>
<p>Another feature missing from the IO is transparency. ICANN staff has explained a number of times that the IO is intended to provide a secret means for governments and others to object to a TLD string without having to do so publicly. For a public governance organisation with transparency requirements, such a proposal for secret objections cannot stand.</p>	<p>NCUC</p>	<p>Yes – see above</p>
<p>According the explanatory memo on so-called Morality and Public Order objections, one of the purposes of the IO is “risk mitigation” to ICANN</p> <p>We do not support staff’s introduction of “risk mitigation strategy” as ICANN’s primary policy objective.</p>	<p>NCUC</p>	<p>No</p>
<p>The IO lacks true independence. The IO is employed by ICANN; likewise the third party contracted to select the experts who will determine the objection is also hired by ICANN, so there is a lack of neutrality on the part of the expert panel.</p>	<p>NCUC</p>	<p>No</p>

<p>Latest DAG sees elimination of sufficient time in which to respond to URS complaints in the latest DAG. Re-working the negotiated community consensus from 21 to 14 days as a timeframe in which to respond is concerning as it provides inadequate protection to registrants, who may be on holidays and unable to find an attorney and respond in a reasonable period of time.</p>	<p>NCUC</p>	<p>No- response time remains at 14 days</p>
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## **Appendix 4.9: Summary of Public Comments Periods on New gTLDs**

PCP 1: First public comments period (8<sup>th</sup> December 2005 - 3<sup>rd</sup> February 2006.)

(For full details of all submitted comments, see <http://forum.icann.org/lists/new-gtlds-pdp-comments/>)

The initial Public Comments Period solicited comment on the Issues Report. 38 public comments were received during the PCP period. Of these, eight were off-topic. The rest of the comments represented the views of sixteen individual persons or organisations (some posted multiple comments). Additionally, some individuals belonged to more than one organisational group; for example, Ross Rader posted some comments as part of a group of registrar constituency members, and some comments in his capacity as director of Tucows Inc.

Appendix 4.9A summarises the key points put forward in the PCP. In this first round of public comments, there do not appear to have been any discernible interest blocs; instead, a range of views was expressed by commentators from a variety of backgrounds. On the fundamental question of whether or not new gTLDs should be introduced, only two of the commentators were clearly opposed (George Kirikos and Paul Tattersfield, both of whom represented Internet related businesses / domain name owners). Most of those in favour of new gTLDs seemed to envisage a larger scale process than the limited TLD introductions seen in 2000 and 2003. However, Caroline G Chicone (IPC) and Ross Rader (representing a group of Registrar Constituency members) proposed that new gTLDs should be introduced in limited numbers only, while a submission from the former DNSO General Assembly advocated further research to ascertain the level of demand for new TLDs before proceeding. Chicone also reiterated the IPC position that any new gTLDs should be sponsored and must be clearly differentiated from existing TLDs. Ross Rader, Werner Staub (Internet Council of Registrars) and Jeff Williams (Information Network Engineers) proposed an open-ended rather than ‘rounds’ based application process.

On the question of selection criteria for the new namespaces, most comments seemed to favour these being limited mainly to technical criteria. However, Danny Younger (a technology writer and former Chair of the DNSO General Assembly) did imply that certain strings ought to be reserved when he conceded that certain namespaces, such as .gay or .god, might create more controversy than they were worth. Younger, Rader and Chicone all raised the need to examine the issue of intellectual property rights in TLD strings. Staub argued that TLD applicants should be backed by a sizeable community, while Rader and Lowenhaupt believed any community TLDs should be backed by clear and demonstrable support from the relevant community.

With regards to allocation methods, there was little support for some of the possible systems mooted in the Issues Report (auctions, lotteries, ballots, first-come-first-served and comparative evaluations). Several comments argued against lotteries or auctions as mechanism for deciding between contending applicants. Elmar Knipp (online business owner), Caroline Chicone and Werner Staub (Internet Council of Registrars) argued in favour of comparative evaluations. George Kirikos proposed a rather complex ‘ascension allocation method’ whereby a prospective new TLD would have to ‘prove’ itself as a second-level domain before being ‘promoted’, but this did not attract any support from the other posters. Thomas Lowenhaupt (potential new TLD applicant) and Ross Rader favoured applicants being subject to financial checks to ensure ability to run a registry.

On the issue of contractual conditions, Edward Hasbrouck (online business owner) argued that TLD operators had consistently failed to respect contractual limitations on their delegated authority. He commented that experience from the previous rounds of TLD expansion demonstrated the need to make rules explicit; for ICANN to exercise better oversight over compliance with these rules; and to establish mechanisms for resolution of complaints of non-compliance. Along similar lines, Ross Rader identified a great need for standardisation of registry contracts; however, Werner Staub argued in favour of differentiated treatment of TLDs with regard to application of ICANN policies. Rader also advocated mandatory data escrow and operational continuity provisions be included in the contract, as a safeguard against business failure of a registry. Danny Younger argued against sunrise periods for new TLDs and was supported in this by Karl Auerbach (former ICANN At-Large Director) and 'kidsearch' (online business owner).

#### PCP 2: Second public comments period (20<sup>th</sup> February - 13<sup>th</sup> March 2006)

(For full details of all submitted comments see <http://forum.icann.org/lists/new-gtlds-pdp-initial-report/>.)

A second Public Comments period was opened between 20<sup>th</sup> February and 13<sup>th</sup> March 2006 to solicit comments on the Draft Initial Report, to which 7 responses were submitted by 7 individual posters.

Seven comments were received. Of the the seven commentators, Matthias Jungbauer (TLD Consultant), Mike Norton (CEO, Plumb Technologies, Inc.), Fuad Firudinbayli (AzHINet" Co. Ltd) and Stephen Castle (Decision Systems Plus Inc.) represented Internet-related businesses. The backgrounds of Alex Osipov, Danna Humphreys and 'JHBX' could not be ascertained. Only two of the comments submitted really appeared meaningful to the debate. Of the other five, Alex Osipov merely made a few suggestions for new TLDs he would like to see, such as .dog and .sex; Fuad Firudinbayli enquired about the possibilities of securing .inaz; Danna Humphreys suggested allowing new top-level domain names based upon the 3 letter city codes used for airports; JHBX posted a mostly incomprehensible rant that seemed to be demanding .rs for the 'Republic of Srpska', a quasi-state entity in Bosnia-Herzegovina; and Stephen Castle posted a comment regarding the litigation over Verisign's continued control over the .com registry, which was not relevant to this issue.

Matthias Jungbauer argued that registration fees for names under the new TLDs should not be higher during any sunrise period. Mike Norton argued that there was no need for a host of new domain names such as .ibm as these were perfectly well catered for as second-level domains.

There were no really comprehensive responses to the issues covered in the Draft Initial Report.

### PCP 3: Third Public Comments Period: 9<sup>th</sup>-29<sup>th</sup> August 2006

(For full details of all submitted comments see <http://forum.icann.org/lists/newgtlds-comments/>)

Another public comments period was held between 9<sup>th</sup> and 29<sup>th</sup> August 2006, following publication of the finalised Initial Report in July. 12 public comments were submitted during this period by 10 individual posters, although a further two were submitted just before the start of the official comments period on 7<sup>th</sup> August 2006.

Appendix 4.9B summarises the main points raised in the PCP. Once again, the positions taken by commentators do not seem to divide up into distinct blocs based on their backgrounds, though some of their proposals were predictable, such as the IPC's backing for trademark protections. There was no outright opposition to new gTLDs, but still considerable debate on how to proceed. Philip Sheppard of the Business Constituency argued that all new gTLDs should be chartered or sponsored; he also favoured IDN TLDs, along with Paul Tattersfield of GPM Group, an IT consultancy company. Dirk Krischenowski, another potential gTLD applicant, did not oppose IDN gTLDs in principle but warned against allowing the new gTLD PDP to be delayed by waiting for the outcome of the IDN process.

Three commentators, including a potential gTLD applicant, argued that large application fees should be levied in order to ensure the financial capability of the applicant, but this was opposed by 'namecritic' (Chris McElroy of the Kidsearch Network, another potential gTLD applicant). Michael Heltzer (IPC) and Philip Sheppard supported the Initial Report's proposal that applicants should be required to demonstrate their financial capability to operate a TLD, while 'namecritic' felt that selection criteria should be limited to technical criteria only. Heltzer, Sheppard and Ray Fassett (no stated affiliation) supported the Initial Report's recommendation that new TLDs must offer a clearly differentiated namespace from existing TLDs; however this was opposed by Bhavin Turakhia (CEO of a Web products company) and the ALAC representatives. Only two commentators mentioned the possible allocation methods discussed in the Report; Krischenowski favoured auctions or lotteries, while Heltzer argued for comparative evaluations. Krischenowski, Heltzer and Tattersfield encouraged formation of TLDs for communities, a concept which the GNSO's Report had expressed interest in.

Danny Younger was highly critical of the whole PDP and expressed a belief that public comments were not being taken properly into account. Similarly, Jeff Williams stated that there was no real open, bottom up representation in ICANN or the GNSO, leaving no method of determining if there was any real consensus.

### PCP 4: Public Comments Period on the Final Report (10<sup>th</sup> - 30<sup>th</sup> August 2007)

(For full details of all submitted comments see <http://forum.icann.org/lists/gtldfinalreport-2007/mail2.html>)

A Public Comments Period on the Final Report was held between the 9<sup>th</sup> and the 29<sup>th</sup> of August 2007. 65 comments were submitted to the public comment forum during this period by 60 individual posters. 19 further comments were submitted after the official end of the

PCP. A synopsis of these public comments, authored by Public Participation Manager Kieren McCarthy, was released to the Committee for consideration.

Appendix 4.9C summarises the major points raised in the PCP. Only one commentator opposed the principle of new gTLDs outright. However, the majority of the comments submitted this time around were critical of at least some of the Recommendations in the Final Report. 23 posts, all entitled "ICANN should confine itself to technical and operational matters", contained identical text. This post argued that ICANN should not try to regulate morality and public order on the Internet (referring to Recommendation 6) and that the proposed policy would apply trademark law "in ways that are completely unprecedented in any national law or international treaty" (referring to Recommendation 20). Several other comments were submitted with different headings but very similar text, again referring to Recommendations 6 and 20. This large number very similar of critical comments appear to have been the result of a campaign by [www.keep-the-net-neutral.org](http://www.keep-the-net-neutral.org), and therefore the comments board appears skewed towards critical comment at first glance.

Nonetheless, some other posters, including some who had been commenting on the process in earlier PCPs, were likewise critical of the recommendations and also of the policymaking process itself. R.J. Glass of the US At-Large group opposed an unlimited number of new TLDs that, he felt, would do little more than replicate the service already available in existing TLDs; he argued that ICANN should go back to the drawing board and identify what types of new namespaces were really necessary. Karl Auerbach, a former ICANN director, criticised the proposals for going beyond ICANN's technical mandate; he argued that the sole criteria for approving a TLD applicant should be whether that applicant was willing and able to abide by broadly accepted and practiced written technical standards and practices for domain name servers. Dan Krimm (an IT professional of no stated affiliation) similarly believed that ICANN had no jurisdiction to make policy over non-technical matters such as morality and public order. On the other hand, there was also some praise; for example, Dirk Krischenowski of dotberlin, a potential TLD applicant, who had been commenting on the process from the beginning, expressed his satisfaction with the proposals of the Final Report

Appendix 4.11 compares the main recommendations of the Final Report to the views expressed in the PCP. There was neither overwhelming support nor strong opposition for most of the recommendations; however, the morality and public order (MAPO) provisions were opposed by ten individuals (as well as the 41 people who submitted the 'standard' email from keep-the-net-neutral.org). The issue of intellectual property rights protections also aroused significant discussion, with six commentators (including IPC and BC representatives) arguing in favour of stronger trademark protections and four others (three of whom represented online free speech organisations) opposing this.

In summary, this public comments period shows a mixed reaction to the Final Report, with the main criticisms revolving around ICANN's proposals to include 'non-technical' selection criteria, particularly 'morality' and trademark related criteria as well as business plans, and also the proposed trademark challenge procedure. Some of the most scathing criticisms, however, came not from directly interested stakeholders but from 'civil society' figures such as Auerbach and Glass.

## PCP 5: Public comments period on DAG v1 (24 October – 15 December 2008)

(For full details of all submitted comments see <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>)

The Public Comments Period on the first iteration of the Draft Applicant Guidebook attracted considerably more interest than any of the previous PCPs. 180 comments were submitted by 146 individual posters.

Of these, 31 posters opposed the concept of new gTLDs outright. Although this represents only 21% of the total posters, it undermines the claim that there was a ‘consensus’ in favour of new gTLDs. A further four posters recommended that new TLDs should be introduced in strictly limited numbers only. Those opposing new gTLDs mostly represented trademark owners, trademark lawyers or organisations set up to represent intellectual property interests. Additionally, 41 posters (again mostly representing trademark interests) called for stronger trademark protection mechanisms before any new gTLDs were introduced.

Appendix 4.9D summarises some of the key arguments and proposals raised in the PCP. One of the most strongly supported proposals was the call for a reserved names list upon which trademark owners could register their marks, rendering these unavailable for registration as TLD strings; this was backed by 28 posters, again mostly trademark interests (and opposed by one poster). Another fairly controversial issue was the proposed level of fees, which 25 posters argued were too high (and one poster supported). Those opposing high fees represented a range of interests, including current and prospective registries, registrars, an Arab League technical task force, the NCUC, an EU politician and several Internet related businesses and business organisations. A few other posters advocated reduced fees for particular types of organisation, such as community applications (four supporters) and ‘closed’ corporate TLDs (one supporter). The issue of whether price caps for second-level registrations should be included in new registry contracts also generated significant discussion, with 17 posters from a range of (mostly commercial) backgrounds favouring price caps for all registries and a further two favouring price caps for larger registries. 15 posters, again from a range of (mostly commercial) backgrounds argued in favour of a ‘thick WHOIS’ model being specified in registry contracts.

As Appendix 4.9D shows, many of the points raised in this PCP were not resolved in DAG v2, but a few were. Nine posters had argued that what constitutes a ‘community’ needed to be better defined; the next iteration of the DAG saw some modification on the definitions and purpose of community as opposed to open TLDs. There was some change to the fee structure, with credit towards the application fee given for qualified 2000 round applicants and reduced annual registry fees. Nine posters had argued that the standard for String Confusion should not be limited to “visually” similar; the next DAG added more language to distinguish when different similarity checks are made (visual, aural, meaning); clarified the relationship between string confusion objections and contention between similar strings; and described improvements to the algorithm for testing visual similarity. Another point that was addressed in the next version of the DAG concerned the status of dispute resolution panel decisions; eight commentators had argued that these should be binding rather than advisory on ICANN. In the next draft of the DAG ICANN explained that it will “accept” the determination and advice of the panel (though some commentators still found this wording ambiguous). Finally, six

people asserted in this PCP that three member panels should be an option for LRO disputes; this became the case in DAG v2.

Furthermore, following this PCP, ICANN staff identified a set of four ‘overarching issues’ for further study, including: trademark protection; TLD demand and economic analysis; security, stability and root zone scaling; and potential for malicious conduct. This was endorsed by the Board, which set up the Implementation Recommendation Team (IRT) to examine trademark issues in particular.<sup>91</sup>

#### PCP 6: Public comments period on DAG v2 (18 February – 13 April 2009)

(For full details of all submitted comments see <http://forum.icann.org/lists/2gtld-guide/>)

The PCP on the second iteration of the DAG attracted 126 comments submitted by 99 individual posters.

21 posters, just over a fifth of the total, opposed the concept of new gTLDs outright. A further seven posters recommended that new TLDs should be introduced in strictly limited numbers only. As in the previous PCP, those opposing new gTLDs mostly represented trademark owners, trademark lawyers or organisations set up to represent intellectual property interests. In addition, 30 posters (again mostly representing trademark interests) called for stronger trademark protection mechanisms before any new gTLDs were introduced.

Again, there were also number of other proposals / arguments about the specifics of the DAG that were backed by a significant number of posters (see Appendix 4.9E). As in the previous PCP, there was considerable support for a reserved trademark names list, a proposal backed by 21 posters, again mostly trademark interests (and opposed by one poster). The proposed level of fees was again somewhat controversial; 18 posters argued they were too high. Again, those arguing for lower application fees came from a range of backgrounds, including the ALAC, the ITA, current and prospective registries, registrars and several Internet related businesses and business organisations. The issue of whether price caps for second-level registrations should be included in new registry contracts again generated significant discussion, with 10 posters from a range of (mostly commercial) backgrounds favouring price caps. 14 posters, again from a range of (mostly commercial) backgrounds argued in favour of a ‘thick WHOIS’ model being specified in registry contracts.

Again, a few of the points raised in the PCP were addressed in the following version of the DAG, though as Appendix 4.9E shows, the majority were not. The subsequent DAG made significant concessions to the trademark lobby including the URS, PDDRP and strong WHOIS, while the trademark clearinghouse proposal was passed to the GNSO for consideration. 8 people in this PDP had called specifically for a notice and takedown procedure for abusive domains, a function the URS was intended to fulfil. Another point that found some degree of resolution in the next DAG concerned variable pricing for second-level domain name registrations; 10 people had opposed this in this PCP, and the subsequent DAG stipulated that registry operators ‘shall offer all domain registration renewals at the same price, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price by Registry Operator.’

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<sup>91</sup> <http://www.icann.org/en/minutes/resolutions-06mar09.htm>

## PCP 7: Public comments period on DAG v3 (4 October – 24 November 2009)

(For full details of all submitted comments see <http://forum.icann.org/lists/3gtld-guide/>)

The PCP on DAG v3 attracted 156 comments submitted by 131 distinct posters.

11 posters, or 8 % of the total, opposed new TLDs outright, a substantially reduced percentage compared to PCPs on earlier versions of the DAG. 7 posters called for a limited number of new gTLDs only. Again, most of the opposition to new gTLDs came from trademark holders and / or their representatives. Despite the concessions to trademark protection in DAG 3, such as the trademark clearinghouse and strong WHOIS, 21 posters still claimed that trademark protection was inadequate; again, these mostly represented the trademark lobby.

Conversely, 53 posters called for the new gTLDs programme to go forward as soon as possible. However, examination of these posts shows that the wording used was very similar in most cases, suggesting that a large number of them were either ‘template’ posts sent as part of an online campaign, or else created by a single individual (or small group of individuals) with multiple ‘sock puppet’ ICANN public comment accounts.

As shown in Appendix 4.9F, various other issues attracted significant discussion. 14 posters argued that the trademark clearinghouse did not represent a proper reserved trademarks list, and called for a true reserved trademarks list to be implemented. Again, these were mostly trademark holders.

Some of the issues that attracted significant discussion in previous PCPs, however, appear to have been mostly resolved. Only four posters argued that the proposed level of fees was too high, significantly less than the number who raised this issue in previous DAGs. Section 2.10 of DAG3 appeared to satisfy most of those who had been calling for price caps for second-level domain registrations; in this PCP only three posters argued that this provision did not go far enough and that ‘hard’ caps were still required.

As with the previous PCP, most of the points raised in this PCP were not resolved in the subsequent issue of the DAG, but several were. Two people in this PCP argued in favour of sunrise periods; the subsequent DAG stipulated that the registry operator must implement, at a minimum, either a Sunrise period or a Trademark Claims service during the start-up phases for registration in the TLD. 6 people in this PDP felt that the URS should be compulsory, not just a ‘best practice’; this was implemented in DAG v4. Five posters argued that the objection filing period should be extended; in the subsequent DAG it was increased to 5½ months. There were some further concessions for those asking for stronger trademark protections, particularly the introduction of the trademark clearinghouse, and also a ‘thick WHOIS’ model which was specifically requested by 14 people in this PDP. DAG v4 also permitted a limited degree of cross-ownership between registries and registrars, which had been supported by two posters (and opposed by one) in this PDP. The subsequent DAG also provided more clarification on how ‘expert panels’ would be formed, which was requested by three people in this PDP.

PCP 8: Public comments period on DAG v.4 (28 May-21 July 2010)

(For full details of all submitted comments see <http://forum.icann.org/lists/4gtld-guide/>)

The PCP on DAG v4 produced 130 comments from 111 individual posters.

As shown in Appendix 4.9G, in this PCP, the opposition to new gTLDs appears to have largely melted away; only 6 posters, or 5% of the total, opposed new TLDs outright, with two others calling for a limited introduction only. However, 20 posters still claimed that trademark protection was inadequate; again, these mostly consisted of trademark owners and their representatives. Conversely, no posters called for the new gTLDs programme to go forward as soon as possible, compared to 53 making the same demand in the last PCP; this further supports the suspicion that the apparent surge in support for the early introduction of new TLDs in the previous PCP was artificially engineered.

12 posters argued that the trademark clearinghouse did not represent a proper reserved trademarks list, and called for a true reserved trademarks list to be implemented. Again, these were mostly trademark holders. In addition, 15 posters, again mostly representing the trademark lobby, called for the Uniform Rapid Suspension mechanism for abusive domains to be strengthened.

As with the last PCP, some of the other issues that attracted substantial comment in earlier versions of the DAG appear to have largely been settled. Only four posters on this occasion believed that the proposed level of fees was too high (with a further four proposing differentiated fees for different application types). Similarly, in this PCP only one posters argued in favour of ‘hard’ price caps for second level domain registrations (and one other opposed this view).

Only a few of the points raised in this PCP were resolved in the subsequent issue of the DAG. Five people had argued that preventing any ICANN-accredited registrar from providing assistance of any kind to prospective new gTLD applicants goes too far would unfairly exclude applicants intending to use registrar expertise to help them build their application; this was resolved in DAG v5, which allowed ICANN accredited registrars to apply for a gTLD. Finally, four people had objected in this PCP to the proposal to conduct background checks in this area of terrorism, which was argued to be unacceptable without any definition of what constituted terrorism. In the subsequent DAG the term ‘terrorism’ was removed from the relevant section.

#### PCP 9: Public comments period on DAG v.5 (12 November 2010-15 January 2011)

(For full details of all submitted comments see <http://forum.icann.org/lists/5gtld-guide/>)

The PCP on version 5 of the DAG saw 145 mails submitted by 96 individual posters.

As shown in Appendix 4.9H, 13 posters opposed new TLDs outright, an increase compared to the previous PCPs but still representing only 14% of the total, down from approximately one-fifth of posters opposing new TLDs in the PCPs on DAGs v1 and v2. Additionally 2 posters called for a limited number of new gTLDs only, while 11 posters called for new gTLDs to go ahead as soon as possible. As in previous PCPs, most of the opposition to new gTLDs came from trademark holders and / or their representatives. 28 posters still claimed that trademark protection was inadequate; again, these mostly represented the trademark lobby. Regarding some of the specifics of trademark protection, this time around no posters argued that the trademark clearinghouse did not represent a proper reserved trademarks list. 5 posters called for reinstatement of strong WHOS, which was included in DAGs v3 and v4 but dropped for DAG v5. 8 posters called for modification / strengthening of the URS.

On this occasion, no posters argued that the proposed level of fees was too high or called for ‘hard’ caps on second-level domain name registrations. 7 posters criticised ICANN for its u-turn on registry / registrar vertical integration, a decision they found to be arbitrary and lacking in transparency.

#### PCP 10: Public comments period on DAG v.6 (15 April 2011-15 May 2011)

(For full details of all submitted comments see <http://forum.icann.org/lists/6gtld-guide/>)

This PCP attracted 69 posts submitted by 65 posters.

As shown in Appendix 4.9I, only three posters continued to oppose the principle of new TLDs outright, while 8 argued in favour of introducing only a limited number of new TLDs. 19 posters continued to argue that trademark protections were inadequate. 8 posters argued in favour of launching the application process without further delay, while 8 others opposed this.

**Appendix 4.9A: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (8<sup>th</sup> December 2005 - 3<sup>rd</sup> February 2006.)**

(For full details of all submitted comments, see <http://forum.icann.org/lists/new-gtlds-pdp-comments/>)

<b>Comment / proposal</b>	<b>Proposed / supported by</b>	<b>Opposed by</b>
Outright opposition to new gTLDs	Paul Tattersfield (gpmgroup.com) (implied but not specifically stated)  George Kirikos (Leap of Faith Financial Services)	Implicitly opposed by all those who made proposals for new gTLDs policy. Explicit arguments in favour of new gTLDs made by:  Thomas Lowenhaupt  Ross Rader (Registrar constituency members / Tucows Inc.)  Werner Staub (CORE Internet Council of Registrars)  Elmar Knipp (Knipp Medien und Kommunikation GmbH)  'kidsearch' (Kidsearch Network)  Matthias Jungbauer (Top Level Domain Consulting)
New gTLDs should be introduced in limited numbers only	Ross Rader (Registrar constituency members) (supports possibly hundreds of TLDs but not tens of thousands)  Caroline G. Chicoine (IPC)	'kidsearch' (Kidsearch Network)
Application process should be ongoing as opposed to 'rounds' based	Ross Rader (Tucows Inc.)  Werner Staub (CORE Internet Council of Registrars)  Jeff Williams	

Support for sunrise periods		Ross Rader (Tu cows Inc.) Jeff Williams 'kidsearch' (Kidsearch Network)
Support for auctions as a method of resolving string contention	Ross Rader / Registrar constituency members Ross Rader (Tu cows Inc.)	Caroline G. Chicoine (IPC) Elmar Knipp (Knipp Medien und Kommunikation GmbH) Danny Younger Jeff Williams
Support for comparative evaluation as a method of resolving string contention	Werner Staub (CORE Internet Council of Registrars) Caroline G. Chicoine (IPC) Elmar Knipp (Knipp Medien und Kommunikation GmbH)	

**Appendix 4.9B: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (9<sup>th</sup>-29<sup>th</sup> August 2006)**

(For full details of all submitted comments see <http://forum.icann.org/lists/newgtlds-comments/>)

<b>Proposal / comment</b>	<b>Proposed / supported by</b>	<b>Opposed by</b>
Large application fees should be levied in order to ensure financial capability of applicant	Bhavin Turakhia (Directi) (states fees should be sufficiently high to 'ensure that the applicant is serious about the registry business')  Dirk Krischenowski (dotBERLIN GmbH)  Paul Tattersfield	'namecritic' (Chris McElroy, Kidsearch Network)
New gTLDs should be clearly differentiated from existing gTLDs	Michael Heltzer (IPC)  Philip Sheppard (BC)  Ray Fassett	Bhavin Turakhia (Directi)  Wendy Seltzer and John Levine (North American Representatives to the Interim ALAC)
The formation of TLDs for communities should be encouraged	Dirk Krischenowski (dotBERLIN GmbH)  Michael Heltzer (IPC)  Paul Tattersfield	

**Appendix 4.9C: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (10<sup>th</sup> - 30<sup>th</sup> August 2007)**

(For full details of all submitted comments see <http://forum.icann.org/lists/gtldfinalreport-2007/mail2.html>)

<b>Proposal / comment</b>	<b>Proposed/ supported by</b>	<b>Opposed by</b>
Standard email or variation thereof drawn from keep-the-net-neutral.org, opposing Recommendations 6 and 20	Joshua Kish Antony Schofield Kelly Garbato Zachary S. Parsons Shane Page Tracy Sanford Richard Jones David Marcus Warren Vinzant William L Landahl III Janine Meunier Susan Stuart Benjamin Gemmill Brian O'Kelley Keith Weng Meinrad Nell Ken Lohento Marc Manthey Marco Barreno Jesse Faught Jeff Flack Carl Stewart Michael Keller Johan Johansen	

	<p>Tom Rossen</p> <p>Phillip Cripps</p> <p>Mike Gustine</p> <p>Charles Hall</p> <p>Fabrizio Colaianni</p> <p>Ian Marshall</p> <p>Kenan Dalley</p> <p>Renee Piraino</p> <p>John Piotrowski</p> <p>Joshua D. Auter</p> <p>Steven Dale</p> <p>Patrick Coulson</p> <p>Paul Yates</p> <p>'Andy'</p> <p>Walter Moczygemba</p> <p>Kevin Henry</p> <p>John Chandler Meline</p>	
<p>MAPO provisions should be removed</p>	<p>Dan Krimm</p> <p>Robin Gross (IP Justice)</p> <p>Kimberley Heitman (Electronic Frontiers Australia Inc)</p> <p>Tapani Tarvainen (Electronic Frontier Finland)</p> <p>Bo Register</p> <p>Marjorie Heins (Free Expression Policy Project)</p> <p>Dave Lindbergh (Hooke Laboratories, Inc.)</p> <p>Aaron Woolf</p>	

	<p>Milton L Mueller</p> <p>(Plus the 41 people who sent in the standard email from keEp-the-net-neutral.org)</p>	
<p>Criteria should be limited to technical and operational matters only. Current proposals are too extensive and stray into areas beyond ICANN's remit.</p>	<p>Dan Krimm</p> <p>Karl Auerbach</p> <p>Bo Register</p>	<p>Werner Staub</p>
<p>Intellectual property rights protections are inadequate and need to be strengthened</p>	<p>Mike Rodenbaugh (BC)</p> <p>Michael D. Palage</p> <p>Seth Finkelstein</p> <p>Judith Lammers (BITKOM)</p> <p>Steve Metalitz</p> <p>Cyril Chua (IPC).</p>	<p>Robin Gross (IP Justice)</p> <p>Kimberley Heitman (Electronic Frontiers Australia Inc)</p> <p>Tapani Tarvainen (Electronic Frontier Finland)</p> <p>Dan Krimm</p>
<p>Application fees should be high to deter frivolous applications</p>	<p>Judith Lammers (BITKOM)</p>	<p>Thomas Lowenhaupt</p> <p>Milton L Mueller</p>
<p>Requirement that only ICANN-accredited registrars be used should be removed</p>	<p>Michael D. Palage</p> <p>北京IDC网 BeijingIDC.com</p> <p>李光皓/ Guanghao Li</p>	<p>Vittorio Bertola (assuming registry-registrar separation is maintained)</p>

**Appendix 4.9D: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (24 October – 15 December 2008)**

(For full details of all submitted comments see <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>
<p>Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues</p>	<p>Emilie Dessens, Domainoo society</p> <p>Oscar A. Robles-Garay, NIC Mexico (ccTLD registry)</p> <p>George Kirikos, Leap of Faith Financial Services</p> <p>Jonathan Robinson, Netnames</p> <p>David Fares, News Corporation</p> <p>Robert Fernandez</p> <p>Olive Gretchen, Corporation Service Company (CSC)</p> <p>Heidi C. Salow, Internet Commerce Coalition</p> <p>Autumn Lotze, Retail Industry Leaders Association</p> <p>Paul Tattersfield, Grange Project Management Group</p> <p>Jolene A Neby, Ameriprise Financial</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p> <p>Christian Merida, US Chamber of Commerce</p> <p>Philip Lodico, Fairwinds Partners (Internet strategy consultants)</p> <p>Margie Milam, MarkMonitor Inc. (corporate domain name registrar)</p>	<p>Implicitly opposed by those comments that did not express any opposition to new gTLDs in principle. Explicit arguments in favour of the principle of new gTLDs put forward by:</p> <p>Richard Tindal, Demand Media</p> <p>Mike O'Connor, haven2.com</p> <p>Neal Krawetz, Hacker Factor Solutions</p>

	<p>Kevin Rupy, USTelecom</p> <p>Gretchen Lohmann, National Cable &amp; Telecommunications Association</p> <p>Natasha, Lipkina, HP.com</p> <p>Dan Jaffe, Association of National Advertisers</p> <p>Jonathan Robinson, NetNames</p> <p>Nick Wood, MARQUES (European Association of Trade Mark Owners)</p> <p>Aimee Nolan, W.W. Grainger, Inc</p> <p>Thomas M. Blasey, ITT Corporation</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>Denise Yee (Kuwabara), Visa Inc.</p> <p>Ryan Foster, Securities Industry and Financial Markets Association</p> <p>Furrer Urs, economiesuisse</p> <p>Enoch Kim, contessa.com</p> <p>Ray Robertson , Tyndall Federal Credit Union (but apparently submitted in a personal capacity)</p> <p>Abdulaziz Al-Zoman, SaudiNIC</p>	
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<p>If new gTLDs go ahead, it should be only in limited numbers</p>	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Peter Ford, Microsoft (recommends slow, phased deployment)</p> <p>Marc-Anthony Signorino</p> <p>Tom Watson, Legal Bank of America Corporation</p>	
<p>Community based applications should go forward ahead of other types</p>	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Claudio Digangi</p> <p>Gayle C. Sullivan, AT&amp;T</p> <p>Marc-Anthony Signorino</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>David Klein DHK Enterprises, Inc.</p> <p>Asociación PuntoGal (Gallic community group / prospective registrar for .gal TLD)</p> <p>Ryan Foster, Securities Industry and Financial Markets Association</p>	
<p>What constitutes a ‘community’ needs to be better defined</p>	<p>Christopher G. Martin, United States Council for International Business</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>Sanjiv Sarwate, Pattishall McAuliffe (IP lawyers)</p> <p>David Daugherty, Software &amp; Information Industry Association (SIIA)</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)</p>	

	<p>Werner Staub, CORE</p> <p>‘oueichek’ Arab Team for Domain Names and Internet Issues (Intergovernmental / Arab League team)</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Milton L Mueller, Noncommercial Users Constituency (NCUC)</p>	
<p>Trademark protections are inadequate</p>	<p>Jonathan Robinson, Netnames</p> <p>Olive Gretchen, Corporation Service Company (CSC)</p> <p>Gayle Sullivan, AT&amp;T</p> <p>Marc-Anthony Signorino, National Association of Manufacturers (Formerly the American Electronics Association)</p> <p>P McGrady, GT Law (on behalf of an ‘undisclosed client’)</p> <p>Fabricio Vayra, Time Warner</p> <p>Heidi C.Salow, Internet Commerce Coalition</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>Autumn Lotze, Retail Industry Leaders Association</p> <p>Paul Smocer, BITS (financial services)</p> <p>Sanjiv Sarwate, Pattishall McAuliffe (IP lawyers)</p> <p>Jolene A Neby, Ameriprise</p>	

	<p>Financial</p> <p>Daniel A Nooger, The Hearst Media Corporation</p> <p>David Daugherty, Software &amp; Information Industry Association (SIIA)</p> <p>Christian Merida, US Chamber of Commerce</p> <p>Margie Milam, MarkMonitor Inc.</p> <p>David Taylor, Lovells LLP</p> <p>Kevin Rupy, USTelecom</p> <p>Gretchen Lohmann, National Cable &amp; Telecommunications Association</p> <p>Lori Cordell</p> <p>Steven Metalitz, IPC</p> <p>Vincent Garlock, American Intellectual Property Law Association</p> <p>Michael Palage</p> <p>Jonathan Robinson, NetNames</p> <p>Nick Wood, MARQUES, the European Association of Trade Mark Owners</p> <p>Brian Hedquist, Cyveillance, Inc.</p> <p>Diane Hamer, BBC</p> <p>Thomas M. Blasey, ITT Corporation</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Bruce Tonkin, Melbourne IT</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p>	
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	<p>Dara Jeffries</p> <p>Yolanda Busse, Oehen Mendes &amp; Assoc.</p> <p>Denise Yee, (Kuwabara).Visa Inc</p> <p>Dan Poliak, Adobe Systems Incorporated</p> <p>Ryan Foster, Securities Industry and Financial Markets Association</p> <p>Furrer Urs, economiesuisse</p> <p>Edwin van Staden, GE Money</p> <p>Andy Coombs, International Anti-Counterfeiting Coalition.</p> <p>Ken Abbott, Gemalto</p> <p>Jim Bikoff, Silverberg, Goldman &amp; Bikoff, LLP (On behalf of International Olympic Committee)</p> <p>Robert S Raines, Chevron Corporation</p> <p>Anne-Mette Holm Madsen , LEGO Juris AS</p> <p>Wendy Chan</p> <p>Aimee Nolan W.W. Grainger, Inc</p>	
<p>Proposal for ‘reserved trademarks’ list on which trademark owners can register their marks, rendering these unavailable as TLD strings MOD 3</p>	<p>Jonathan Robinson, Netnames (Registrar)</p> <p>David Fares, News Corporation</p> <p>Susan Kawaguchi, eBay</p> <p>Olive Gretchen, Corporation Service Company (CSC)</p>	<p>Phil Corwin Internet Commerce Association (says it would go well beyond existing trademark law)</p>

	<p>Claudio Digangi (no stated affiliation)</p> <p>Gayle C. Sullivan, AT&amp;T</p> <p>Fabrici Vayra, Time Warner</p> <p>Heidi C. Salow, Internet Commerce Coalition</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>Sanjiv Sarwate, Pattishall McAuliffe (IP lawyers)</p> <p>Christian Merida, US Chamber of Commerce</p> <p>Margie Milam, MarkMonitor Inc. (corporate domain name registrar)</p> <p>Kevin Rupy, USTelecom</p> <p>Lori Cordell (no stated affiliation)</p> <p>Michael Palage (no stated affiliation)</p> <p>Thomas M. Blasey, ITT Corporation</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Denise Yee (Kuwabara), Visa Inc</p> <p>Andy Coombs, International Anti-Counterfeiting Coalition.</p> <p>Ryan Foster, Securities Industry and Financial Markets Association</p> <p>Anne-Mette Holm Madsen, LEGO Juris AS</p> <p>Wendy Chan, Nike</p> <p>McGradyP, GT Law (on behalf of an 'undisclosed client')</p>	
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	<p>Jolene A Neby, Ameriprise Financial</p> <p>Philip Lodico, Fairwinds Partners (Internet strategy consultants)</p> <p>Steven Metalitz, Intellectual Property Consituency</p> <p>Bruce Tonkin, Melbourne IT</p> <p>George Kirikos (Leap of Faith Financial Services)</p>	
<p>Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups</p>	<p>Oscar A. Robles-Garay, NIC Mexico(ccTLD registry)</p> <p>Patrick Vande Walle</p> <p>Richard Tindal, Demand Media(renewal fees only)</p> <p>P McGrady, GT Law (on behalf of an ‘undisclosed client’)</p> <p>Claudio Digangi (no stated affiliation)</p> <p>Clarke D. Walton, Registrar constituency</p> <p>Jeff Neuman, Neustar Inc.</p> <p>Daniel A Nooger, The Hearst Corporation</p> <p>Antony Van Couvering, Names@Work</p> <p>Taylor, David Lovells LLP</p> <p>Thomas Lowenhaupt, Connecting.nyc Inc</p> <p>Thomas Lenz, .köl</p> <p>‘oueichek;, Arab Team for Domain Names and Internet Issues (Intergovernmental / Arab League team)</p>	<p>Watson, Tom -Legal Bank of America Corporation *re application fee only -argues application fee should be at least \$500,000 to deter ‘frivolous’ applications. However, also believes fee for filing an objection should be very low</p>

	<p>Milton L Mueller, Noncommercial Users Constituency</p> <p>Mike O'Connor, haven2.com</p> <p>Dr. Neal Krawetz, Hacker Factor Solutions</p> <p>Dan Schindler (no stated affiliation)</p> <p>Dirk Krischenowski, dotcities / dotBerlin</p> <p>Susan Santaniello, City of New York</p> <p>Sara Medi / Jill Evans MEP, Plaid Cymru</p> <p>Roelof Meijer, Stichting Internet Domeinregistratie Nederland (SIDN)</p> <p>Oscar A. Robles Garay, NIC Mexico</p> <p>Tony Harris, eECOM-LAC, the Latin America and Caribbean Federation of Internet and Electronic Commerce</p> <p>Robert S Raines, Chevron Corporation</p> <p>Vittorio Bertola, bertola.eu</p>	
<p>Fees should be lowered particularly for community groups</p>	<p>David Hutchison, DotSCO (Prospective new registry for Scots cultural group)</p> <p>Aran Jones, dotCYM (Prospective new registry for Scots cultural group)</p> <p>Asociación PuntoGal (Prospective new registry for Gallic cultural group)</p> <p>Vittorio Bertola, bertola.eu</p>	

<p>Many scripts, like Chinese, Japanese and Korean, use ideographs and pictographs that are information-rich descriptors and not low-information alphabets. This is quite different from English, where a single or two characters are unlikely to have any meaning. Restricting strings to 3 or more characters unfairly disadvantages these scripts and therefore the 3-character minimum string rule should be removed for these scripts.</p>	<p>James Seng, APTLD  Wil Tan, Zodiac  Yu Yang, China Organizational Name Administration Center (CONAC)  Yao Jiankang, Chinese Domain Name Consortium</p>	
<p>Standard for String Confusion should not be limited to “visually” similar.</p>	<p>Claudio Digangi (no stated affiliation)  Paul Smocer BITS (financial services)  Sanjiv Sarwate, Pattishall McAuliffe (IP lawyers)  Christian Merida, US Chamber of Commerce  Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)  Tom Watson, Legal Bank of America Corporation  David W. Maher, .org public interest registry  George Kirikos, Leap of Faith Financial Services  Vittorio Bertola, bertola.eu</p>	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency  Richard Tindal, Demand Media (both argue against synonyms, e.g. .car and .auto, being covered by string similarity rules)</p>
<p>The use of string similarity algorithms should be accompanied by manual reviews</p>	<p>Heidi C. Salow, Internet Commerce Coalition  Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)  Ryan Foster, Securities Industry and Financial Markets</p>	

	<p>Association</p> <p>George Kirikos, Leap of Faith Financial Services</p> <p>Mark Davis, Unicode Technical Committee (UTC)</p>	
<p>Opposition to auctions as a ‘last resort’ method for resolving string contention.</p>	<p>David Fares, News Corporation</p> <p>Claudio Digangi</p> <p>‘oueichek’, Arab Team for Domain Names and Internet Issues (Intergovernmental / Arab League team)</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Ryan Foster, Securities Industry and Financial Markets Association</p> <p>Roelof Meijer SIDN (Stichting Internet Domeinregistratie Nederland)</p>	<p>Richard Tindal, Demand Media</p>
<p>Multiple objectors to the same application should be allowed consolidate into a single proceeding (for a single fee) (p3-5?)</p>	<p>David Fares, News Corporation</p> <p>Susan Kawaguchi, eBay</p> <p>Fabricio Vayra, Time Warner</p> <p>Wendy Chan, Nike</p>	
<p>The decisions of a dispute resolution panel from a dispute resolution service provider should be binding rather than advisory on ICANN</p>	<p>David Fares, News Corporation</p> <p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Fabricio Vayra, Time Warner</p> <p>McGradyP, GT Law (on behalf of an ‘undisclosed client’)</p> <p>Christopher G. Martin, United States Council for International Business</p> <p>Olive Gretchen Corporation Service Company (CSC)</p>	

	<p>Christian Merida, US Chamber of Commerce</p> <p>Thomas M. Blasey, ITT Corporation</p>	
Trademark sunrise periods required	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Heidi C. Salow, Internet Commerce Coalition</p> <p>McGradyP, GT Law (on behalf of an 'undisclosed client')</p> <p>Sanjiv Sarwate, Pattishall McAuliffe (IP lawyers)</p> <p>Bruce Tonkin, Melbourne IT</p>	<p>Jonathan Robinson Netnames</p> <p>Tom Watson, Legal Bank of America Corporation</p>
Notice and takedown procedure for abusive domains required	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Kevin Rupy, USTelecom</p> <p>Steven Metalitz, Intellectual Property Constituency</p> <p>Andy Coombs, International Anti-Counterfeiting Coalition.</p>	.
Three member panels should be an option for LRO disputes	<p>Susan Kawaguchi, eBay</p> <p>Heidi C. Salow, Internet Commerce Coalition</p> <p>David Daugherty, Software &amp; Information Industry Association (SIIA)</p> <p>Steven Metalitz, Intellectual Property Constituency</p> <p>Vincent Garlock, American Intellectual Property Law Association</p> <p>Diane Hamer, BBC</p>	.

<p>Prevailing party in dispute resolution should have fee refunded / losing party should bear costs</p>	<p>Claudio Digangi (no stated affiliation)</p> <p>Diane Hamer, BBC</p> <p>Bruce Tonkin, Melbourne IT</p> <p>Andy Coombs, International Anti-Counterfeiting Coalition.</p>	
<p>MAPO provisions should be scrapped</p>	<p>Richard Tindal, Demand Media</p> <p>Phil Corwin, Internet Commerce Association (unless ‘narrow and clearly articulated criteria for such objections’ can be established)</p> <p>Christian Merida, US Chamber of Commerce</p> <p>oueichek The Arab team for Domain Names and Internet Issues</p> <p>Jonathan Shea, Asia Pacific Top Level Domain Organisation</p> <p>Milton L Mueller, Noncommercial Users Constituency</p>	
<p>Objections on trademark grounds should not carry a fee</p>	<p>Christian Merida, US Chamber of Commerce</p> <p>Margie Milam, MarkMonitor Inc. (corporate domain name registrar)</p> <p>Aimee Nolan, W.W. Grainger, Inc</p>	<p>David Klein, DHK Enterprises, Inc. (argues objectors should bear the full costs both for themselves and the applicant, as ‘It is unfair to make the applicant the subject of a financial war during the dispute mediation phase’.)</p>
<p>Applicants should be allowed to apply for a ‘family of marks’ and not have to pay multiple application fees for each one.</p>	<p>Paul D. McGrady, Greenberg Traurig, LLP (on behalf of ‘undisclosed client)</p>	

<p>If multiple applicants apply for the same string, or similarly infringing strings, trademark owners should not have to object separately to each application</p>	<p>Nick Wood, MARQUES, the European Association of Trade Mark Owners</p> <p>Dara Jeffries (no stated affiliation)</p> <p>Yolanda Busse, Oehen Mendes &amp; Assoc.</p>	
<p>Support for joint ventures as a method of resolving string contention</p>	<p>Richard Tindal, Demand Media</p> <p>Susan Kawaguchi, eBay</p> <p>Tom Watson, Legal Bank of America Corporation</p> <p>Bruce Tonkin, Melbourne IT</p> <p>Dan Schindler (no stated affiliation)</p> <p>Rosette, Kristina (no stated affiliation)</p> <p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p>	
<p>Setting of variable prices for domain names should not be permitted /price caps should be maintained in the new TLD registry contracts</p>	<p>Mike Rodenbaugh, Rodenbaugh Law / Business Constituency</p> <p>Charles Christopher (no stated affiliation)</p> <p>Jonathon Nevett, Network Solutions LLC (only if a registry has 'market power')</p> <p>URL Names</p> <p>Mike O'Connor, haven2.com</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>'Tom'</p> <p>Katherine Pilna, Special Design Services Inc.</p> <p>Jeremy Sprout (no stated affiliation)</p>	

	<p>Dale Craig (no stated affiliation)</p> <p>Max Menius, Menius Enterprises, Inc.</p> <p>Gregory Boulter, Vertical Research Corp</p> <p>Tom, Kingsnames</p> <p>Kevin Ohashi, Ohashi.Info</p> <p>Katy Smith (no stated affiliation)</p> <p>Michael Castello, Cities Internet Network, Inc.</p> <p>Kelly Pitts (no stated affiliation)</p>	
<p>Thick WHOIS model required</p>	<p>Jonathan Robinson, Netnames</p> <p>Susan Kawaguchi, eBay</p> <p>Olive Gretchen, Corporation Service Company (CSC)</p> <p>Gayle C. Sullivan, AT&amp;T</p> <p>Heidi C. Salow, Internet Commerce Coalition</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>David Daugherty, Software &amp; Information Industry Association (SIIA)</p> <p>Christian Merida, US Chamber of Commerce</p> <p>Margie Milam, MarkMonitor Inc. (corporate domain name registrar)</p> <p>David Taylor, Lovells LLP</p> <p>Vincent Garlock, American Intellectual Property Law Association</p>	

	Jonathan Robinson, NetNames  Thomas M. Blasey, ITT Corporation  Denise Yee (Kuwabara), Visa Inc  Andy Coombs, International Anti-Counterfeiting Coalition	
ICANN should not be able to modify the registry contract at will	Jeff Neuman, Neustar Inc.  David Hutchison, DotSCO (Prospective new registry)  Antony Van Couvering, Names@Work  Dan Schindler (no stated affiliation)  Oscar A. Robles Garay, NIC Mexico  Vittorio Bertola, bertola.eu	
Price caps for larger registries only	Jeff Neuman, Neustar Inc.  Ivan Vachovsky, Aplus.Net a.k.a. Abacus (registrar)	
The Guidebook currently holds a provision that an “applicant agrees not to challenge, in Court or in any other judicial entity, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.” ICANN should not be given such broad immunity, and applicants should not be asked to waive their rights to challenge ICANN’s decision in court.	Autumn Lotze, Retail Industry Leaders Association  Metalitz, Steven, Intellectual Property Constituency  Vincent Garlock, American Intellectual Property Law Association  Nick Wood, MARQUES, the European Association of Trade mark Owners (believes this is not ICANN’s intention but the wording should be changed)  Milton L Mueller, Noncommercial Users Constituency	

	<p>Ryan Foster, Securities Industry and Financial Markets Association</p> <p>David W. Maher, Registries Constituency</p> <p>Robin Gross (no stated affiliation)</p>	
<p>Ownership of a registrar by a registry is permissible, but functions should be kept separate</p>	<p>Richard Tindal, Demand Media</p> <p>Jonathon Nevett, Network Solutions LLC</p> <p>Bruce Tonkin, Melbourne IT (only in case of single owner TLDS, or maybe for small registries with a cap of 50,000 names to be sold total)</p>	<p>Phil Corwin Internet Commerce Association (exceptions may be permissible in some cases)</p> <p>Raines, Robert S, Chevron Corporation</p>
<p>Any interested party should have the right to object on morality and public order grounds.</p>	<p>Claudio Digangi (no stated affiliation)</p>	

**Appendix 4.9E: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (18 February – 13 April 2009)**

(For full details of all submitted comments see <http://forum.icann.org/lists/2gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed / supported by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>
<p>Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for further study</p>	<p>Hope D Mehlman, Regions Financial Corporation</p> <p>Robert D MacDonald, 3M</p> <p>David A.Lieber , National Business Coalition on E-Commerce and Privacy</p> <p>John Burden, Commerce Garden Inc</p> <p>Yvette Wojciechowski The Coalition Against Domain Name Abuse (CADNA)</p> <p>Paul Smocer, BITS</p> <p>Scott Roberts, Khamma Group, LLC</p> <p>Patrick Martin Flaherty, (Padraic), Verizon Corporate Resources Group LLC</p> <p>Michele Cantley, Regions Financial Corporation</p> <p>James Crowne, American Intellectual Property Law Association</p> <p>Claude Gélinas</p> <p>Sandra Aistars, Time Warner</p> <p>‘Tom’, Kingsnames</p> <p>Ken Ryan</p> <p>Ron Jackson</p>	<p>James M. Bladel, GODADDY</p> <p>eCOM-LAC</p> <p>Andrew Mack, AMGlobal Consulting</p> <p>Michele Neylon Blacknight</p> <p>Stéphane Van Gelder INDOM</p> <p><i>(Presumably also implicitly opposed by all those who did not argue against new gTLDs)</i></p>

	<p>Yee, Denise (Kuwabara), Visa Inc</p> <p>Pochylá Monika, Ministry of Industry and Trade of the Czech Republic</p> <p>Max Menius, Menius Enterprises, Inc.</p> <p>George Kirikos, Leap of Faith Financial Services</p> <p>Phillip V. Marano, International Olympic Committee</p> <p>'go2ao'</p> <p>Derick Harris</p> <p>Gayle Sullivan, AT&amp;T</p> <p>Marc-Anthony Signorino, The Coalition for Online Trademark Protection</p> <p>Nick Wood, MARQUES</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>Mike Housman, DomainWeb US</p> <p>Andrew Allemann</p> <p>Jorgen Abild Andersen, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark</p>	
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<p>If new gTLDs go ahead, it should be only in limited numbers</p>	<p>Gayle Sullivan, AT&amp;T</p> <p>Marc-Anthony Signorino, The Coalition for Online Trademark Protection</p> <p>Nick Wood, MARQUES</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>Mike Housman, DomainWeb US <a href="http://www.DomainWeb.US">www.DomainWeb.US</a></p> <p>Andrew Allemann</p> <p>Jorgen Abild Andersen, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark</p>	
<p>New gTLDs process should be completed and new TLDs launched as quickly as possible</p>	<p>Anthony Harris eCOM-LAC (prospective new registrar)</p> <p>Andrew Mack AMGlobal Consulting</p> <p>‘dotgal’, Asociación PuntoGal</p>	<p>James M. Bladel, GODADDY eCOM-LAC</p> <p>Andrew Mack, AMGlobal Consulting</p> <p>Michele Neylon, Blacknight</p> <p>Stéphane Van Gelder, INDOM</p>

<p>Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups</p>	<p>ALAC</p> <p>Russell Pangborn, Microsoft</p> <p>Roger Castillo, NIC Mexico</p> <p>Michael Palage</p> <p>David Taylor, Lovells LLP</p> <p>Ron Andruff, RNA Partners, Inc.</p> <p>Katherine Wunningham, City of New York</p> <p>PuntuEus Elkartea, dotEus</p> <p>Konstantinos Komaitis NCUC</p> <p>Thomas Lenz, dotKoeln</p> <p>‘dotgal’, Asociación PuntoGal</p> <p>Thomas Lowenhaupt, Connecting.nyc Inc.</p> <p>Sophia B</p> <p>Thomas Rickert eco, e.V. (<a href="http://www.eco.de">www.eco.de</a>)</p> <p>Craig Shea, Adobe Systems Incorporated</p> <p>Sharon Aguayo, International Trademark Association</p> <p>Jan Barnes, European-American Business Council</p> <p>Dirk Krischenowski, dotBERLIN</p> <p>Patrick Vande Walle, ALAC (but posting in personal capacity)</p>	
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<p>Proposal for 'reserved trademarks' list on which trademark owners can register their marks, rendering these unavailable as TLD strings</p>	<p>Russell Pangborn, Microsoft</p> <p>Hope D Mehlman. Regions Financial Corporation</p> <p>Michael Palage</p> <p>Andy Coombs International Anti-Counterfeiting Coalition</p> <p>Gayle Sullivan, AT&amp;T</p> <p>Marc-Anthony Signorino, The Coalition for Online Trademark Protection</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)</p> <p>Flaherty, Patrick Martin (Padraic) , Verizon Corporate Resources Group LLC</p> <p>Phil Corwin, Internet Commerce Association</p> <p>Michele Cantley, Regions Financial Corporation</p> <p>Antony Van Couvering, Minds + Machines</p> <p>Nick Wood, MARQUES</p> <p>Fred Krueger, Dot Eco LLC's</p> <p>Daniel A Nooger, Hearst Communications, Inc.</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>Yee, Denise (Kuwabara), Visa Inc</p> <p>Elisa Cooper, MarkMonitor Inc.</p> <p>Phillip V. Marano, International Olympic Committee</p> <p>Sharon Aguayo , International</p>	<p>Richard Tindal, Demand Media Inc</p>
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	<p>Trademark Association</p> <p>Anne-Mette Holm Madsen, LEGO</p> <p>Jan Barnes, European-American Business Council</p>	
Trademark ‘sunrise’ periods required in new TLDs	<p>Hope D Mehlman, Regions Financial Corporation</p> <p>Michele Cantley and Hope Mehlman, Regions Financial Corporation</p> <p>Antony Van Couvering, Minds + Machines</p> <p>Daniel A Nooger, Hearst Communications, Inc.</p> <p>Denise Yee, (Kuwabara), Visa Inc</p> <p>Jan Barnes, European-American Business Council</p>	Richard Tindal, Demand Media Inc
Many scripts, like Chinese, Japanese and Korean, use ideographs and pictographs that are information-rich descriptors and not low-information alphabets. This is quite different from English, where a single or two characters are unlikely to have any meaning. Restricting strings to 3 or more characters unfairly disadvantages these scripts and therefore the 3-character minimum string rule should be removed for these scripts.	<p>刘昕, Internet Society of China Wil Tan</p> <p>Konstantinos Komaitis NCUC</p> <p>James Seng</p> <p>李光皓 China Internet Network Information Center (CNNIC)</p> <p>Yang Yu, China Organizational Name Administration Center (CONAC)</p>	
Synonyms are not confusing and should be allowed	<p>Patrick Martin Flaherty, (Padraic), Verizon Corporate Resources Group LLC</p> <p>Antony Van Couvering, Minds + Machines</p>	Ron Andruff, RNA Partners, Inc.

<p>Opposition to auctions as a ‘last resort’ method for resolving string contention.</p>	<p>Werner Staub</p> <p>Fred Krueger, Dot Eco LLC's</p> <p>James Crowne, American Intellectual Property Law Association</p> <p>Sharon Aguayo, International Trademark Association</p> <p>Patrick Vande Walle, ALAC (but posting in personal capacity)</p> <p>Matt Mansell, Mesh Digital Ltd</p>	
<p>Support for mandatory comparative evaluation as a method for resolving string contention, including non-community TLDs</p>	<p>James Crowne American Intellectual Property Law Association</p> <p>Steven Metalitz, IPC</p> <p>Werner Staub</p>	
<p>Notice and takedown procedure for abusive domains required</p>	<p>Michael Palage</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p> <p>David Taylor, Lovells LLP</p> <p>Antony Van Couvering Minds + Machines</p> <p>Richard Tindal, Demand Media Inc</p> <p>Fred Krueger, Dot Eco LLC's</p> <p>James Crowne, American Intellectual Property Law Association</p> <p>Nick Wood, MARQUES</p>	

<p>Support for joint ventures as a method of resolving string contention</p>	<p>Susan Kawaguchi, eBay Inc. David W. Maher, Registries Constituency Fred Krueger, Dot Eco LLC's</p>	
<p>Setting of variable prices for domain names should not be permitted /price caps should be maintained in the new TLD registry contracts</p>	<p>Patrick Martin Flaherty (Padraic), Verizon Corporate Resources Group LLC Phil Corwin, Internet Commerce Association (argues exceptions are permissible for a carefully circumscribed group of “closed” registries subject to strict numerical registration limits) ‘Tee’ ‘Tom’, Kingsnames Michael H. Berkens, Worldwide Media, Inc. Denise Yee, (Kuwabara), Visa Inc ‘Tom’, Kingsnames Sharon Aguayo, International Trademark Association Mike Housman, <a href="http://DomainWeb.US">DomainWeb.US</a> Andrew Allemann</p>	
<p>Ownership of a registrar by a registry is permissible, but functions should be kept separate</p>	<p>Michael Palage (Permissible only under narrow conditions, must be rigidly policed) Katrin Ohlmer, DOTZON GmbH (Only for single-user TLDs)</p>	<p>Michele Neylon, Blacknight</p>

<p>Categorisation of applications into open and community based is inadequate. More sophisticated categorisation is required, and different categories should be treated differently re application process and / or contractual conditions.</p>	<p>ALAC  Roelof Meijer, SIDN (.nl registry)  Matthieu CrÃdou, pointbzh.com  Elisa Cooper , MarkMonitor Inc.  StÃphane Van Gelder, INDOM</p>	
<p>Morality and public order objections should be scrapped.</p>	<p>ALAC  Phil Corwin, Internet Commerce Association  Andrew Allemann</p>	
<p>Multiple objectors to a single application should be allowed to combine their objections into a joint one</p>	<p>Russell Pangborn, Microsoft  Daniel A Nooger, Hearst Communications, Inc.  Denise Yee (Kuwabara), Visa Inc</p>	

<p>Thick WHOIS model required</p>	<p>Kawaguchi Susan, eBay Inc.</p> <p>Andy Coombs</p> <p>Gayle Sullivan, AT&amp;T</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p> <p>David A. Lieber, National Business Coalition on E-Commerce and Privacy</p> <p>David Taylor, Lovells LLP</p> <p>Marc-Anthony Signorino, The Coalition for Online Trademark Protection</p> <p>J. Scott Evans, Yahoo! Inc.</p> <p>James Crowne, American Intellectual Property Law Association</p> <p>Nick Wood, MARQUES</p> <p>Michele Neylon, Blacknight</p> <p>Mike O'Connor, haven2.com</p> <p>Denise Yee (Kuwabara), Visa Inc</p> <p>Elisa Cooper, MarkMonitor Inc.</p>	
<p>Need clarification on how 'expert panels' will be formed and who will be on them</p>	<p>Steve Metalitz,</p> <p>Fred Krueger, Dot Eco LLC's</p> <p>Daniel A Nooger, Hearst Communications, Inc.</p>	

<p>Trademark protections are inadequate</p>	<p>Russell Pangborn, Microsoft</p> <p>Hope D Mehlman, Regions Financial Corporation</p> <p>Michael Palage</p> <p>Kawaguchi Susan      eBay Inc.</p> <p>Andy Coombs International Anti-Counterfeiting Coalition</p> <p>Gayle C Sullivan, AT&amp;T</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p> <p>David A. Lieber, National Business Coalition on E-Commerce and Privacy</p> <p>Marc-Anthony Signorino, The Coalition for Online Trademark Protection</p> <p>Yvette Wojciechowski The Coalition Against Domain Name Abuse (CADNA)</p> <p>Paul Smocer, BITS</p> <p>Patrick Martin Flaherty, (Padraic) Verizon Corporate Resources Group LLC</p> <p>Michele Cantley, Regions Financial Corporation</p> <p>J. Scott Evans Yahoo! Inc.</p> <p>Richard Tindal Demand Media Inc</p> <p>Fred Krueger, Dot Eco LLC's</p> <p>Steve Metalitz, IPC</p> <p>James Crowne, American Intellectual Property Law</p>	
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	<p>Association</p> <p>Nick Wood, MARQUES</p> <p>Nooger, Daniel A      Hearst Communications, Inc.</p> <p>Sandra Aistars, Time Warner</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p> <p>Denise Yee, (Kuwabara), Visa Inc</p> <p>Elisa Cooper, MarkMonitor Inc.</p> <p>Craig Shea, Adobe Systems Incorporated</p> <p>‘Intern1’</p> <p>Phillip V. Marano, International Olympic Committee</p> <p>Sharon Aguayo , International Trademark Association</p> <p>Anne-Mette Holm Madsen, LEGO</p> <p>Peter Taylor, Bradford &amp; Bingley</p> <p>Jan Barnes, European-American Business Council</p>	
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**Appendix 4.9F: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (4 October – 24 November 2009)**

(For full details of all submitted comments see <http://forum.icann.org/lists/3gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed / supported by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	<p>Diane Hamer BBC and BBC Worldwide Limited.</p> <p>Phillip Marano, International Olympic Committee</p> <p>Frederick Felman, Markmonitor</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Lise Fuhr, Danish Internet Forum</p> <p>Anne-Laure, joint comments of ECTA (European Communities Trade Mark Association) and MARQUES</p> <p>Vincent Garlock, American Intellectual Property Law Association (AIPLA)</p> <p>George Kirikos, Leap of Faith Financial Services</p> <p>Mitchell Stabbe, National Cable &amp; Telecommunications</p> <p>Denise Yee, (Kuwabara), VISA</p> <p>Michael H. Berkens, Esq, Worldwide Media Inc.</p>	<p>Megan Ferraro Ferraro Strategy Group</p> <p>Adam Toronto</p> <p>Kenneth Nahigian</p> <p>Patrick A. Jacxsens, MADC Partners</p> <p>Martha Lopez, Martha Elena &amp; Fela's Shop</p> <p>Amy M. McKinlay, R. Chris Harbold &amp; Associates</p> <p>‘press’, AmericaSpeakOn.org</p> <p>Doug Motley, Energy Consulting, Inc.</p> <p>Keith Nahigian, Nahigian Strategies, LLC</p> <p>Allyson Bell</p> <p>John Poelman</p> <p>Rob Seidel</p> <p>Geoff Hale</p> <p>Courtney Daly</p> <p>Dirk Krischenowski, dotberlin</p> <p>Adina Reichard, dotbayern</p> <p>Drew McNeill</p> <p>Paul Couture</p> <p>Mary Boese</p>

		<p>MÄller, Martina, pr-ide GbR   PR &amp; Industrial Design</p> <p>Markus Tofote</p> <p>Gabriele Werner, Dumrath &amp; Fassnacht KG (GmbH &amp; Co.)</p> <p>Frank Haegele, Berlin Plaza Hotel</p> <p>Sean Storan</p> <p>Markus Erbach</p> <p>Robert Gerstemeier</p> <p>Matt Crow</p> <p>Elizabeth Letchworth</p> <p>Richard Wein</p> <p>Carter Livingston</p> <p>John C. Kalitka</p> <p>Julie G Addington</p> <p>Nicole Carosella</p> <p>Lutz Treutler. CBXNET GmbH</p> <p>Andrea Peters, media.net</p> <p>Greg Houston</p> <p>Matthew M. Barnes</p> <p>Francisco Salamero, ELZABURU</p> <p>Courtney Perrone</p> <p>Thomas Lenz, dotkoln</p> <p>Bastian Tippkemper , Top- level-Domain .spe</p> <p>‘GA’ IH&amp;RA</p> <p>Asociación PuntoGal,</p>
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		<p>Asociación PuntoGal</p> <p>Jean-Philippe Clément, City of Paris</p> <p>Fabien Betremieux, (AFNIC)</p> <p>Oliver J. Süme, .hamburg</p> <p>Stéphane Van Gelder, indom</p> <p>Clark Landry, Dot Eco LLC</p> <p>Caspar von Veltheim, Bayern Connect</p> <p>Jean Christophe Vignes, EuroDNS SA</p> <p><i>(Presumably also implicitly opposed by all those who did not argue against new gTLDs)</i></p>
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<p>If new gTLDs go ahead, it should be in limited numbers only</p>	<p>Daniel A Nooger, Hearst Communications, Inc. (suggests this should be the case until remaining issues are ironed out)</p> <p>Doug Johnson, American Bankers Association (advocates 'incremental' approach)</p> <p>Michael H. Berkens, Esq, Worldwide Media Inc. (wants 'closed' TLDs only, no requirement for more 'open' TLDs)</p> <p>Scott Roberts, Khamma Group, LLC</p> <p>Russell Pangborn, Microsoft</p> <p>Paula Guibault, Coca-Cola Company</p> <p>Uwe Stache, BB-ONE.net Ltd.</p>	
<p>Community based applications should go forward ahead of other types</p>	<p>Daniel A Nooger, Hearst Communications, Inc. (suggests this should be the case until remaining issues are ironed out)</p> <p>Werner Staub</p>	<p>Antony Van Couvering, Minds + Machines</p>
<p>New TLDs programme should go forward ASAP</p>	<p>Megan Ferraro, Ferraro Strategy Group</p> <p>Adam Toronto</p> <p>Kenneth Nahigian</p> <p>Patrick A. Jacxsens, MADC Partners</p> <p>Martha Lopez, Martha Elena &amp; Fela's Shop</p> <p>Amy M. McKinlay, R. Chris Harbold &amp; Associates</p>	

	<p>'press', AmericaSpeakOn.org</p> <p>Doug Motley, Energy Consulting, Inc.</p> <p>Keith Nahigian, Nahigian Strategies, LLC</p> <p>Allyson Bell</p> <p>John Poelman</p> <p>Rob Seidel</p> <p>Geoff Hale</p> <p>Courtney Daly</p> <p>Dirk Krischenowski, dotberlin</p> <p>Adina Reichard, dotbayern</p> <p>Drew McNeill</p> <p>Paul Couture</p> <p>Mary Boese</p> <p>MÄller, Martina, pr-ide GbR   PR &amp; Industrial Design</p> <p>Markus Tofote</p> <p>Gabriele Werner, Dumrath &amp; Fassnacht KG (GmbH &amp; Co.)</p> <p>Frank Haegele, Berlin Plaza Hotel</p> <p>Sean Storan</p> <p>Markus Erbach</p> <p>Robert Gerstemeier</p> <p>Matt Crow</p> <p>Elizabeth Letchworth</p> <p>Richard Wein</p> <p>Carter Livingston</p> <p>John C. Kalitka</p>	
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	<p>Julie G Addington</p> <p>Nicole Carosella</p> <p>Lutz Treutler. CBXNET GmbH</p> <p>Andrea Peters, media.net</p> <p>Greg Houston</p> <p>Matthew M. Barnes</p> <p>Francisco Salamero, ELZABURU</p> <p>Courtney Perrone</p> <p>Thomas Lenz, dotkoln</p> <p>Bastian Tippkemper , Top-Level-Domain .spe</p> <p>‘GA’ IH&amp;RA</p> <p>Asociación PuntoGal, Asociación PuntoGal</p> <p>Jean-Philippe Clément, City of Paris</p> <p>Fabien Betremieux, (AFNIC)</p> <p>Oliver J. Süme, .hamburg</p> <p>Stéphane Van Gelder, indom</p> <p>Clark Landry, Dot Eco LLC</p> <p>Caspar von Veltheim, Bayern Connect</p> <p>Jean Christophe Vignes, EuroDNS SA</p>	
<p>Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups</p>	<p>David W. Maher, Registries Stakeholder Group</p> <p>Paul Smocer, BITS</p> <p>Michele Neylon, Blacknight</p> <p>David Allen</p>	

<p>Opposition to auctions as a ‘last resort’ method for resolving string contention.</p>	<p>Claudio Di Gangi International Trademark Association</p> <p>Vincent Garlock, American Intellectual Property Law Association (AIPLA)</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p>	
<p>Section 2.10 "Registry Operator shall offer all domain registration renewals at the same price, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price by Registry Operator." This is still not enough, as the registries will simply have everyone agree that they could change the price at any time in their agreements that no one ever reads. Hard caps are still required.</p>	<p>George Kirikos, Leap of Fith Financial Services</p> <p>Max Menius, Menius Enterprises, Inc.</p> <p>Michael H. Berkens, Esq, Worldwide Media Inc.</p>	
<p>ICANN should not be able to modify the registry contract at will</p>	<p>Antony Van Couvering, Minds + Machines</p> <p>Clarke D. Walton Registrar Stakeholder Group</p> <p>Rnulf Storm, Norwegian GAC Representative</p> <p>Jeff Eckhaus, Demand Media</p>	
<p>Ownership of a registrar by a registry is permissible, but functions should be kept separate</p>	<p>Clarke D. Walton, Registrar Stakeholder Group</p> <p>Drazek, Keith, Neustar</p> <p>Jeff Eckhaus, Demand Media</p>	<p>Claudio Di Gangi, International Trademark Association (wants complete separation)</p>
<p>ICANN should avoid country, territory or place names, as these blur the distinction between ccTLDs and gTLDs.</p>	<p>Chris Disspain, ccNSO</p> <p>Annebeth Lange, UNINETT</p> <p>James M. Blade, GoDaddy</p> <p>Rnulf Storm, Norwegian GAC Representative</p>	

<p>Post Delegation Dispute Resolution Process should be based on ICANN's involvement in contract enforcement, instead of passing responsibility on to the registry</p>	<p>Neuman, Jeff Neustar, Inc. (posting in a personal capacity)</p> <p>Diane Hamer BBC and BBC Worldwide Limited.</p> <p>Taylor, David Lovells LLP</p> <p>Jeff Eckhaus Demand media</p> <p>Antony Van Couvering Minds + Machines</p> <p>Roger Castillo NIC Mexico</p>	
<p>'Trademark clearinghouse' database does not represent a proper globally reserved marks list. Proper reserved list is required.</p>	<p>Daniel A Nooger, Hearst Communications, Inc.</p> <p>Phillip Marano, International Olympic Committee</p> <p>Frederick Felman, Markmonitor</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Craig Shea, Adobe systems</p> <p>Anne-Laure, joint comments of ECTA (European Communities</p> <p>Trade Mark Association) and MARQUES</p> <p>Leonora Hoicka, IBM Corporation</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse</p> <p>Denise Yee, (Kuwabara), VISA</p> <p>Michael H. Berkens, Esq, Worldwide Media Inc.</p>	<p>Antony Van Couvering</p>

	<p>Russell Pangborn, Microsoft</p> <p>James B. Lake, Thomas</p> <p>Locicero + Bralow</p> <p>Mike Rodenbaugh, Business Constituency</p> <p>Paula Guibault, Coca-Cola Company</p>	
<p>URS should be compulsory, not just a ‘best practice’</p>	<p>Anne-Laure joint comments of ECTA (European Communities Trade Mark Association) and MARQUES</p> <p>Roelof Meijer SIDN</p> <p>James B. Lake, Thomas</p> <p>Locicero + Bralow</p> <p>Mike Rodenbaugh, Business Constituency</p> <p>Paula Guibault, Coca-Cola Company</p>	
<p>Objection filing period should be extended</p>	<p>Paul Smocer BITS</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Mark Bohannon, Software &amp; Information Industry Association (SIIA)</p> <p>Russell Pangborn, Microsoft</p> <p>Paula Guibault, Coca-Cola Company</p>	

<p>Trademark protections inadequate</p>	<p>Daniel A Nooger, Hearst Communications, Inc.</p> <p>Francisco Salamero, ELZABURU</p> <p>Phillip Marano, International Olympic Committee</p> <p>Sandra Aistars, Time Warner</p> <p>Frederick Felman, Markmonitor</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Craig Shea, Adobe systems</p> <p>Anne-Laure, joint comments of ECTA (European Communities Trade Mark Association) and MARQUES</p> <p>Vincent Garlock, American Intellectual Property Law Association (AIPLA)</p> <p>Leonora Hoicka, IBM Corporation</p> <p>Jarkko Ruuska, Nokia</p> <p>Paul Smocer, BITS</p> <p>Doug Johnson, American Bankers Association</p> <p>Mitchell Stabbe, National Cable &amp; Telecommunications</p> <p>Steven Metalitz, Coalition for online accountability</p> <p>David Taylor, Lovells LLP</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse</p>	
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	<p>Denise Yee, (Kuwabara), VISA</p> <p>J. Scott Evans, Yahoo! Inc.</p> <p>Russell Pangborn, Microsoft</p> <p>James B. Lake, Thomas Locicero + Bralow</p> <p>Mike Rodenbaugh, Business Constituency</p> <p>Paula Guibault, Coca-Cola Company</p>	
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**Appendix 4.9G: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs 28 May-21 July 2010**

(For full details of all submitted comments see <http://forum.icann.org/lists/4gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed / supported by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	George Kirikos, Leap of Faith Financial Services Jakob Balling, Arla Søren Ingemann Larsen, H.Lundbeck A/S Charlotte Munck,Solveig Hove-Christensen Phillip Marano, International Olympic Committee Susan Payne, BBC	<i>(Presumably implicitly opposed by all those who did not argue against new gTLDs)</i>
New TLDs should go forward ASAP	Dirk Krischenowski, dotBERLIN Markus Bahmann, .bayern Antony Van Couvering, Minds and Machines Fabien Betremieux, AFNIC	
Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups	Lisa Salazar, Paralegal 曹华平, Internet Society of China Ibaa Oueichek, Arab Team for Domain Names and Internet Issues David Taylor, Hogan Lovells	

<p>Different fee models should be adopted for different application types</p>	<p>谭亚凌 ,CNNIC</p> <p>Antony Van Couvering, Minds and Machines</p> <p>Abdulaziz Al-Zoman, Communications and Information Technology Commission (CITC)</p> <p>Amber Sterling, Association of American Medical Colleges</p>	
<p>‘Trademark clearinghouse’ database does not represent a proper globally reserved marks list. Proper reserved list is required.</p>	<p>Mette M. Andersen, LEGO Juris A/S</p> <p>Vibeke Aagaard Sørensen, VKR Holding A/S</p> <p>Charlotte Munck, Solveig Hove-Christensen</p> <p>Lisbeth Rahbek , Coloplast A/S</p> <p>Frederick Felman, MarkMonitor</p> <p>Clare Speed, Reckitt Benckiser Group plc birgit . schnell Red Bull GmbH</p> <p>Andrew Mills, MARQUES, the Association of European Trade Mark Owners and</p> <p>ECTA, the European Communities Trade Mark Association</p> <p>Nick Wood, Com Laude</p> <p>Caroline Perriard, Nestec S.A.</p> <p>Martin Sutton, HSBC</p> <p>DJ Culkar Comerica Bank / MarkMonitor</p>	

<p>URS system needs to be beefed up. Should be truly rapid and offer more than short-term suspension. Need loser pays mechanism / no significant cost to trademark owner.</p>	<p>Mette M. Andersen, LEGO Juris A/S</p> <p>Jakob Balling, Arla</p> <p>Katja Grabienski, JONAS Rechtsanwaltsgesellschaft gmbH</p> <p>Vibeke Aagaard Sørensen, VKR Holding A/S</p> <p>Charlotte Munck. Solveig Hove-Christensen</p> <p>Lisbeth Rahbek, Coloplast A/S</p> <p>Nick Wood, Com Laude</p> <p>Frederick Felman, MarkMonitor</p> <p>Clare Speed, Reckitt Benckiser Group plc</p> <p>Birgit Schnell, Red Bull GmbH</p> <p>Andrew Mills, MARQUES, the Association of European Trade Mark Owners and ECTA, the European Communities Trade Mark Association</p> <p>David Taylor, Hogan Lovells</p> <p>Caroline Perriard, Nestec S.A.</p> <p>Alex Gakuru</p> <p>DJ Culkar, Comerica Bank / Markmonitor</p>	
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<p>Preventing any ICANN-accredited registrar from providing assistance of any kind to prospective new gTLD applicants goes too far. Would unfairly exclude applicants intending to use registrar expertise to help them build their application.</p>	<p>Stéphane Van Gelder, indom.com</p> <p>Abdulaziz Al-Zoman, Communications and Information Technology Commission (CITC)</p> <p>Ibaa Oueichek, Arab Team for Domain names and Internet issues</p> <p>Volker Greimann, Key-Systems GmbH</p> <p>Thomas Rickert Association of the German Internet Industry</p>	
<p>Background checks in the area of ‘terrorism’, as it is presented in the DAG 4, without any definition, is unacceptable.</p>	<p>LM Fattal, The Multilingual Internet Group</p> <p>Abdulaziz Al-Zoman, Communications and Information Technology Commission (CITC)</p> <p>Mary Wong, Pierce Law</p> <p>Thomas Rickert, Association of the German Internet Industry</p>	
<p>Morality and public order provisions should be scrapped</p>	<p>Jacob Malthouse, Big Room Inc</p> <p>曹华平, Internet Society of China</p> <p>Alex Gakuru</p> <p>Mary Wong, Pierce Law</p> <p>Konstantinos Komaitis, University of Strathclyde</p> <p>Antony Van Couvering, , Minds and Machines</p>	<p>Katrin Ohlmer, dotBERLIN</p>

<p>Trademark rights protection mechanisms are inadequate</p>	<p>Mail, Arbitrator, WIPO</p> <p>Jakob Balling, Arla</p> <p>Søren Ingemann Larsen, H.Lundbeck A/S</p> <p>Katja Grabienski, JONAS Rechtsanwalts-gesellschaft mbH</p> <p>Charlotte Munck, Solveig Hove-Christensen</p> <p>Marianne Frank Simonsen, Vestas Wind Systems A/S</p> <p>Lisbeth Rahbek, Coloplast A/S</p> <p>Andrea Whetzel, Akerman Senterfitt LLP</p> <p>Clare Speed, Reckitt Benckiser Group plc</p> <p>Birgit Schnell, Red Bull GmbH</p> <p>Andrew Mills, MARQUES, the Association of European Trade Mark Owners and ECTA, the European Communities Trade Mark Association</p> <p>Oliver Süme, Initiative dotHAMBURG e.V</p> <p>Nick Wood, Com Laude</p> <p>Celia Ullmann, Philip Morris International Management S.A.</p> <p>Brian Beckham, WIPO</p> <p>David Taylor, Hogan Lovells</p> <p>Caroline Perriard, Nestec S.A.</p> <p>Phillip Marano, International</p>	
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	Olympic Committee Susan Payne BBC Martin Sutton, HSBC DJCulkar, Comerica Bank / Markmonitor	
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**Appendix 4.9H: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (12 November 2010-15 January 2011)**

(For full details of all submitted comments see <http://forum.icann.org/lists/5gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed / supported by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>
<p>Outright opposition to new TLDs at least insofar as the programme is currently conceived– programme should be cancelled altogether or at least delayed to allow more time for study of issues</p>	<p>George Kirikos, Leap of Faith Financial Services</p> <p>Phillip Marano, International Olympic Committee (IOC)</p> <p>Coalition for Online Accountability</p> <p>Kristin Jordan Harkins, Trademark Internet Committee</p> <p>Marc Salvatierra</p> <p>US Chamber of Commerce</p> <p>Paul Tattersfield</p> <p>Robert Fernandez</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)</p> <p>Adam Scoville, RE/MAX, LLC</p> <p>Craig Shea, Adobe Systems Incorporated</p> <p>Søren Ingemann Larsen, H.Lundbeck A/S</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Vayra, Fabricio, Time Warner Inc.</p> <p>Paul Foody</p>	<p>Fred Krueger</p> <p>Daniel Schindler</p> <p>Elaine Prais, VP Client Services</p> <p>Manuel Vilas, Asociación Puntogal</p> <p>dotEUS Association, dotEUS Association</p> <p>Elliot Noss, Tucows Inc.</p> <p>Statton Hammock, Network Solutions</p> <p>Robin Gross, NCUC</p> <p>Marc Salvatierra, DotConnectAfrica</p> <p>Annalisa Roger, dotgreen</p> <p><i>(Presumably also implicitly opposed by all those who did not argue against new gTLDs)</i></p>

<p>New TLDs application process should go ahead ASAP</p>	<p>Daniel Schindler</p> <p>Elaine Pruis, VP Client Services</p> <p>Manuel Vilas, Asociación Puntogal</p> <p>dotEUS Association, dotEUS Association</p> <p>Elliot Noss, Tucows Inc.</p> <p>Statton Hammock, Network Solutions</p> <p>Robin Gross, NCUC</p> <p>Marc Salvatierra, DotConnectAfrica</p> <p>Annalisa Roger, dotgreen</p>	
<p>Initial limited introduction/ fast track process for ‘safe’ community TLDs</p>	<p>Davie Hutchison, Dot Scot</p> <p>Davie Hutchison, European Cultural and Linguistic Top Level Internet Domain working group</p> <p>Frederick Felman, MarkMonitor</p>	<p>Antony Van Couvering, Minds + Machines</p>
<p>Opposition to auctions as a ‘last resort’ method for resolving string contention.</p>	<p>Deb Hughes, American Red Cross</p> <p>‘NONPROFITCANN’, proposed Not-for-Profit Organisations Constituency (NPOC)</p> <p>Constantine G. Roussos, dotMusic (.music) Domain Initiative</p>	

<p>ICANN's U-turn on vertical integration (removing all restrictions on registry / registrar cross-ownership) lacks transparency</p>	<p>Coalition for Online Accountability</p> <p>Frederick Felman, MarkMonitor</p> <p>Fiona Alexander, NTIA</p> <p>Sharon Aguayo , INTA</p> <p>Vayra, Fabricio, Time Warner</p> <p>Paul Tattersfield, GPM Group</p> <p>Marc Salvatierra, IPC</p>	
<p>Thick WHOIS should be reinstated</p>	<p>Russell Pangborn, Microsoft</p> <p>Sharon Aguayo , INTA</p> <p>Andrew Coombs, IACC</p> <p>J. Scott Evans, IPC</p> <p>Yvette Wojciechowski The Coalition Against Domain Name Abuse (CADNA)</p> <p>Susan Payne, BBC</p> <p>Isobelle C Fabian, Telstra Corporation Ltd</p>	
<p>Need loser pays model in URS</p>	<p>Sharon Aguayo , INTA</p> <p>Frederick Felman, MarkMonitor</p> <p>J. Scott Evans IPC</p> <p>Cathy van Vuuren, ECTA (European Communities Trade Mark Association)</p>	

<p>URS needs to be strengthened</p>	<p>Andrew Coombs, IACC</p> <p>David Taylor, Hogan Lovells</p> <p>Frederick Felman, MarkMonitor</p> <p>Mitchell Stabbe</p> <p>Cathy van Vuuren, ECTA (European Communities Trade Mark Association)</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)</p>	
<p>Denying an entity the opportunity to operate a gTLD because of 3 adverse UDRP decisions is an extremely broad standard that will unintentionally disqualify otherwise qualified applicants.</p>	<p>Jeff Eckhaus, Demand Media</p> <p>Phil Corwin, Internet Commerce Association</p> <p>Michael H. Berkens, Worldwide Media, Inc.</p>	
<p>Trademark rights protection mechanisms are inadequate</p>	<p>Janet O'Callaghan, News Corporation</p> <p>Phillip Marano, International Olympic Committee (IOC)</p> <p>Brian Beckham, WIPO</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>Kristin Jordan Harkins</p> <p>Steve DelBianco, Business Constituency (BC)</p> <p>Russell Pangborn, Microsoft</p> <p>Sharon Aguayo, INTA</p> <p>Marc Salvatierra, US Chamber of Commerce</p> <p>Andrew Coombs, IACC</p> <p>David Taylor, Hogan Lovells</p>	<p>Jeff Eckhaus, Demand Media</p> <p>Jon Nevett, Domain Dimensions</p>

	<p>Fabricio Vayra, Time Warner</p> <p>Frederick Felman, MarkMonitor</p> <p>J. Scott Evans, IPC</p> <p>Mitchell Stabbe, comments on behalf of autotrader.com</p> <p>Cathy van Vuuren, ECTA (European Communities Trade Mark Association)</p> <p>Yvette Wojciechowski, The Coalition Against Domain Name Abuse (CADNA)</p> <p>Susan Payne, BBC</p> <p>Adam Scoville, RE/MAX, LLC</p> <p>Craig Shea, Adobe Systems Incorporated</p> <p>Isabelle C Fabian, Telstra Corporation Ltd</p> <p>Mette M. Andersen, LEGO Juris A/S</p> <p>Marianne Frank Simonsen, Vestas Wind Systems A/S</p> <p>Jakob Balling, Arla Foods</p> <p>Victoria Sheckler, Recording Industry Association of America</p> <p>Vibeke Aagaard Bendtsen, VKR Holding A/S</p> <p>Jacob Williams, UrbanBrain Inc.</p> <p>Claudio Di Gangi, International Trademark Association</p>	
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<p>If new gTLD applicants are to be judged for their compliance with UDRP law, they should be judged equally for findings of cybersquatting and of reverse domain-name hijacking.</p>	<p>Wendy Seltzer  Michael H. Berkens, Worldwide Media, Inc.  Phil Corwin, Internet Commerce Association</p>	
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**Appendix 4.9I: Summary of comments / proposals attracting support or opposition of three or more individuals in Public Comments Period on New gTLDs (15 April 2011-15 May 2011)**

(For full details of all submitted comments see <http://forum.icann.org/lists/6gtld-guide/>)

Comment / proposal	Proposed / supported by	Opposed by
<p>Outright opposition to new TLDs at least insofar as the programme is currently conceived– programme should be cancelled altogether or at least delayed to allow more time for study of issues</p>	<p>George Kirikos, Leap of Faith Financial Services</p> <p>Kristin Jordan Harkins, American Intellectual Property Law Association</p> <p>Søren Ingemann Larsen, H.Lundbeck A/S</p>	<p>Richard Tindal, Donuts Inc.</p> <p>Thomas Lenz, dotkoln</p> <p>Jon Nevett, Domain Dimensions</p> <p>Elliot Noss Tucows Inc.</p> <p>Caspar Veltheim, Bayern Connect</p> <p>Elaine Pruis, Minds + Machines</p> <p>Annalisa Roger , dotgreen</p> <p>Manuel Vila, Asociación Puntogal</p> <p><i>(Presumably also implicitly opposed by all those who did not argue against new gTLDs)</i></p>
<p>New TLDs should go ahead, but only in limited numbers</p>	<p>Elisa Cooper, MarkMonitor</p> <p>David Taylor, Hogan Lovells</p> <p>Kathleen McCarthy, Coca-Cola Company</p> <p>Steven Metalitz, Coalition for Online Accountability</p> <p>Lise Fuhr, Dansk Internet Forum</p> <p>Claudio Di Gangi, INTA</p> <p>Fabricio Vayra, Time Warner</p> <p>Mark Partridge, Partridge IP Law</p>	

<p>The Board should finalise the application procedure and launch the programme without further delay</p>	<p>Richard Tindal, Donuts Inc. Thomas Lenz, dotkoln Jon Nevett, Domain Dimensions Elliot Noss, Tucows Inc. Caspar Veltheim, Bayern Connect Elaine Pruis, Minds + Machines Annalisa Roger , dotgreen Manuel Vila, Asociación Puntogal</p>	<p>George Kirikos, Leap of Faith Financial Services Søren Ingemann Larsen, H.Lundbeck A/S Scott Bain, The Software &amp; Information Industry Association (SIIA) Steven Metalitz, Coalition for Online Accountability Russell Pangborn, Microsoft Janet O'Callaghan, News Corporation Craig Shea, Adobe Systems Elizabeth Cummings, The Coalition Against Domain Name Abuse (CADNA) Kristin Jordan Harkins, American Intellectual Property Law Association</p>
<p>Trademark rights protection mechanisms are inadequate</p>	<p>Brian Winterfeldt, IPC Scott Bain, The Software &amp; Information Industry Association (SIIA) Kathleen McCarthy, Coca-Cola company Steven Metalitz, Coalition for Online Accountability Andy Coombs International anticounterfeiting coalition Phillip Marano, IOC Andrew Mills, ECTA /MARQUES Russell Pangborn, Microsoft Claudio Di Gangi, INTA</p>	<p>Richard Tindal, Donuts Inc. Jon Nevett, Domain Dimensions Krista Papac, AusRegistry International Elliot Noss, Tucows Inc.</p>

	<p>Fabricio Vayra, Time Warner</p> <p>Mark Partridge, Partridge IP Law</p> <p>Janet O'Callaghan, News Corporation</p> <p>Ruby J. Haddock, United States Olympic Committee</p> <p>Craig Shea, Adobe Systems</p> <p>Elizabeth Cummings, The Coalition Against Domain Name Abuse (CADNA)</p> <p>Kristin Jordan Harkins, American Intellectual Property Law Association</p> <p>Brian Beckham, WIPO Arbitration and Mediation</p> <p>Sarah Hayward , Valideus Ltd</p> <p>Søren Ingemann Larsen H.Lundbeck A/S</p>	
<p>Two-character ASCII TLDs should be permitted.</p>	<p>Constantine G. Roussos, .MUSIC Initiative</p> <p>Thomas Lenz, dotkoln</p> <p>Katrin Ohlmer DOTZON</p> <p>Dirk Krischenowski,.berlin</p>	
<p>Expand the Trademark Claims and Sunrise period services beyond the exact match of the registered trademark filed with the Clearinghouse.</p>	<p>Amber Sterling, Association of American Medical Colleges</p> <p>Phillip Marano, IOC</p> <p>Claudio Di Gangi, International Trademark Association</p> <p>Janet O'Callaghan, News Corporation</p>	

<p>Reduce the requirements for the limited loser pays model from the currently stated 26 or more disputed domain names. The threshold of 26 or more is exceptionally high for the standard of complaint set by the URS.</p>	<p>Amber Sterling, Association of American Medical Colleges</p> <p>Fabricio Vayra, Time Warner</p> <p>Kristin Jordan Harkins, American Intellectual Property Law Association</p>	
<p>URS needs to be strengthened</p>	<p>Brian Winterfeldt, IPC</p> <p>McCarthy, Kathleen Coca-Cola company</p> <p>Andy Coombs International Anticounterfeiting Coalition</p> <p>Mills, Andrew ECTA /MARQUES</p> <p>Russell Pangborn, Microsoft</p> <p>Craig Shea, Adobe Systems</p> <p>Leonora Hoicka, IBM</p> <p>Elizabeth Cummings, The Coalition Against Domain Name Abuse (CADNA)</p> <p>Sarah Hayward, Valideus Ltd</p> <p>Max Menius, Menius Enterprises</p>	
<p>PDDRP needs to be strengthened</p>	<p>Brian Winterfeldt, IPC</p> <p>Andy Coombs, International Anticounterfeiting Coalition</p> <p>Russell Pangborn, Microsoft</p> <p>Claudio Di Gangi, International Trademark Association</p>	
<p>Searchable WHOIS should be mandatory</p>	<p>Russell Pangborn, Microsoft</p> <p>Fabricio Vayra, Time Warner</p> <p>Janet O'Callaghan ,News Corporation</p>	

**APPENDIX 4.10: Summary of patterns across all Public Comments Periods on New gTLDs**

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Total number of comments</b>	38	7	12	65	180	126	156	130	145	69	928
<b>Number of individual posters</b>	16	7	10	60	146	99	131	111	96	65	741
<b>Number of posts opposed to new gTLDs</b>	2	0	0	1	31	21	11	6	13	3	88
<b>Number of posts calling for all new gTLDs to be sTLDs or IDN TLDs</b>	1	0	1	0	0	0	0	0	0	0	2
<b>Number of posts advocating an unlimited number of new gTLDs</b>	0	0	0	0	0	0	0	0	0	0	0
<b>Number of posts supporting new gTLDs but opposing an unlimited number</b>	2	0	0	1	4	7	7	2	2	8	33
<b>Number of posts supporting an ongoing as opposed to 'rounds' based process</b>	3	0	1	0	0	0	0	0	0	0	4

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts supporting large application fees</b>	1	0	3	1	1	0	0	0	0	0	6
<b>Number of posts opposing large application fees</b>	0	0	1	3	25	18	4	4	0	0	55
<b>Number of posts calling for financial / business plan checks on TLD applicants</b>	2	0	2	0	0	0	0	0	0	0	4
<b>Number of posts opposing financial / business plan checks</b>	0	0	1	0	0	0	0	0	0	0	1
<b>Number of posts calling for selection criteria to be limited to technical criteria only</b>	1	0	1	3	0	0	0	0	0	0	4
<b>Number of posts opposed to MAPO provisions</b>	0	0	0	50	6	3	1	6	1	0	67
<b>Number of posts calling for stronger trademark protection</b>	3	0	2	6	47	30	21	21	28	19	177

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts opposing proposed trademark protections</b>	0	0	0	4	0	0	0	0	0	0	4
<b>Number of posts supporting auctions as a method of resolving string contention</b>	2	0	1	0	1	0	0	0	0	0	4
<b>Number of posts opposing auctions as a method of resolving string contention</b>	4	0	1	0	6	6	3	1	3	0	24
<b>Number of posts supporting ballots as a method of resolving string contention</b>	0	0	0	0	0	0	0	0	0	0	0
<b>Number of posts opposing ballots as a method of resolving string contention</b>	1	0	0	0	0	0	0	0	0	0	1
<b>Number of posts supporting lotteries as a method of resolving string contention</b>	0	0	1	0	0	0	0	0	0	0	1

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts opposing lotteries as a method of resolving string contention</b>	1	0	1	0	0	0	0	0	0	0	2
<b>Number of posts supporting comparative evaluation as a method of resolving string contention</b>	3	0	1	0	1	3	0	0	0	0	8
<b>Number of posts opposing comparative evaluation as a method of resolving string contention</b>	0	0	0	0	0	0	0	0	0	0	0
<b>Number of posts supporting sunrise periods</b>	0	0	0	1	5	7	2	0	0	7	22
<b>Number of posts opposing sunrise periods</b>	3	0	1	0	3	1	0	0	0	0	8
<b>Number of posts supporting strong WHOIS</b>	1	0	1	1	15	14	0	0	5	3	40
<b>Number of posts opposing strong WHOIS</b>	0	0	0	0	0	0	1	1	0	0	2

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts supporting reserved trademarks list</b>	0	0	0	0	28	21	14	12	2	2	79
<b>Number of posts opposing reserved trademarks list</b>	0	0	0	0	1	1	0	0	0	0	2
	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts supporting vertical integration of registries / registrars</b>	0	0	0	1	3	2	3	0	0	0	9
<b>Number of posts opposing vertical integration of registries / registrars</b>	0	0	0	0	2	1	1	0	0	0	4

	<b>PCP 1</b> 8/12/05 - 3/2/06	<b>PCP 2</b> 20/2-06 – 13/3/06	<b>PCP 3</b> 9/8/06 - 29/8/06	<b>PCP 4</b> 10/8/07 – 30/8/07	<b>PCP 5</b> 24/10/08- 15-12/08	<b>PCP 6</b> 18/2/09 - 13/04/09	<b>PCP 7</b> 04/10/09 24/11/09	<b>PCP 8</b> 28/5/10- 21/7/10	<b>PCP 9</b> 12/11/10- 15/1/11	<b>PCP 10</b> 15/4/11- 15/5/11	<b>TOTAL</b>
<b>Number of posts opposing requirement that only ICANN-accredited registrars be used</b>	0	0	0	3	0	0	0	0	0	0	3
<b>Number of posts supporting requirement that only ICANN-accredited registrars be used</b>	0	0	0	1	0	0	0	0	0	0	2
<b>Number of posts advocating that government should have final decision on geographic identifiers</b>	0	0	1	0	2	0	0	0	0	0	3
<b>Number of posts advocating that government should not have final decision on geographic identifiers</b>	0	0	0	2	1	0	0	0	0	0	3

#### **Appendix 4.11: Comparison of public comments to subsequent policy outcomes**

This appendix summarises the key points addressed by three or more posters in each of the Public Comments Periods on new gTLDs, together with an indication of the outcome in the subsequent policy document. Points that were addressed by only one or two individual posters in a given PCP are not listed.

PCP 1: First public comments period (8<sup>th</sup> December 2005 - 3<sup>rd</sup> February 2006.)

(For full details of all submitted comments, see <http://forum.icann.org/lists/new-gtlds-pdp-comments/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed / supported by</u></b>	<b><u>Opposed by</u></b>	<b><u>Addressed in Draft Initial Report?</u></b>
Outright opposition to new gTLDs	2 posters	Implicitly opposed by those who did not argue against new gTLDs. Specific arguments in favour of new gTLDs put forward by 6 posters	Report proposed to go ahead with a new gTLDs programme
Future gTLD addition should be on an open-ended basis rather than a 'rounds' based approach	3 posters	0 posters	Issue left open
Issues of intellectual property rights need to be examined	3 posters	1 poster	Issue left open
Support for sunrise periods for new gTLDs	0 posters	3 posters	Issue left open
Support for auctions as allocation method	0 posters	3 posters	Issue left open
Support for comparative evaluations as allocation method	4 posters	0 posters	Issue left open
Need for standardised registry contracts with explicit and clearly stated rules	2 posters	1 poster	Recommendation 6 notes that 'There is general agreement that standardized contractual conditions for registry operations should be published prior to any agreement being signed'.

PCP 2: Second public comments period (20<sup>th</sup> February - 13<sup>th</sup> March 2006)

(For full details of all submitted comments see <http://forum.icann.org/lists/new-gtlds-pdp-initial-report/>.)

There were only seven responses to this PCP, none of which comprehensively addressed the issues. There were no points on which three or more posters agreed.

PCP 3: Third Public Comments Period: 9<sup>th</sup>-29<sup>th</sup> August 2006

(For full details of all submitted comments see <http://forum.icann.org/lists/newgtlds-comments/>)

<b>Comment / proposal</b>	<b>Proposed / supported by</b>	<b>Opposed by</b>	<b>Addressed in Final Report?</b>
Outright opposition to new gTLDs	0 posters	Implicitly opposed by those who did not argue against new gTLD. Specific arguments in favour of new gTLDs put forward by 3 posters	Recommended that a new gTLDs programme should go ahead
Large application fees should be levied in order to ensure the financial capability of the applicant	3 posters	1 poster	Partly – Implementation Guideline B stated that ‘Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process.’
Applicants should be required to demonstrate their financial capability to operate a TLD	2 posters	1 poster	Yes – Recommendation 8 stated ‘Applicants must be able to demonstrate their financial and organisational operational capability’.
New TLDs must offer a clearly differentiated namespace from existing TLDs	3 posters	1 poster	Not explicitly recommended that this must be the case

PCP 4: Public Comments Period on the Final Report (10<sup>th</sup> - 30<sup>th</sup> August 2007)

(For full details of submitted comments see <http://forum.icann.org/lists/gtldfinalreport-2007/mail2.html>)

<b>Comment / proposal</b>	<b>Proposed/ supported by</b>	<b>Opposed by</b>	<b>Addressed in Board Report?</b>
Outright opposition to new gTLDs	1 poster	Implicitly opposed by all those who did not argue against new gTLDs. Specific arguments / endorsements in favour of new gTLDs put forward by 4 posters	Recommended that a new gTLDs programme should go ahead
MAPO provisions should be removed	10 posters  (Plus the 41 people who sent in the standard email from keep-the-net-neutral.org)	0 posters	No – MAPO provisions retained
Criteria should be limited to technical and operational matters only. Current proposals are too extensive and stray into areas beyond ICANN's remit.	3 posters	1 poster	No – 'public policy' criteria were retained
Intellectual property rights protections are inadequate and need to be strengthened	6 posters	4 posters	Recommendations remain same as in Final Report
Application fees should be high to deter frivolous applications	1 poster	3 posters	Recommendations remain same as in Final Report
Requirement that only ICANN-accredited registrars be used should be removed	3 posters	1 poster	Recommendations remain same as in Final Report

**PCP 5: Public comments period on DAG v1 (24 October – 15 December 2008)**

(For full details of all submitted comments see <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>)

<b>Comment / proposal</b>	<b>Number of posters in favour</b>	<b>Number of posters opposing</b>	<b>Implemented in DAG v2?</b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	31 posters	Implicitly opposed by those comments that did not express any opposition to new gTLDs in principle. Explicit arguments in favour of the principle of new gTLDs put forward by 3 posters	No – but TLD demand and economic analysis were among the four ‘overarching issues’ identified by the Board as requiring further analysis.
Community based applications should go forward ahead of other types	8 posters	0 posters	No
What constitutes a ‘community’ needs to be better defined	9 posters	0 posters	Some modification / clarification on community vs. open and why these terms are used; added language on intent of community-based category and under what circumstances community claims are evaluated
Trademark protections are inadequate	47 posters	0 posters	No major changes; however trademark protection was among the four ‘overarching issues’ identified by the Board as requiring further analysis.

Comment / proposal	Number of posters in favour	Number of posters opposing	Implemented in DAG v2?
Proposal for 'reserved trademarks' list on which trademark owners can register their marks, rendering these unavailable as TLD strings	28 posters	1 poster	No. However, intellectual property rights was identified as one of the four 'overarching issues' requiring further discussion and study
Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups	25 posters	1 poster	<p>Application fees unchanged at \$185,000. However, more details on amount of fee that may be returned if the application is withdrawn at various stages of the process.</p> <p>Added credit for qualified 2000 round applicants.</p> <p>Reduced annual registry fees</p> <p>Community application comparative evaluation fee now estimated at \$10,000 (no figure given in previous DAG). Furthermore it is now structured as a deposit and returned if criteria are met</p> <p>Other evaluation and dispute resolution fees still not specified.</p>

Comment / proposal	Number of posters in favour	Number of posters opposing	Implemented in DAG v2?
Fees should be lowered particularly for community groups	4 posters	0 posters	No change; application fees remain £185,000 for all types of applications. However, Community application comparative evaluation fee now estimated at \$10,000 (no figure given in previous DAG). Furthermore it is now structured as a deposit and returned if criteria are met.
Many scripts, like Chinese, Japanese and Korean, use ideographs and pictographs that are information-rich descriptors and not low-information alphabets. This is quite different from English, where a single or two characters are unlikely to have any meaning. Restricting strings to 3 or more characters unfairly disadvantages these scripts and therefore the 3-character minimum string rule should be removed for these scripts.	4 posters	0 posters	No

<b>Comment / proposal</b>	<b>Number of posters in favour</b>	<b>Number of posters opposing</b>	<b>Implemented in DAG v2?</b>
Standard for String Confusion should not be limited to “visually” similar.	9 posters	2 posters	Yes - - added more language to distinguish when different similarity checks are made (visual, aural, meaning); clarified relationship between string confusion objections and contention between similar strings; described improvements to the algorithm for testing visual similarity.
The use of string similarity algorithms should be accompanied by manual reviews	5 posters	0 posters	No
Opposition to auctions as a ‘last resort’ method for resolving string contention.	6 posters	1 poster	No – auctions confirmed as ‘last resort’ method for resolving string contention
Multiple objectors to the same application should be allowed consolidate into a single proceeding (for a single fee)	4 posters	. 0 posters	No
The decisions of a dispute resolution panel from a dispute resolution service provider should be binding rather than advisory on ICANN	8 posters	0 posters	In the Second Draft, ICANN explained that it will “accept” the determination and advice of the panel. However some commentators still found this wording ambiguous.

<b>Comment / proposal</b>	<b>Number of posters in favour</b>	<b>Number of posters opposing</b>	<b>Implemented in DAG v2?</b>
Trademark sunrise periods required	5 posters	3 posters	No
Notice and takedown procedure for abusive domains required	4 posters	0 posters	No
Three member panels should be an option for LRO disputes	6 posters	0 posters	Yes - 3 member panels made an option for LRO disputes
Prevailing party in dispute resolution should have fee refunded / losing party should bear costs	4 posters	0 posters	DAGv2 P29 “The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding.”  -however, this provision was already present in DAGv1!  No additional provision made.
MAPO provisions should be scrapped	5 posters	0 posters	No
Objections on trademark grounds should not carry a fee	3 posters	1 poster	No

<b>Comment / proposal</b>	<b>Number of posters in favour</b>	<b>Number of posters opposing</b>	<b>Implemented in DAG v2?</b>
If multiple applicants apply for the same string, or similarly infringing strings, trademark owners should not have to object separately to each application	4 posters	0 posters	No
Support for joint ventures as a method of resolving string contention	7 posters	0 posters	No
Setting of variable prices for domain names should not be permitted /price caps should be maintained in the new TLD registry contracts	17 posters	0 posters	No
Thick WHOIS model required	15 posters	0 posters	No
ICANN should not be able to modify the registry contract at will	6 posters	0 posters	No

Comment / proposal	Number of posters in favour	Number of posters opposing	Implemented in DAG v2?
<p>The Guidebook currently holds a provision that an “applicant agrees not to challenge, in Court or in any other judicial entity, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.” ICANN should not be given such broad immunity, and applicants should not be asked to waive their rights to challenge ICANN’s decision in court.</p>	8 posters	0 posters	No

PCP 6: Public comments period on DAG v2 (18 February – 13 April 2009)

(For full details of all submitted comments see <http://forum.icann.org/lists/2gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Number of posters supporting</u></b>	<b><u>Number of posters opposing</u></b>	<b><u>Addressed in DAG v3?</u></b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	21 posters	Implicitly opposed by all those who did not argue against new gTLDs. Explicit arguments in favour of new gTLDs made by 5 posters	Programme continues to go forward
New TLDs should go ahead, but only in limited numbers	6 posters	0 posters	No
New gTLDs precess should be completed and new TLDs launched as quickly as possible	3 posters	21 posters	No
Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups	17 posters	0 posters	No changes to most fees. Community priority evaluation fee now estimated at \$10,000 (no figure given in previous DAG)
Proposal for ‘reserved trademarks’ list on which trademark owners can register their marks, rendering these unavailable as TLD strings	21 posters	1 poster	No – though trademark clearinghouse proposals passed to GNSO for consideration

<b><u>Comment / proposal</u></b>	<b><u>Number of posters supporting</u></b>	<b><u>Number of posters opposing</u></b>	<b><u>Addressed in DAG v3?</u></b>
Trademark ‘sunrise’ periods required in new TLDs	7 posters	1 poster	No – but was ultimately addressed in DAG v.4, which stipulated that the registry operator must implement, at a minimum, either a Sunrise period or a Trademark Claims service during the start-up phases for registration in the TLD.
Many scripts, like Chinese, Japanese and Korean, use ideographs and pictographs that are information-rich descriptors and not low-information alphabets. This is quite different from English, where a single or two characters are unlikely to have any meaning. Restricting strings to 3 or more characters unfairly disadvantages these scripts and therefore the 3-character minimum string rule should be removed for these scripts.	6 posters	0 posters	No
Opposition to auctions as a ‘last resort’ method for resolving string contention.	6 posters	0 posters	No

<b><u>Comment / proposal</u></b>	<b><u>Number of posters supporting</u></b>	<b><u>Number of posters opposing</u></b>	<b><u>Addressed in DAG v3?</u></b>
Notice & takedown procedure required for abusive domains	8 posters	0 posters	URS implemented in DAG3
Support for joint ventures as a method of resolving string contention	3 posters	0 posters	No
Setting of variable prices for domain names should not be permitted /price caps should be maintained in the new TLD registry contracts	10 posters	0 posters	Partially – Section 2.10 of DAG v3 states "Registry Operator shall offer all domain registration renewals at the same price, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price by Registry Operator."
Ownership of a registrar by a registry is permissible, but functions should be kept separate	3 posters	1 poster	Limited cross-ownership permitted in DAG3
Categorisation of applications into open and community based is inadequate. More sophisticated categorisation is required, and different categories should be treated differently re application process and / or contractual conditions.	4 posters	0 posters	No

<b><u>Comment / proposal</u></b>	<b><u>Number of posters supporting</u></b>	<b><u>Number of posters opposing</u></b>	<b><u>Addressed in DAG v3?</u></b>
Morality and public order objections should be scrapped.	3 posters	0 posters	No
Multiple objectors to a single application should be allowed to combine their objections into a joint one	3 posters	0 posters	No
Thick WHOIS model required	14 posters	0 posters	Yes- Section 1.1.2 of Specification 4 attached to the Revised Proposed Draft New Registry Agreement mandates the Registry operator to provide the full detail of a registrant's information.
Need clarification on how 'expert panels' will be formed and who will be on them	3 posters	0 posters	Yes – more detail supplied on these issues
Trademark protections are inadequate	31 posters	0 posters	Additional protections implemented including: URS,PDDRP,Strong WHOIS  Trademark clearinghouse passed to GNSO for consideration

PCP 7: Public comments period on DAG v3 (4 October – 24 November 2009)

(For full details of all submitted comments see <http://forum.icann.org/lists/3gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>	<b><u>Addressed in DAG v4?</u></b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	11 posters	Implicitly opposed by all those who did not argue against new gTLDs. Explicit arguments in favour of new gTLDs made by 1 poster	No
New TLDs should go ahead, but only in limited numbers	6 posters	0 posters	No
Community based applications should go forward ahead of other types	2 posters	1 poster	No
New TLDs programme should go forward ASAP	52 posters	0 posters	No
Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups	4 posters	0 posters	No change, except to state that applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (p204)
Opposition to auctions as a ‘last resort’ method for resolving string contention.	3 posters	0 posters	No

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>	<b><u>Addressed in DAG v4?</u></b>
Section 2.10 states: "Registry Operator shall offer all domain registration renewals at the same price, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price by Registry Operator." This is still not enough. Hard caps are still required.	3 posters	0 posters	No
ICANN should not be able to modify the registry contract at will	4 posters	0 posters	No
Ownership of a registrar by a registry is permissible, but functions should be kept separate	3 posters	1 poster	Limited cross-ownership already permitted in DAG3 and carried over to DAG4
ICANN should avoid country, territory or place names, as these blur the distinction between ccTLDs and gTLDs.	4 posters	0 posters	No change

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>	<b><u>Addressed in DAG v4?</u></b>
Post Delegation Dispute Resolution Process should be based on ICANN's involvement in contract enforcement, instead of passing responsibility on to the registry	6 posters	0 posters	No change – DAG V3 and v4 state that registry operators are required to comply with  and implement decisions made according to the Trademark Post-Delegation Dispute Resolution Policy (PDDRP), but no mention of enforcement mechanisms
'Trademark clearinghouse' database does not represent a proper globally reserved marks list. Proper reserved list is required.	14 posters	1 poster	Trademark clearinghouse adopted substantially unaltered
URS should be compulsory, not just a 'best practice'	5 posters	0 posters	Yes - . The registry operator is required to implement decisions made under the URS procedure, including suspension of specific domain names within the registry.
Objection filing period should be extended	5 posters	0 posters	Yes – extended to 5 ½ months

Trademark protections inadequate	21 posters	0 posters	Some changes, particularly introduction of trademark clearinghouse
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PCP 8: Public comments period on DAG v4 (28 May-21 July 2010)

(For full details of all submitted comments see <http://forum.icann.org/lists/4gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>	<b><u>Addressed in DAG v5?</u></b>
Outright opposition to new TLDs – programme should be cancelled altogether or at least delayed to allow more time for study of issues	6 posters	0 posters	No
New TLDs should go forward ASAP	4 posters	0 posters	Partly – DAG5 was intended to be the ‘proposed final applicant guidebook’
Application, evaluation, dispute resolution and renewal fees are too high, not justified and represent a barrier to entry for some groups	4 posters	0 posters	No
Different fee models should be adopted for different application types	4 posters	0 posters	No
‘Trademark clearinghouse’ database does not represent a proper globally reserved marks list. Proper reserved list is required.	12 posters	0 posters	No change to trademark clearinghouse
URS system needs to be beefed up. Should be truly rapid and offer more than short-term suspension. Need loser pays mechanism / no significant cost to trademark owner.	14 posters	0 posters	No

<u>Comment / proposal</u>	<u>Proposed by (Poster name / affiliation)</u>	<u>Opposed by (Poster name / affiliation)</u>	<u>Addressed in DAG v5?</u>
Preventing any ICANN-accredited registrar from providing assistance of any kind to prospective new gTLD applicants goes too far. would unfairly exclude applicants intending to use registrar expertise to help them build their application. (mod 1)	5 posters	0 posters	ICANN accredited registrars now are allowed to apply for a gTLD
background checks in this area of terrorism, as it is presented in the DAG 4, without any definition, is unacceptable	4 posters	0 posters	Yes – term ‘terrorism’ removed from the relevant section
Morality and public order provisions should be scrapped	6 posters	1 poster	No
Trademark rights protection mechanisms are inadequate	21 posters	0 posters	No change to trademark protections

PCP 9: Public comments period on DAG v.5 (12 November 2010-15 January 2011)

(For full details of all submitted comments see <http://forum.icann.org/lists/5gtld-guide/>)

<b><u>Comment / proposal</u></b>	<b><u>Proposed by (Poster name / affiliation)</u></b>	<b><u>Opposed by (Poster name / affiliation)</u></b>	<b><u>Addressed in DAG v6?</u></b>
Outright opposition to new TLDs at least insofar as the programme is currently conceived—programme should be cancelled altogether or at least delayed to allow more time for study of issues	13 posters	Implicitly opposed by all those who did not argue against new gTLDs. Explicit arguments in favour of new gTLDs made by 3 posters	No
New TLDs application process should go ahead ASAP	11 posters	0 posters	Partly - DAG v6 proved to be the penultimate version and gave way to final / approved version within weeks
Initial limited introduction/ fast track process for ‘safe’ community TLDs	3 posters	1 poster	No
Opposition to auctions as a ‘last resort’ method for resolving string contention.	3 posters	0 posters	No
ICANN’s U-turn on vertical integration (removing all restrictions on registry / registrar cross-ownership) lacks transparency	7 posters	0 posters	No
Thick WHOIS should be reinstated	7 posters	0 posters	Some strengthening to WHOIS requirements including requirement for searchable WHOIS.

<u>Comment / proposal</u>	<u>Proposed by (Poster name / affiliation)</u>	<u>Opposed by (Poster name / affiliation)</u>	<u>Addressed in DAG v6?</u>
Need 'loser pays' model in URS	3 posters	0 posters	Limited 'loser pays' model adopted for complaints listing 26 or more domain names.
URS needs to be strengthened	6 posters	0 posters	Yes, to some degree – See modifications to URS appended to DAG V.6
Denying an entity the opportunity to operate a gTLD because of 3 adverse UDRP decisions is an extremely broad standard that will unintentionally disqualify otherwise qualified applicants.	3 posters.	0 posters	No
Trademark rights protection mechanisms are inadequate	28 posters	2 posters	Some changes including strengthened WHOIS + URS. Revisions to Trademark Clearinghouse, PDDRP and sunrise requirements.
If new gTLD applicants are to be judged for their compliance with UDRP law, they should be judged equally for findings of cybersquatting and of reverse domain-name hijacking.	3 posters	0 posters	No

PCP 10: Public comments period on DAGv6 (15 April 2011-15 May 2011)

(For full details of all submitted comments see <http://forum.icann.org/lists/6gtld-guide/>)

<b>Comment / proposal</b>	<b>Proposed / supported by</b>	<b>Opposed by</b>	<b>Addressed in Final Applicant Guidebook?</b>
Outright opposition to new TLDs at least insofar as the programme is currently conceived– programme should be cancelled altogether or at least delayed to allow more time for study of issues	4 posters	Implicitly opposed by all those who did not argue against new gTLDs.	Programme continues to go forward
New TLDs should go ahead, but only in limited numbers	8 posters	0 posters	No – though commitment to a review of impact after first application round closes
The Board should finalise the application procedure and launch the programme without further delay	8 posters	7 posters	Yes – final approval given for next version of DAG on 20 <sup>th</sup> June 2011
Trademark rights protection mechanisms are inadequate	19 posters	4 posters	No significant change
Proper global reserved marks list needed	2 posters	1 poster	No
Two-character ASCII TLDs should be permitted.	4 posters	0 posters	No
Expand the Trademark Claims and Sunrise period services beyond the exact match of the registered trademark filed with the Clearinghouse.	4 posters	0 posters	No
Reduce the requirements for the limited loser pays model from the currently stated 26 or more disputed domain names.	3 posters	0 posters	No

<b>Comment / proposal</b>	<b>Proposed / supported by</b>	<b>Opposed by</b>	<b>Addressed in Final Applicant Guidebook?</b>
URS needs to be strengthened	10 posters	0 posters	No significant change to URS
PDDRP needs to be strengthened	4 posters	0 posters	No significant changes to PDDRP

**Appendix 4.12: Comparison between GAC Principles regarding Public Policy Aspects related to new gTLDs<sup>92</sup> and GNSO Final Report: Introduction of New Generic Top-Level Domains<sup>93</sup>**

<b>GAC Principle</b>	<b>Cross-reference to GNSO Final Report</b>
<p>2.1 New gTLDs should respect:</p> <p>a) The provisions of the Universal Declaration of Human Rights which seek to affirm "fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".</p> <p>b) The sensitivities regarding terms with national, cultural, geographic and religious significance.</p>	<p>Covered by Principle G and Recommendation 3 in the Final Report.</p>
<p>2.2 ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.</p>	<p>Not addressed by the Final Report and went on to become a significant point of contention between the GAC and the GNSO.</p>
<p>2.3 The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs).</p>	<p>Covered by Recommendation 3 in the Final Report.</p>
<p>2.4 In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced.</p>	<p>The reference to ‘confusingly similar’ gTLD strings is covered by Recommendation 2 in the Final Report. The issue of two-character gTLDs is not addressed in the report though the matter was discussed by the GNSO</p>

<sup>92</sup> ICANN (2007). GAC Principles regarding New gTLDs, Presented by the Governmental Advisory Committee. Section 2: Public Policy Aspects related to new gTLDs. March 28 2007. Retrieved 5 February 2009, from [http://gac.icann.org/web/home/gTLD\\_principles.pdf](http://gac.icann.org/web/home/gTLD_principles.pdf)

<sup>93</sup> ICANN (2007). GNSO Final Report: Introduction of New Generic Top-Level Domains. 8 August 2007. Retrieved 14 July 2010, from <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

<b>GAC Principle</b>	<b>Cross-reference to GNSO Final Report</b>
<p>2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.</p>	<p>Covered by Recommendation 1 in the Final Report.</p>
<p>2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.</p>	<p>Covered by Principle C, D and Recommendation 4 in the Final Report.</p>
<p>2.7 Applicant registries for new gTLDs should pledge to:</p> <p>a) Adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD.</p> <p>b) Ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.</p>	<p>This is not addressed by the Final Report.</p>
<p>2.8 Applicants should publicly document any support they claim to enjoy from specific communities.</p>	<p>Partially addressed by Implementation Guideline IG H, however this states that applications claiming to represent a community will be taken on trust unless there is a clear objection.</p>

<b>GAC Principle</b>	<b>Cross-reference to GNSO Final Report</b>
2.9 Applicants should identify how they will limit the need for defensive registrations and minimise cyber-squatting that can result from bad-faith registrations and other abuses of the registration system	Principle F and Recommendation 6 require compliance with ICANN policies on matters such as cybersquatting and dispute resolution policies.
2.10 A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity and validity of registry information.	Addressed by Principle C in the Final Report.
2.11 ICANN and a new gTLD operator/registry should establish clear continuity plans for maintaining the resolution of names in the DNS in the event of registry failure.	This is not addressed by the Final Report, however ICANN did release a gTLD Registry Failover Plan in July 2008.
2.12 ICANN should continue to ensure that registrants and registrars in new gTLDs have access to an independent appeals process in relation to registry decisions related to pricing changes, renewal procedures, service levels, or the unilateral and significant change of contract conditions.	This is not addressed by the Final Report, however it is established practice for existing gTLDs and presumably is likely to be applied to new ones also.
2.13 ICANN should ensure that any material changes to the new gTLD operations, policies or contract obligations be made in an open and transparent manner allowing for adequate public comment.	This is not addressed by the Final Report.
2.14 The GAC WHOIS principles are relevant to new gTLDs.	This is not addressed by the Final Report.

**Appendix 4.13: Comparison between GAC indicative ‘scorecard’ on new gTLD outstanding issues<sup>94</sup> and Board response<sup>95</sup>**

<b>Issue</b>	<b>GAC advice<sup>96</sup></b>	<b>Board response<sup>97</sup></b>
1. The objection procedures including the requirements for governments to pay fees	The GAC advises the ICANN Board to instruct ICANN staff to delete the procedures related to “Limited Public Interest Objections” in Module 3.	The Board stated an intention to retain the “Limited Public Interest Objection” process for entities other than GAC members and other governments, instead of the original GAC recommendation that the entire section be deleted.  GAC and individual governments to be provided with a separate procedure for objections based on public policy concerns.
2. Procedures for the review of sensitive strings	The GAC advises the ICANN Board to instruct ICANN staff to amend the provisions and procedures contained in Modules 1 and 3 to clarify the following:  1. “Community-based strings” include those that purport to represent or that embody a particular group of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a	2.1.1: String Evaluation and Objections: While the Board has accepted the core component of the GAC’s recommendation that governments will use the GAC as a platform to raise objections  2.1.2: The Board has rejected the recommendation that GAC advice during the Initial Evaluation could also suggest measures to mitigate concerns, on the basis that this approach introduces subjective assessments into the evaluation process.  2.1.3: The Board has accepted the

<sup>94</sup> ICANN (2011). GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué. 23 February 2011. Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

<sup>95</sup> ICANN (2011). GAC comments on the Board response to the GAC indicative scorecard on new gTLD outstanding issues. Retrieved 17 July 2011, from [http://gac.icann.org/system/files/20110412\\_GAC\\_comments\\_on\\_the\\_Board\\_response\\_to\\_the\\_GAC\\_scorecard\\_0.pdf](http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf)

<sup>96</sup> ICANN (2011). GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué. 23 February 2011. Retrieved 17 July 2011, from <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

<sup>97</sup> ICANN (2011). GAC comments on the Board response to the GAC indicative scorecard on new gTLD outstanding issues. Retrieved 17 July 2011, from [http://gac.icann.org/system/files/20110412\\_GAC\\_comments\\_on\\_the\\_Board\\_response\\_to\\_the\\_GAC\\_scorecard\\_0.pdf](http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf)

	<p>national minority, disability, age, and/or a language or linguistic group (non exhaustive). In addition, those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse, should also be considered “community-based” strings.</p> <p>2. Applicants seeking such strings should be required to affirmatively identify them as “community-based strings” and must demonstrate their affiliation with the affected community, the specific purpose of the proposed TLD, and –when opportune– evidence of support or non-objection from the relevant authority/ies that the applicant is the appropriate or agreed entity for purposes of managing the TLD.</p> <p>3. In the event the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed, the application should be rejected.</p> <p>4. The requirement that objectors must demonstrate “material detriment to the broader Internet community” should be amended to reflect simply “material detriment”, as the former represents an extremely vague standard that may prove impossible to satisfy.</p> <p>5. Individual governments that choose to file objections to any proposed “community-based” string should not be required to pay</p>	<p>GAC’s advice that it must provide a rationale for decisions in the event that the Board determines to take an action that is inconsistent with GAC advice.</p> <p>2.2.1, 2.2.2, 2.2.3: Expand Categories of Community-Based Strings: The Board has categorically rejected the core components of the GAC’s advice, and is substituting a Community objections procedure for the more proactive and preventative mechanism that would require an affirmative demonstration of Community support.</p>
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	fees.	
3. Root Zone Scaling	<p>1. The Board should continue implementing a monitoring and alerting system and ensure a) that ICANN can react predictably and quickly when there are indicators that new additions and changes are straining the root zone system, and b) that the processes and possible resulting restorative measures that flow from its results are fully described in the Application Guidebook before the start of the first application round.</p> <p>2. The Board commits to defer the launch of a second round or batch of applications unless an evaluation shows that there are indications from monitoring the root system etc. that a first (limited) round did not in any way jeopardize the security and stability of the root zone system.</p> <p>3. The Board commits to make the second round or batch of applications contingent on a clean sheet from full technical and administrative assessment of impact of the first round with recommendations which should go out to public comment for approval.</p> <p>4. The Board commits to avoid the possibility that other activities will be impacted by the possible diversion of resources to processing new gTLD applications.</p> <p>5. The Board should ensure that ICANN can effectively address the specific needs of applicants from different, perhaps non-English speaking cultures, and with different legal environments.</p> <p>6. The Board should monitor the</p>	<p>Root zone monitoring systems are currently in place. ICANN will work with root zone operators to identify relevant reporting metrics and to establish a process for reporting such metrics to the GAC and the Internet community.</p> <p>Furthermore, a process will be implemented that enables the delegation of TLDs to be slowed or stopped in the event that there is a strain on the root zone system.</p> <p>ICANN also commits to review the effects of the new gTLD program on the operations of the root zone system, and to defer delegations in a second round until it is determined that the delegations in the first round have not jeopardized the root zone system's security or stability.</p> <p>ICANN commits that the operation of the IANA functions and ICANN's coordination of the root zone system will not be negatively affected.</p>

	<p>pace and effectiveness of ICANN’s management of contract negotiations for new gTLDs in a potential situation of 200 to 300 simultaneous applications and evaluations.</p> <p>7. The Board is confident that all relevant actors (IANA, root server operators, etc) are sufficiently informed about what is expected from them in terms of work loadings and resources in order to fulfil their respective roles, in particular the pre delegation checking, approvals, implementation of potentially 200 to 300 root zone changes a year and expected postdelegation changes.</p>	
<p>4. Market and Economic Impacts</p>	<p>1. Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.</p> <p>2. A requirement that new gTLD applicants provide information on the expected benefits of the proposed gTLD, as well as information and proposed operating terms to eliminate or minimize costs to registrants and consumers.</p> <p>3. Due diligence or other operating restrictions to ensure that Community-based gTLDs will in fact serve their targeted communities and will not broaden their operations in a manner that makes it more likely for the registries to impose costs on existing domain owners in other TLDs.</p>	<p>1. It is not planned that information gathered as part of the application will be used to predict the net benefit of the prospective TLD – that would be too speculative to be of real value.</p> <p>However, during the discussions between the GAC and the Board in Brussels, the GAC indicated that the weighing of costs and benefits should instead take place as part of the new gTLD program review as specified in section 9.3 of the Affirmation of Commitments.</p> <p>2. As clarified through the discussions with the GAC in Brussels, ICANN will continue to explore with the GAC during the ICANN Public meeting in March 2011 what data might be included in the application to provide useful input to later economic studies and</p>

		<p>community analysis.</p> <p>3. The Board has accepted the GAC's advice that due diligence or other operating restrictions to ensure that Community-based TLDs will in fact serve the targeted communities and will not broaden their operations in a manner that makes it more likely for registries to impose costs on existing domain owners in other TLDs.</p>
5. Registry – Registrar Separation	<p>The GAC advises the ICANN Board to instruct ICANN staff to amend the proposed new registry agreement to restrict crossownership between registries and registrars, in those cases where it can be determined that the registry does have, or is likely to obtain, market power. The GAC further advises the ICANN Board that it considers the absence of a thorough and reasoned explanation of its decision in November 2010 to reverse its earlier decision of March 2010 to maintain " strict separation of entities offering registry services and those acting as registrars"</p>	<p>Board rejected the GAC proposal.</p>
6. Protection of Rights Owners and consumer protection issue	<p><i>1. Rights Protection: Trademark Clearing House (TC)</i></p> <p>GAC Advice</p> <p>The GAC proposes the following refining changes that significantly improve the operation and achieve the maximum impact of the</p> <p>TC:</p> <p><input type="checkbox"/> <input type="checkbox"/> The TC should be permitted to</p>	<p>1. ICANN agrees that the registry operator must assist appropriately in law enforcement investigations. There might be a difference between local and International law enforcement agencies. There is a question about whether this requirement would be stronger than what is already required by law. Changes to the Guidebook will be made after consideration of those</p>

	<p>accept all types of intellectual property rights that are recognized under the national law of the country or countries under which the registry is organized or has its principal place of business. The only mandatory requirement for new registry operators will be to recognize national and supranational trademark registrations issued before June 26, 2008 and court-validated common law trademarks.</p> <p><input type="checkbox"/> <input type="checkbox"/> Sunrise services and IP claims should both be mandatory for registry operators because they serve different functions with IP claims serving a useful notice function beyond the introductory phase.</p> <p><input type="checkbox"/> <input type="checkbox"/> IP claims services and sunrise services should go beyond exact matches to include exact match plus key terms associated with goods or services identified by the mark ) e.g. “Kodakonlineshop”) and typographical variations identified by the rights holder.</p> <p><input type="checkbox"/> <input type="checkbox"/> All trademark registrations of national and supranational effect, regardless of whether examined on substantive or relative grounds, must be eligible to participate in the pre-launch sunrise mechanisms.</p> <p><input type="checkbox"/> <input type="checkbox"/> Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.</p> <p><input type="checkbox"/> <input type="checkbox"/> The IP claims service should notify the potential domain name</p>	<p>issues.</p> <p>2. Board agrees to augment ICANN's contractual compliance function with additional resources to support the program of contracts between ICANN and the registries and registrars.</p> <p>3. ICANN has requested clarification from the GAC of the intended meaning of "generally regulated industries", but generally believes that a priori categorization of strings is inherently problematic.</p> <p>4. ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes however that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook consciously targets "crimes of trust".)</p> <p>5. ICANN could consider providing extra points in some aspects of the qualification evaluation scoring process. (ICANN notes however that a priori categorization of strings is inherently problematic.)</p> <p>6. ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available</p>
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	<p>registrant of the rights holder’s claim and also notify the rights holder of the registrant’s application for the domain name.</p> <ul style="list-style-type: none"> <li>□□The TC should continue after the initial launch of each gTLD.</li> <li>□□Rights holders, registries and registrars should all contribute to the cost of the TC because they all benefit from it.</li> </ul> <p><i>2. Rights Protection: Uniform Rapid Suspension (URS):</i></p> <p>GAC Advice:</p> <ul style="list-style-type: none"> <li>□□Significantly reduce the timescales. See attached table for proposed changes.</li> <li>□□The URS processes should be streamlined as follows: <ul style="list-style-type: none"> <li>o The complaint should be simplified by replacing the 5,000 word free text limit + unlimited attachments [para 1.2] with a simple pro forma standardised wording with the opportunity for not more than 500 words of freeform text and limit the attachments to copies of the offending website.</li> <li>o Decisions should be taken by a suitably qualified ‘Examiner’ and not require panel appointments..</li> <li>o Where the complaint is based upon a valid registration, the requirement that the jurisdiction of registration incorporate substantive examination (paras 1.2f (i) and 8.1a) should be removed.</li> <li>o If, as is expected in the majority</li> </ul> </li> </ul>	<p>expertise is focused on this issue. (ICANN is mindful that this particular recommendation could lead applicants to locate in certain regions in order to gain the depth of domestic screening. International screening is likely to include the reports of local agencies and could therefore be duplicative.)</p> <p>7. ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook already addresses serious crimes of trust.)</p> <p>8. ICANN will explore possible ways to make results public, but is concerned that posting such information poses concerns about privacy that should be explored further.</p>
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	<p>of cases, there is no response from the registrant, the default should be in favour of the complainant and the website locked. The examination of possible defences in default cases according to para 8.4(2) would otherwise give an unjustified privilege to the non-cooperating defendant.</p> <p>o The standard of proof (para 8.2) should be lowered from “clear and convincing evidence” to a preponderance of evidence”.</p> <p>□□The “bad faith” requirement in paras 1.2f), 1.2g) and 8.1c) is not acceptable. Complainants will in only rare cases prevail in URS proceedings if the standards to be fulfilled by registrants are lax. Correspondingly, the factors listed in paras 5.7a) (“bona fide”) and b) “been commonly known by the domain name”) can hardly allow a domain name owner to prevail over the holders of colliding trademarks.</p> <p>□□A ‘loser pays’ mechanism should be added. In addition, registrants who have lost five or more URS proceedings should be deemed to have waived the opportunity to respond to future URS complaints (this amendment corresponds to the “two strikes” provision which applies to rights holders).</p> <p>□□However, there should be a clear rationale for appeal by the complainant. The time for filing an appeal in default cases must be reduced from 2 years to not more than 6 months. In addition, the examination of possible defences in default cases according to para 8.4(2) means an unjustified</p>	
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	<p>privilege of the non-cooperating defendant.</p> <p><input type="checkbox"/> <input type="checkbox"/> The URS filing fee should be US\$200-US\$300 and minor administrative deficiencies should not result in dismissal of the URS complaint.</p> <p><input type="checkbox"/> <input type="checkbox"/> A successful complainant should have the right of first refusal for transfer of the disputed domain name after the suspension period so that the complainant is not forced to pursue a UDRP proceeding to secure a transfer.</p> <p><input type="checkbox"/> <input type="checkbox"/> The URS should go beyond ‘exact’ matches and should at least include exact + goods/other generic words e.g.</p> <p>“Kodakonlineshop”</p> <p><i>3. Rights Protection: Post-delegation Dispute Resolution Procedure (PDDRP)</i></p> <p>GAC Advice:</p> <p>The GAC recommends that:</p> <p><input type="checkbox"/> <input type="checkbox"/> The standard of proof be changed from “clear and convincing evidence” to a “preponderance of evidence”.</p> <p><input type="checkbox"/> <input type="checkbox"/> The second level registrations that form the underlying basis of a successful PDDRP complaint should be deleted.</p> <p><input type="checkbox"/> <input type="checkbox"/> The requirement of “substantive examination” in para 9.2.1(i) should be deleted.</p> <p><input type="checkbox"/> <input type="checkbox"/> A new para 6.1 a) be added: “being identical to the complainant’s mark in relation to goods and services which are</p>	
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	<p>identical to</p> <p>those for which the complainant’s mark is registered. This would not apply if the registrant has a better right to the mark. In particular the registrant will in normal circumstances have a better right if the mark has been registered prior to the registration of the complainant’s mark.”</p> <p>□□Regarding the second level (para 6.2), the registrant operator should be liable if he/she acts in bad faith or is grossly negligent in relation to the circumstances listed in para 6.a)-d).</p> <p>□□The requirement in para 7.2.3 lit.d) that the complainant has to notify the registry operator at least 30 days prior to filing a complaint is burdensome and should be reduced to 10 days if not deleted entirely.</p> <p>Para 19.5 should be amended as follows: “In cases where the Expert Determination decides that a registry operator is liable under the standards of the Trademark PDDRP, ICANN will impose appropriate remedies that are in line with the Determination.</p> <p>Explanation and Argument These changes would ensure that the PDDRP is consistent with the requirements in a civil action for contributory trademark infringement action or unfair competition and that the abusive second level registrations are deleted after a successful PDDRP complaint.</p> <p>The GAC believes that the liability</p>	
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	<p>criteria in the Applicant Guidebook are too lax. In particular, according to para 6, the liability of the registry operator is only triggered by behaviours such as “taking unfair advantage”, “unjustifiable impairment of the distinctive character of the reputation of the complainant’s mark” or “impermissible likelihood of confusion with the complainant’s mark”. The proposed changes to para 6 are therefore intended to strengthen the criteria.</p> <p>The GAC considers that para 19.5 grants ICANN too much discretion in choosing the remedies it imposes on the registry operators and recommends that the remedies be consistent with the Expert Determination.</p> <p>Ensuring full and effective compliance with the rules is a crucial issue post-delegation. The GAC believes therefore that ICANN needs to deploy a sufficiently large team for this purpose with an appropriate budget allocation.</p> <p><i>4. Consumer Protection</i></p> <p>Recommended GAC Advice:</p> <p>Points of Contact for Abuse: The GAC proposes the following amendment to the "Maintain an abuse point of contact" paragraph in the DAG to include government agencies which address consumer protection:</p> <p>A registry operator must assist law enforcement, government agencies and agencies endorsed by governments with their enquiries about abuse complaints concerning</p>	
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	<p>all names registered in the TLD, including taking timely action, as required, to resolve abuse issues.</p> <p>Effective Contract Compliance: The GAC advises the Board to ensure that ICANN’s contract compliance function is adequately resourced to build confidence in ICANN’s ability to enforce agreements between ICANN and registries and registrars</p> <p>Vetting of certain strings</p> <p>The GAC proposes that gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs.</p>	
7. Post-Delegation Disputes	<p>The GAC advises the ICANN Board to instruct ICANN staff to amend the Applicant Guidebook in the following way:</p> <ol style="list-style-type: none"> <li>1. Change the wording in the sample letter of Government support in AG back to the wording in DAGv4 and keeping the new paragraph 7.13 of the new gTLD registry agreement with the changed wording from “may implement” to “will comply”. E.g change the wording from “may implement” back to “will comply” with a legally binding decision in the relevant jurisdiction.</li> <li>2. In addition describe in the AG that ICANN will comply with a legally binding decision in the relevant jurisdiction where there has been a dispute between the relevant government or public</li> </ol>	<p>7.1 ICANN will modify the suggested wording of the letter of support or non-objection, and make clear its commitments to governments in additional text of the Applicant Guidebook.</p> <p>However, the registry agreement will continue to indicate that ICANN “may implement” instead of “will comply” with such decisions for legal reasons. As discussed previously with the GAC, ICANN’s commitment to comply with legally binding decisions is made to governments, not to registries. Therefore, it is not necessarily in the interest of ICANN, or of governments, to place that obligation in registry agreements, giving registry operators the ability, and perhaps duty, to force ICANN to implement decisions in every case. (ICANN</p>

	<p>authority and registry operator.</p>	<p>has a mechanism to enforce its contracts with registry operators.)</p> <p>7.2 The suggestion to change “court decision” to “legally binding decision” requires further discussion as it may in some cases amount to a redelegation request. Also, there could be multiple jurisdictions that have given their support to one application (e.g., multiple “Springfield”s), thus it may not be appropriate to implement a particular action based on one such decision.</p>
<p>8. Use of geographic names:</p>	<p><i>1. Definition of geographic names</i></p> <p>Recommended GAC Advice:</p> <p>The GAC asks ICANN to ensure that the criteria for community objections are implemented in a way that appropriately enables governments to use this instrument to protect their legal interest.</p> <p>ICANN refers to detailed explanations given in the “Final Draft Applicant Guidebook”.</p> <p>The GAC is of the view that the criteria for community objections do still not meet these requirements. The problem could be solved, if a free of charge objection mechanism would allow governments to protect their interest and to define names that are to be considered geographic names. This implies that ICANN will exclude an applied for string from entering the new gTLD process when the government formally states that this string is considered to be a name for which this country is commonly known as.</p>	<p>8.1.1.1</p> <p>ICANN will investigate a mechanism for the forthcoming round under which GAC members could be exempted from paying fees for objections in some circumstances (subject to constraints imposed by budget and other considerations).</p> <p>8.1.1.2</p> <p>The process relies on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. Governments and other representatives of communities will continue to be able to utilize the community objection process to address attempted misappropriation of community labels. ICANN will continue to explore the possibility of pre-identifying using additional authoritative lists of geographic identifiers that are published by recognized global organizations.</p>

	<p>The GAC considers that the provisions in DAG4 in relation to city names carry the danger that an applicant could seek to avoid the safeguard of government support or non-objection if the applicant simply states that the intended use of the name is for non-community purposes.</p> <p>The GAC asks ICANN to review the proposal in the DAG in order to ensure that this potential does not arise.</p> <p>ICANN states that applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and condition of submitting an application including confirming that all statements and representations contained in the application are true and accurate.</p> <p>The GAC is of the view that this statement does not reflect fully its concerns and asks for further explanations. The problem could be solved, if a free objection mechanism would allow governments to protect their interest.</p> <p>The GAC reminds the Board that governments need time to consult internally before deciding on whether or not to deliver a letter of approval or non-objection.</p> <p>ICANN explains that it has not been decided how long the application period will be open from the launching of the gTLD program and recalls that there will be a four months communications campaign prior to the launch.</p> <p>No further action required by now.</p>	<p>8.1.2 ICANN will continue to rely on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. This is in the interest of providing a transparent and predictable process for all parties.</p> <p>8.1.3</p> <p>There are post-delegation mechanisms to address this situation. In addition, the "early warning" opportunity will offer an additional means to indicate community objections.</p> <p>8.1.4 (1B) ICANN will investigate a mechanism for the forthcoming round under which GAC members could be exempted from paying fees for objections in some circumstances (subject to constraints imposed by budget and other considerations).</p> <p>8.2.1 This principle is agreed, and this can be clarified in the Guidebook. ICANN invites governments to identify appropriate points of contact on this issue.</p> <p>8.2.2 ICANN will continue to suspend processing of applications with inconsistent/conflicting support, but will allow multiple applicants all endorsed by the same authority to go forward, when requested by the government.</p>
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	<p>The GAC reiterates its position that governments should not be required to pay a fee for raising objections to new gTLD applications.</p> <p>It is the view of the ICANN Board that governments that file objections should be required to cover costs of the objection process just like any other objector.</p> <p>The problem could be solved, if a free objection mechanism would allow governments to protect their interest.</p> <p><i>2. Further requirements regarding geographic names</i></p> <p>The GAC clarifies that it is a question of national sovereignty to decide which level of government or which administration is responsible for the filing of letters of support or non-objection. There may be countries that require that such documentation has to be filed by the central government - also for regional geoTLDs; in other countries the responsibility for filing letters of support may rest with sub-national level administrations even if the name of the capital is concerned. GAC requests some clarification on this in the next version of the Applicants Guidebook.</p> <p>According to the current DAG applications will be suspended (pending resolution by the applicants), if there is more than one application for a string representing a certain geographic name, and the applications have requisite government approvals. The GAC understands such a position for applications that have support of different administrations</p>	
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	<p>or governmental entities. In such circumstances it is not considered appropriate for ICANN to determine the most relevant governmental entity; the same applies, if one string represents different geographic regions or cities. Some governments, however, may prefer not to select amongst applicants and support every application that fulfils certain requirements. Such a policy may facilitate decisions in some administrations and avoid time-consuming calls for tenders. GAC encourages ICANN to process those applications as other competing applications that apply for the same string.</p>	
<p>9. Legal Recourse for Applications:</p>	<p>The GAC reiterates its concern that excluding the possibility of legal recourse might raise severe legal problems. GAC therefore urges the ICANN Board to seek legal advice in major jurisdiction whether such a provision might cause legal conflicts – in particular but not limited to US and European competition laws. If ICANN explains that it has already examined these legal questions carefully and considering the results of these examinations still adheres to that provision, GAC will no longer insist on its position. However, the GAC expects that ICANN will continue to adhere to the rule of law and follow broad principles of natural justice. For example, if</p> <p>ICANN deviates from its agreed processes in coming to a decision, the GAC expects that ICANN will provide an appropriate mechanism</p>	<p>As discussed with the GAC, ICANN has examined these legal questions carefully and considering the results of these examinations still adheres to this provision. ICANN will clarify in the Applicant Guidebook that: if ICANN deviates from its agreed processes in coming to a decision, ICANN's internal accountability mechanisms will allow complaints to be heard.</p>

	for any complaints to be heard.	
10. Providing opportunities for all stakeholders including those from developing countries	<p><i>Main issues</i></p> <p>1. Cost Considerations</p> <p>“ GAC urged ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude stakeholders from developing countries from participating in the new gTLD process.”</p> <p>GAC: new gTLD applications from municipalities and local governments in developing countries</p> <p>2. Language diversity</p> <p>Key documents produced by ICANN must be available in all UN languages within a reasonable period in advance of the launch of the gTLD round. The GAC strongly recommends that the communications strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority”.</p> <p>3. Technical and logistics support</p> <p>4. Outreach – as per Joint AC/SO recommendations</p> <p>5. Joint AC/SO Working Group on support for new gTLD applicants.</p> <p>On 10th December 2010 the GAC through its Cartagena GAC communiqué stated as follows: “The GAC welcomed an update on the work of the Joint AC/SO Working Group on support, and encourages the Working Group to continue their efforts, particularly</p>	<p>1. TBD ICANN’s Board recognised the importance of an inclusive New gTLD Program and issued a Resolution forming a Joint Working Group (JAS WG) which is underway. ICANN would like to receive the report of the JAS WG as soon as possible. JAS WG is requested to provide a possible deadline for this work during the ICANN meeting in SFO allowing the Board to act.</p> <p>It is noted that one of the challenges in developing support mechanisms for applicants is to ensure that such support is actually received by those applicants with the most need, rather than being used advantageously by other participants. This issue has also been taken into account in the work of the JAS WG.</p> <p>2. Some documents are already available in the 6 UN languages. The Final Application Guidebook will be also in due course, and the web site will be organized to find easily all the documents available in each language.</p> <p>3. ICANN has agreed to provide certain mechanisms for technical and logistical support, such as assisting with matching needs to providers. ICANN is also considering setting up regional help desks to provide more responsive and relevant technical support to</p>

	<p>with regard to further outreach with developing countries” further, the GAC urged ICANN to adopt recommendations of the Joint AC/SO Working Group.</p> <p>Recommendations of the Joint AC/SO Working Group:</p> <p>Who should receive Support?</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <input type="checkbox"/> Non-governmental Organizations (NGOs), civil society and not-for-profit organizations</li> <li><input type="checkbox"/> <input type="checkbox"/> Limited Community based applications such as cultural, linguistic and ethnic</li> <li><input type="checkbox"/> <input type="checkbox"/> Applications in languages whose presence on the web is limited</li> <li><input type="checkbox"/> <input type="checkbox"/> Local entrepreneurs, in those markets where market constraints make normal business operations more difficult</li> <li><input type="checkbox"/> <input type="checkbox"/> Applicants located in emerging economies</li> </ul> <p>Type of support:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <input type="checkbox"/> Cost Reduction Support</li> <li><input type="checkbox"/> <input type="checkbox"/> Sponsorship and other funding support</li> <li><input type="checkbox"/> <input type="checkbox"/> Modifications to the financial continued operation instrument obligation</li> <li><input type="checkbox"/> <input type="checkbox"/> Technical support</li> <li><input type="checkbox"/> <input type="checkbox"/> Logistical support</li> <li><input type="checkbox"/> <input type="checkbox"/> Obligation Technical support for applicants in operating or qualifying to operate a gTLD</li> <li><input type="checkbox"/> <input type="checkbox"/> gTLD Exception to the rules requiring separation of the Registry</li> </ul>	<p>new gTLD applicants in developing countries.</p> <p>4. Concurrence of views between the Board and GAC on the critical need for outreach to developing countries</p> <p>5. TBD This item from the GAC Scorecard appears to reflect the interim report of the JAS WG. ICANN is awaiting their final report. (ICANN would like to receive the report of the JAS WG as soon as possible.)</p> <p>6. TBD This set of issues overlaps with and is addressed in the other items in this section.</p>
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	<p>and Registrar function</p> <p>6. Applications from Governments or National authorities (especially municipal councils and provincial authorities) –</p> <p>special consideration for applications from developing countries</p> <p>GAC communiqué’s on the issue:</p> <p>i. Brussels Communiqué Commitments. It therefore urged ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude developing country stakeholders from participating in the new gTLD-process. Key documents should be available in all UN languages. The GAC urges that the communications and outreach strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.</p> <p>ii. Nairobi Communiqué</p> <p>The GAC believed that instead of the then proposal of single-fee requirement, a cost-based structure of fees appropriate to each category of TLD would:</p> <p>a) prevent cross subsidization and</p> <p>b) better reflect the project scale,</p> <p>This would improve logistical requirements and financial position of local community and developing country stakeholders who should not be disenfranchised from the new TLD round.</p>	
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	<p>Further the board believes that :</p> <p>a. New gTLD process is developed on a cost recovery model.</p> <p>b. Experience gained from first round will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds.</p> <p>c. Non-financial means of support are being made available to deserving cases.</p> <p>i. Proposed that the following be entertained to achieve cost reduction:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <input type="checkbox"/> Waiving the cost of Program Development (\$26k).</li> <li><input type="checkbox"/> <input type="checkbox"/> Waiving the Risk/Contingency cost (\$60k).</li> <li><input type="checkbox"/> <input type="checkbox"/> Lowering the application cost (\$100k)</li> <li><input type="checkbox"/> <input type="checkbox"/> Waiving the Registry fixed fees (\$25k per calendar year), and charge the Registry- Level Transaction Fee only (\$0.25 per domain name registration or renewal).</li> </ul> <p>ii. Proposed that the reduced cost be paid incrementally, which will give the applicants/communities from developing countries more time to raise money, and investors will be more encouraged to fund an application that passes the initial evaluation.</p> <p>iii. Believe that communities from developing countries apply for new gTLDs according to an appropriate business model</p>	
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	<p>taking into consideration the realities of their regions. ICANN's commitment towards supporting gTLD applicants in communities from developing countries will be a milestone to the development of the overall Internet community in Africa and other developing regions.</p> <p>A. Other Developing world Community comments</p> <p>Rolling out new gTLD and IDNs was done in a hurry and without basis on a careful feasibility study on the impact that this rollout will have on developing countries. For some representatives, this is a massive roll out of gTLDs and IDNs that will find many developing countries unprepared and unable to absorb it. There is the fear that there might be serious consequence in terms of economic impact to developing countries.</p>	
<p>11. Law enforcement due diligence recommendations to amend the Registrar Accreditation Agreement as noted in the Brussels Communiqué</p>	<p>The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook as follows:</p> <p>Module 1:</p> <ol style="list-style-type: none"> <li>1. Include other criminal convictions as criteria for disqualification, such as Internet-related crimes (felony or misdemeanor) or drugs.</li> <li>2. Assign higher weight to applicants offering the highest levels of security to minimize the potential for malicious activity, particularly for those strings that present a higher risk of serving as</li> </ol>	<p>11.1 ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes however that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook consciously targets "crimes of trust".)</p> <p>11.2.1 ICANN could consider providing extra points in some aspects of the qualification</p>

	<p>venues for criminal, fraudulent or illegal conduct (e.g. such as those related to children, health-care, financial services, etc.)</p> <p>Module 2:</p> <ol style="list-style-type: none"> <li>1. Add domestic screening services, local to the applicant, to the international screening services.</li> <li>2. Add criminal background checks to the Initial Evaluation.</li> <li>3. Amend the statement that the results of due diligence efforts will not be posted to a positive commitment to make such results publicly available</li> <li>4. Maintain requirements that WHOIS data be accurate and publicly available.</li> </ol>	<p>evaluation scoring process. (ICANN notes however that a priori categorization of strings is inherently problematic.)</p> <p>11.3 ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN is mindful that this particular recommendation could lead applicants to locate in certain regions in order to game the depth of domestic screening. International screening is likely to include the reports of local agencies and could therefore be duplicative.)</p> <p>11.4 ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook already addresses serious crimes of trust.)</p> <p>11.5 ICANN will explore possible ways to make results public, but is concerned that posting such information poses concerns about privacy that should be explored further.</p>
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		<p>11.6 From the Affirmation of Commitments: "ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information."</p>
<p>12. The need for an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities (including geographical names)</p>	<p>In conjunction with the GAC's proposed amendments to the Objections Procedures, to Community-based strings, and Geographic Names, the GAC advises ICANN to reconsider its objection to an "early warning" opportunity for governments to review potential new gTLD strings and to advise applicants whether their proposed strings would be considered controversial or to raise national sensitivities.</p>	<p>The principle of an early warning is already included in the Guidebook. The exact process needs to be discussed further – please see the Board's notes above with respect to the GAC's advice on "Procedures for the review of sensitive strings."</p>

# **Appendix to Chapter 5**

### **Appendix 5.1.A: Initial GAC statement on IDN public policy areas**

The GAC made its first formal statement on IDNs in its Melbourne communiqué (March 2001)<sup>98</sup>:

**With regard to international domain names (IDNs)**, the GAC confirms the importance and interests of this development to the benefit of Internet users worldwide. Further, regarding IDNs, including testbed initiatives, the GAC considers that three key public policy areas need to be kept at the forefront of the considerations of ICANN, its Supporting Organisations and the broader Internet community. These are:

- the essential importance of interoperability of the present and future Internet;
- the prevention of cybersquatting and resolution of disputes in the IDNs environments should be addressed by appropriate means and processes such as an appropriate dispute resolution policy and implementation of sunrise periods; and
- the application of competition and market access, consumer protection and intellectual property principles.

Specifically, the GAC states that:

Anti-cybersquatting principles and mechanisms should translate from the current ASCII character set environment to any non-ASCII character set environments, and that technological implementation should appropriately keep pace with any developments in this area.

Preserving the universal connectivity and accessibility domain name system is vital to the continuance of the Internet as a global network. While various technical experimentation may need to be investigated in the pursuit of unified standards, ultimately, a unified or interoperable standards for multilingual domain names should be achieved, with the ability of systems to work ubiquitously across the Internet.

IDNs registration in top level domains should benefit from effective and fair conditions of competition, at appropriate levels and scale of activity. ICANN should take steps to communicate to operators of IDNs testbeds that they should note any legal obligation they have to inform consumers regarding both the status and operation of their testbeds, including the status of their registrations within that testbed, particularly in circumstances where registrations are taken prior to full system implementation.

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<sup>98</sup> ICANN. (2001). GAC Communiqué VIII – Melbourne, 10 March 2001. Retrieved January 6, 2009, from <http://www.icann.org/en/committees/gac/communique-10mar01.htm>

### **Appendix 5.1.B: Initial GAC Principles on the IDN testbeds**

The GAC stated its nine principles in its Stockholm Communiqué (June 2001)<sup>99</sup>:

- (1) The testbed process will not be used to undermine the universal interoperability of the Internet.
- (2) Testbeds should be appropriately coordinated within a community-based framework such as ICANN and/or the IETF.
- (3) ICANN should issue information regarding testbed operations for participants interested in implementing preliminary standards, with a view to encouraging widespread participation at varied levels of scale and scope of operations.
- (4) Experimental and testing environments should contain a clearly articulated statement of operational scope, goals, milestones, and, to the extent foreseeable, implementation timelines.
- (5) All testbed undertakings should be clearly labeled and communicated to the public as experiments. Operators should be required to implement measures that ensure that users are fully informed of any limitations arising from testbed participation and operation.
- (6) It should be well understood by testbed operators and users that testing environments may end without establishing any prior claims on future standards or operational directions.
- (7) Testbed operators should adapt to consensus-based standards when they emerge through the ICANN process or other community-based processes such as the IETF
- (8) Appropriate mechanisms for the prevention and resolution of disputes that may arise from the testbed environment should be implemented as part of operational tests to the extent possible.
- (9) While operational testing in a "live" commercial environment may be necessary, the scale and scope of such operations should be consistent with the notion of the undertaking as a "testbed" endeavor, rather than a market launch.

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<sup>99</sup> ICANN (2001). GAC Principles on Internationalised Domain Names , as stated in GAC Communiqué IX – Stockholm, 2 June 2001. Retrieved 3 August 2009, from [https://gacweb.icann.org/download/attachments/1540197/GAC\\_09\\_Stockholm\\_Communique.pdf?version=1&modificationDate=1312230827000](https://gacweb.icann.org/download/attachments/1540197/GAC_09_Stockholm_Communique.pdf?version=1&modificationDate=1312230827000)

## **Appendix 5.2 IDN Guidelines**

### **Appendix 5.2.A: IDN Guidelines version 1.0 (20 June 2003)**

Source: <http://www.icann.org/en/general/idn-guidelines-20jun03.htm>

1. Top-level domain registries that implement internationalized domain name capabilities will do so in strict compliance with the technical requirements described in RFCs [3490](#), [3491](#), and [3492](#) (collectively, the "IDN standards").
2. In implementing the IDN standards, top-level domain registries will employ an "inclusion-based" approach (meaning that code points that are not explicitly permitted by the registry are prohibited) for identifying permissible code points from among the full Unicode repertoire.
3. In implementing the IDN standards, top-level domain registries will (a) associate each registered internationalized domain name with one language or set of languages, (b) employ language-specific registration and administration rules that are documented and publicly available, such as the reservation of all domain names with equivalent character variants in the languages associated with the registered domain name, and, (c) where the registry finds that the registration and administration rules for a given language would benefit from a character variants table, allow registrations in that language only when an appropriate table is available.
4. Registries will work collaboratively with relevant and interested stakeholders to develop language-specific registration policies (including, where the registry determines appropriate, character variant tables), with the objective of achieving consistent approaches to IDN implementation for the benefit of DNS users worldwide. Registries will work collaboratively with each other to address common issues, through, for example, ad hoc groups, regional groups, and global fora, such as the ICANN IDN Registry Implementation Committee.
5. In implementing the IDN standards, top-level domain registries should, at least initially, limit any given domain label (such as a second-level domain name) to the characters associated with one language or set of languages only.
6. Top-level domain registries (and registrars) should provide informational resources and services in all languages for which they offer internationalized domain name registrations.

### **Notes**

*Note to Guideline 1 for Registries Having Agreements with ICANN:* Registries with sponsorship agreements or registry agreements with ICANN must also comply with the format requirements for Registered Names in their sponsorship or registry agreements. In one way or another, the agreements state that all Registered Names (including ACE names) will comply with the following syntax in augmented Backus-Naur Form (BNF) as described in [RFC 2234](#):

```
dot = %x2E ; "."
dash = %x2D ; "-"
alpha = %x41-5A / %x61-7A ; A-Z / a-z
digit = %x30-39 ; 0-9
```

ldh = alpha / digit / dash  
id-prefix = alpha / digit  
label = id-prefix [\*61ldh id-prefix]  
sldn = label dot label  
hostname = \*(label dot) sldn

In addition, length limitations should be observed.

To meet these requirements, the UseSTD3ASCIIRules flag described in [RFC 3490](#) should be set when in performing ToASCII conversions to produce ACE names, and the resulting format restriction should be interpreted as above.

*Note to Guideline 2:* Except where a registry determines that an exception is appropriate, permissible code points will not include: (a) line symbol-drawing characters, (b) symbols and icons that are neither alphanumeric nor ideographic language characters, such as typographical and pictographic dingbats, (c) punctuation characters, and (d) spacing characters. The Prohibited Output profile of Section 5 of [RFC 3491](#) also prohibits certain code points, such as spacing characters. In addition, the IDN standards have additional prohibitions that are checked outside that profile. In accord with [Guideline 1](#), a registry may not by exception permit code points that are prohibited by the IDN standards.

*Note to Guideline 3:* Under [Guideline 3](#), every internationalized-domain-name registration will be associated with a language or set of languages for the purpose of identifying a registry-established set of registration and administration rules (a “registration ruleset”) that applies to the registration. Registration rulesets will be associated with languages or set of languages. For example, a registry might specify one registration ruleset for internationalized-domain-name registrations that have been designated as “German” and another registration ruleset for internationalized-domain-name registrations that have been designated “Chinese-Japanese-Korean”. The mapping of particular languages to particular rulesets will be specified by the registry. Registrars (and ultimately registrants) will be able to specify the language or set of languages of a registration, which will determine which of the registry-established registration ruleset will be applied.

Registries will make the language-to-ruleset mapping, as well as the details of the rulesets themselves, publicly available on their websites. Thirty days notice to registrars (which may be given by public notice) will ordinarily be given of the establishment or revision of rulesets. See also [Guideline 4](#) concerning consultation in the establishment of rulesets.

Appropriate topics for rulesets may, but will not necessarily, include: permissible Unicode code points, character variant tables, and prohibited Unicode strings, as well as other policies as the registry operator determines are appropriate. Permissible Unicode code points for different rulesets may be overlapping or even congruent.

*Note to Guideline 3 Concerning Un-sponsored gTLDs:* Rulesets must not interfere with the equivalent access to Registry Operator's Registry Services by all ICANN-Accredited Registrars that have Registry-Registrar Agreements in effect. Registry operators of un-sponsored TLDs will ordinarily give thirty days notice to ICANN and accredited, authorized registrars of the establishment or revision of rulesets. (In urgent situations, the registry operator and ICANN may agree in writing on a shorter time.)

## Appendix 5.2.B Draft IDN Guidelines version 2.0 (20 September 2005)

Source: <http://www.icann.org/en/general/idn-guidelines-20sep05.htm>

1. Top-level domain registries that implement internationalized domain name capabilities will do so in strict compliance with the technical requirements described in RFCs [3454](#), [3490](#), [3491](#), and [3492](#) (collectively, the "IDN standards").
2. In implementing the IDN standards, top-level domain registries will employ an "inclusion-based" approach (meaning that code points which are not explicitly permitted by the registry are prohibited) for identifying permissible sets of code points from among the full Unicode repertoire, as described below.
  3. (a) In implementing the IDN standards, top-level domain registries will associate each label in a registered internationalized domain name, as it appears in their registry, with a single language or a single script using accepted designators for both. The restriction, in either case, is intended to limit the set of permitted characters within a label. If greater specificity is desired, the association may be made by combining both a language designator and a script designator. Alternatively, a label may be associated with a set of languages, or with more than one designator under the conditions described below. Language designators are illustrated in RFC 3066 (<http://www.rfc-editor.org/rfc/rfc3066.txt>). Script designators are illustrated in ISO 15924 and Unicode Technical Report #23 (<http://www.unicode.org/reports/tr23/>). (b) A registry will publish the aggregate set of code points that it makes available in clearly identified IDN-specific character tables, and must define equivalent character variants if registration policies are established on their basis. Any such table must be designated in a manner that indicates the language(s) and/or script(s) it is intended to support. (c) All code points in a single label must be taken from the same script as determined by the Unicode character properties (UTR#23). Exception to this is permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. Visually confusable characters from different scripts must not appear in a single label unless there are overriding legitimate linguistic reasons for doing so. Each such situation must be associated with a specific language and a corresponding character table must be available before registration of such names can be accepted. (d) All registry policies based on these considerations must be documented and publicly available, including a character table for each permissible set of code points, before the registration of any IDN associated with such an aggregate may be accepted.
4. Permissible code points will not include: (a) line symbol-drawing characters (as those in the Unicode Box Drawing block), (b) symbols and icons that are neither alphanumeric nor ideographic language characters, such as typographical and pictographic dingbats, (c) punctuation characters that lack grammatical significance in the language with which the IDN registration is associated (with necessary punctuation including characters such as the ETHIOPIC WORDSPACE in Amharic and the MIDDLE DOT in Catalan), and (d) other characters with well-established functions as protocol elements. When a registry determines that an exception to any of these rules is appropriate, as discussed in Guideline #3, the basis for that decision must be documented in the IANA Registry for IDN Tables or otherwise made readily available online. A registry may not even by exception permit code points that are prohibited by the IDN standards.

5. A registry must define the scope of an IDN registration in terms of both its Unicode and ASCII-encoded representations. The availability of a given Unicode sequence is currently determined by its encodability into the scheme defined in RFC 3491, and changes to that component of the IDN standard can have disruptive consequences for the operability of a Unicode name. For this reason an IDN registry should treat the ASCII-encoded form as the primary registered name, and include in its documentation a description of the factors that determine the way that sequence appears at the user interface.
6. Top-level domain registries will work collaboratively with relevant and interested stakeholders to develop IDN-specific registration policies, with the objective of achieving consistent approaches to IDN implementation for the benefit of DNS users worldwide. Top-level domain registries will work collaboratively with each other to address common issues, for example by forming or appointing a consortium to coordinate contact with external communities, elicit the assistance of support groups, and establish global fora.
7. Top-level domain registries (and registrars) must make definitions of what constitutes an IDN registration and associated registration rules available to the <[IANA Registry for IDN Tables](#)>. If material fundamental to the understanding of a registry's IDN policies is not published by the IANA, it must otherwise be made readily available online by the registry.
8. The top-level domain registries should provide resources containing information about the sources and references that were used in the formation of the corresponding IDN registration policies for all languages and scripts in which they offer IDN registrations.

### Administrative details

*For Registries Having Agreements with ICANN:* Registries with sponsorship agreements or registry agreements with ICANN must also comply with the format requirements for Registered Names in their sponsorship or registry agreements. In one way or another, the agreements state that all Registered Names (including ACE names) will comply with the following syntax in augmented Backus-Naur Form (BNF) as described in [RFC 2234](#):

```
dot = %x2E ; "."
dash = %x2D ; "-"
alpha = %x41-5A / %x61-7A ; A-Z / a-z
digit = %x30-39 ; 0-9
ldh = alpha / digit / dash
id-prefix = alpha / digit
label = id-prefix [*6ldh id-prefix]
sldn = label dot label
hostname = *(label dot) sldn
```

In addition, length limitations should be observed.

To meet these requirements, the UseSTD3ASCIIRules flag described in [RFC 3490](#) should be set when in performing ToASCII conversions to produce ACE names, and the resulting format restriction should be interpreted as above.

*For Un-sponsored gTLDs:* Rulesets based on these Guidelines must not interfere with the equivalent access to Registry Operator's Registry Services by all ICANN-Accredited

Registrars that have Registry-Registrar Agreements in effect. Registry operators of unsponsored TLDs will ordinarily give thirty days notice to ICANN and accredited, authorized registrars of the establishment or revision of rulesets. In urgent situations, the registry operator and ICANN may agree in writing on a shorter time. Special terms may also be attached to the release of time-sensitive information, for example, in situations where land rush effects are anticipated.

### **Additional remarks**

The deceptive use of visually confusable characters from different scripts is discussed in detail in the Unicode Technical Report #36 on ‘Unicode Security Conditions’ at <http://www.unicode.org/reports/tr36/>. Limitations to the character repertoire available for IDNs are suggested there in tables presented under the heading “Data files”.

The list of languages in ISO 639-2 is currently being revised in preparation for ISO 639-3, which is in an advanced draft (as of the date of the present Guidelines). The normative reference to BCP47 made in the terms for the IANA IDN Language Table Registry will require modification when ISO 639-3 is finalized, and it should also be noted that the IETF is currently dealing with the final draft of a successor document to that BCP. This will provide expanded means for specifying languages, including designations for script and orthographic authority as components of a language tag. That revision is being prepared by the IETF Language Tag Registry Update working group ([ltr](#)). As its work acquires formal normative status, the results may require further modification to the IDN Guidelines.

The aggregation of languages on the basis of their shared use of a single script (such as Latin-script African or European languages) may ease the development of focused IDN policies in technical and other regards, thus reducing potential for confusion. Unless there is need to associate individual labels in an IDN with different scripts, even where script-based policies are otherwise applied, the least confusing way to designate an IDN will often be by association with a single language. However, the current restriction of top-level labels to the 26-letter basic Latin alphabet will frequently necessitate that the language attributes of an IDN be determined without consideration of the top-level label. The discussion that is in progress about permitting a more extensive character repertoire in top-level labels can result in a change to this condition, as well as raising need for further guidelines specific to the new situation.

## Appendix 5.2.C Finalised IDN Guidelines version 2.0 (7 November 2005)

Source: <http://www.icann.org/en/general/idn-guidelines-14nov05.htm>

1. Top-level domain registries that implement internationalized domain name capabilities will do so in strict compliance with the technical requirements described in RFCs [3454](#), [3490](#), [3491](#), and [3492](#) (collectively, the "IDN standards").
2. In implementing the IDN standards, top-level domain registries will employ an "inclusion-based" approach (meaning that code points which are not explicitly permitted by the registry are prohibited) for identifying permissible sets of code points from among the full Unicode repertoire, as described below.
3. (a) In implementing the IDN standards, top-level domain registries will associate each label in a registered internationalized domain name, as it appears in their registry with a single script. This restriction is intended to limit the set of permitted characters within a label. If greater specificity is needed, the association may be made by combining descriptors for both language and script. Alternatively, a label may be associated with a set of languages, or with more than one designator under the conditions described below. (b) A registry will publish the aggregate set of code points that it makes available in clearly identified IDN-specific character tables, and will define equivalent character variants if registration policies are established on their basis. Any such table will be designated in a manner that indicates the script(s) and/or language(s) it is intended to support. (c) All code points in a single label will be taken from the same script as determined by the Unicode Standard Annex #24: Script Names at <http://www.unicode.org/reports/tr24>. Exception to this is permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. In such cases, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible codepoints unless a corresponding policy and character table is clearly defined. (d) All registry policies based on these considerations will be documented and publicly available, including a character table for each permissible set of code points, before the registration of any IDN associated with such an aggregate may be accepted.
4. Permissible code points will not include: (a) line symbol-drawing characters (as those in the Unicode Box Drawing block), (b) symbols and icons that are neither alphanumeric nor ideographic language characters, such as typographic and pictographic dingbats, (c) characters with well-established functions as protocol elements, (d) punctuation marks used solely to indicate the structure of sentences. (e) Punctuation marks that are used within words may only be permitted if they are not excluded by any of the preceding points, are essential to the language of the IDN registration, and are associated with explicit prescriptive rules about the context in which they may be used. (f) Under corresponding conditions, a single specified character may be used as a separator within a label, either by allowing the hyphen-minus to appear together with non-Latin scripts, or by designating a functionally equivalent punctuation mark from within the script.

When a pre-existing registered name requires a registry to make transitional exception to any of these rules, the terms of that action will be made readily available online. A registry may not even by exception permit code points that are prohibited by the IDN standards.

5. A registry will define an IDN registration in terms of both its Unicode and ASCII-encoded representations. The availability of a given Unicode sequence is currently determined by its encodability into the scheme defined in RFC 3491, and changes to that component of the IDN standard can have disruptive consequences for the operability of a Unicode name. Since the appearance of hyphens in the third and fourth positions of a label indicates an encoding scheme, the registration of any label containing hyphens in these positions must not be permitted unless the hyphens follow a two-letter designator for a sanctioned scheme and the label conforms to the corresponding specifications.

6. Top-level domain registries will work collaboratively with relevant stakeholders to develop IDN-specific registration policies, with the objective of achieving consistent approaches to IDN implementation for the benefit of DNS users worldwide. Top-level domain registries will work collaboratively with each other to address common issues, for example by forming or appointing a consortium to coordinate contact with external communities, elicit the assistance of support groups, and establish global fora.

7. Top-level domain registries will make definitions of what constitutes an IDN registration and associated registration rules available to the IANA Registry for IDN Tables. If material fundamental to the understanding of a registry's IDN policies is not published by the IANA, it will otherwise be made readily available online by the registry, which should also ensure that its registrars call the attention of prospective holders of IDN names to it.

8. The top-level domain registries should provide resources containing information about the sources and references that were used in the formation of the corresponding IDN registration policies for all languages and scripts in which they offer IDN registrations.

#### **Additional remarks**

The deceptive use of visually confusable characters from different scripts is discussed in detail in the Unicode Technical Report #36 on 'Unicode Security Conditions' at <http://www.unicode.org/reports/tr36/> and in a draft Unicode Technical Report #39 at <http://www.unicode.org/reports/tr39/>. Limitations to the character repertoire available for IDNs are suggested in UTR#36 in tables presented under the heading "Data files".

The current restriction of top-level labels to the 26-letter basic Latin alphabet makes it necessary to determine the language attributes of an IDN without consideration of the top-level label. The discussion that is in progress about permitting a more extensive character repertoire in top-level labels may change this, as well as raise need for guidelines specific to the new condition.

## Appendix 5.2.D Finalised IDN Guidelines version 2.1 (22 February 2006)

Source: <http://www.icann.org/en/general/idn-guidelines-22feb06.htm>

1. Top-level domain registries that implement internationalized domain name capabilities will do so in strict compliance with the technical requirements described in RFCs [3454](#), [3490](#), [3491](#), and [3492](#) (collectively, the "IDN standards").

2. In implementing the IDN standards, top-level domain registries will employ an "inclusion-based" approach (meaning that code points which are not explicitly permitted by the registry are prohibited) for identifying permissible sets of code points from among the full Unicode repertoire, as described below.

3. (a) In implementing the IDN standards, top-level domain registries will associate each label in a registered internationalized domain name, as it appears in their registry with a single script. This restriction is intended to limit the set of permitted characters within a label. If greater specificity is needed, the association may be made by combining descriptors for both language and script. Alternatively, a label may be associated with a set of languages, or with more than one designator under the conditions described below. (b) A registry will publish the aggregate set of code points that it makes available in clearly identified IDN-specific character tables, and will define equivalent character variants if registration policies are established on their basis. Any such table will be designated in a manner that indicates the script(s) and/or language(s) it is intended to support. (c) All code points in a single label will be taken from the same script as determined by the Unicode Standard Annex #24: Script Names at <http://www.unicode.org/reports/tr24>. Exception to this is permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. In such cases, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible codepoints unless a corresponding policy and character table is clearly defined. (d) All registry policies based on these considerations will be documented and publicly available, including a character table for each permissible set of code points, before the registration of any IDN associated with such an aggregate may be accepted.

4. Permissible code points will not include: (a) line symbol-drawing characters (as those in the Unicode Box Drawing block), (b) symbols and icons that are neither alphanumeric nor ideographic language characters, such as typographic and pictographic dingbats, (c) characters with well-established functions as protocol elements, (d) punctuation marks used solely to indicate the structure of sentences. (e) Punctuation marks that are used within words may only be permitted if they are not excluded by any of the preceding points, are essential to the language of the IDN registration, and are associated with explicit prescriptive rules about the context in which they may be used. (f) Under corresponding conditions, a single specified character may be used as a separator within a label, either by allowing the hyphen-minus to appear together with non-Latin scripts, or by designating a functionally equivalent punctuation mark from within the script.

When a pre-existing registered name requires a registry to make transitional exception to any of these rules, the terms of that action will be made readily available online. A registry may not even by exception permit code points that are prohibited by the IDN standards.

5. A registry will define an IDN registration in terms of both its Unicode and ASCII-encoded representations. The availability of a given Unicode sequence is currently determined by its encodability into the scheme defined in RFC 3491, and changes to that component of the IDN standard can have disruptive consequences for the operability of a Unicode name. Since the appearance of hyphens in the third and fourth positions of a label indicates an encoding scheme, the registration of any label containing hyphens in these positions must not be permitted unless the hyphens follow a two-letter designator for a sanctioned scheme and the label conforms to the corresponding specifications.

6. Top-level domain registries will work collaboratively with relevant stakeholders to develop IDN-specific registration policies, with the objective of achieving consistent approaches to IDN implementation for the benefit of DNS users worldwide. Top-level domain registries will work collaboratively with each other to address common issues, for example by forming or appointing a consortium to coordinate contact with external communities, elicit the assistance of support groups, and establish global fora.

7. Top-level domain registries will make definitions of what constitutes an IDN registration and associated registration rules available to the IANA Registry for IDN Tables. If material fundamental to the understanding of a registry's IDN policies is not published by the IANA, it will otherwise be made readily available online by the registry, which should also ensure that its registrars call the attention of prospective holders of IDN names to it.

8. The top-level domain registries should provide resources containing information about the sources and references that were used in the formation of the corresponding IDN registration policies for all languages and scripts in which they offer IDN registrations.

9. The UseSTD3ASCIIRules flag described in RFC 3490 must be set when performing ToASCII conversions to produce ACE names.

### **Additional remarks**

The deceptive use of visually confusable characters from different scripts is discussed in detail in the Unicode Technical Report #36 on 'Unicode Security Conditions' at <http://www.unicode.org/reports/tr36/> and in a draft Unicode Technical Report #39 at <http://www.unicode.org/reports/tr39/>. Limitations to the character repertoire available for IDNs are suggested in UTR#36 in tables presented under the heading "Data files".

The current restriction of top-level labels to the 26-letter basic Latin alphabet makes it necessary to determine the language attributes of an IDN without consideration of the top-level label. The discussion that is in progress about permitting a more extensive character repertoire in top-level labels may change this, as well as raise need for guidelines specific to the new condition.

## Appendix 5.2.E Finalised IDN Guidelines version 2.2 (26 April 2007)

Source: <http://www.icann.org/en/topics/idn/idn-guidelines-26apr07.pdf>

1. Domain registries that implement internationalized domain name capabilities at any level, including their own top-level designations, will do so in strict compliance with the technical requirements described in RFCs 3454, 3490, 3491, and 3492 (collectively, the "IDN standards").
2. In implementing the IDN standards, domain registries will employ an "inclusion-based" approach (meaning that code points which are not explicitly permitted by the registry are prohibited) for identifying permissible sets of code points from among the full Unicode repertoire, as described below. A registry may not even by exception permit code points that are prohibited by the IDN standards.
3. In implementing the IDN standards, domain registries will associate each label in a registered internationalized domain name, as it appears in their registry, with a single script as defined by the block division of the Unicode code chart. A more specific association may be made by combining descriptors for both language and script. Alternatively, a label may be associated with a set of languages, or with more than one designator under the conditions described below.
  - 3.1 A domain registry will publish the aggregate set of code points that it makes available in clearly identified IDN-specific character tables, and will define equivalent character variants if registration policies are established on their basis. Any such table will be designated in a manner that indicates the script(s) and/or language(s) it is intended to support.
  - 3.2 All code points in a single label will be taken from the same script as determined by the Unicode Standard Annex #24: Script Names <<http://www.unicode.org/reports/tr24>>. Exceptions to this guideline are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. Even in the case of this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible codepoints unless a corresponding policy and character table is clearly defined.
4. All registry policies based on these considerations will be documented and publicly available, including a character table for each permissible set of code points, before the registration of any IDN associated with such an aggregate may be accepted.
5. Permissible code points will not include:
  - 5.1 geometrical and line-drawing symbols such as those in the Unicode Box Drawing and Box Elements blocks,
  - 5.2 symbols and icons that are neither alphanumeric nor ideographic language characters, such as typographic and pictographic dingbats,
  - 5.3 characters with well-established functions as protocol elements,
  - 5.4 punctuation marks used solely to indicate the structure of sentences,

5.5 punctuation marks that are used within words, with possible exception of those that are not excluded by any of the preceding points, are essential to the language represented by the IDN, and are associated with explicit prescriptive rules about the context in which they may be used.

6. A domain registry will define an IDN registration in terms of both its Unicode and ASCII-encoded representations (also termed U-label and A-label). The availability of a given Unicode sequence is currently determined by its encodability into the scheme defined in RFC 3491.

6.1 Changes to that component of the IDN standard can have disruptive consequences for the operability of a Unicode name. Characters that are marginally acceptable in the terms noted in the preceding section should therefore only be made available where there is compelling and clearly documented reason.

6.2 The appearance of hyphens in the third and fourth positions of a label indicates an encoding scheme. The registration of any label containing hyphens in these positions must not be permitted unless the hyphens follow a two-letter designator for a sanctioned scheme and the label conforms to the corresponding specifications.

7. Domain registries will work collaboratively with relevant stakeholders to develop IDN-specific registration policies, with the objective of achieving consistent approaches to IDN implementation for the benefit of DNS users worldwide. Domain registries will work collaboratively with each other to address common issues, for example by forming or appointing a consortium to coordinate contact with external communities, elicit the assistance of support groups, and establish global fora.

8. Domain registries will make definitions of what constitutes an IDN registration and associated registration rules available to the IANA Repository for TLD IDN Practices <<http://www.iana.org/assignments/idn/>>. If material fundamental to the understanding of a registry's IDN policies does not appear in the IANA Repository, it will otherwise be made readily available online by the registry. The registry should also ensure that its registrars call the attention of prospective holders of IDN names to this documentation.

9. Domain registries should provide resources containing information about the sources and references that were used in the formation of the corresponding IDN registration policies for all languages and scripts in which they offer IDN registrations.

Additional remarks.

The deceptive use of visually confusable characters from different scripts is discussed in detail in the Unicode Technical Standard #39 on Unicode Security Mechanisms <<http://www.unicode.org/reports/tr39/>>.

A revision to the IDN standards that is currently under consideration may result in increased constraint on the availability of punctuation marks as discussed in Guideline 5.5. The RFCs cited in Guideline 1 will be provided with forward references to any replacement documents that may be adopted.

## Appendix 5.2F: IDN Guidelines version 3.0 (2 September 2011)

Source: <http://www.icann.org/en/topics/idn/idn-guidelines-02sep11-en.htm>

### **IDN Guidelines**

1. Top-level domain ("TLD") registries supporting Internationalized Domain Names ("IDNs") will do so in strict compliance with the requirements of the IETF protocol for Internationalized Domain Names in Applications. The initial version of this protocol was defined in RFCs 3454, 3490, 3491, and 3492. A revised version is defined in RFCs 5890, 5891, 5892, 5893, and 5894. Both will be in parallel use in applications for an indeterminate transitional period but registries will conform fully with IDNA2008 in the shortest practicable order.

2. No code point permitted in IDNA2003 but disallowed in IDNA2008 will be accepted for registration regardless of the extent to which such code points appear in names registered prior to the protocol revision. The registrant of a domain that is no longer supported by IDNA2008 should be notified that there may be unanticipated consequences for a user attempting to reach it, and such names should be replaced, held, or deleted at registry initiative.

3. A registry will publish one or several lists of Unicode code points that are permitted for registration and will not accept the registration of any name containing an unlisted code point. Each such list will indicate the script or language(s) it is intended to support. If registry policy treats any code point in a list as a variant of any other code point, the nature of that variance and the policies attached to it will be clearly articulated.

4. All such code point listings will be placed in the IANA Repository for IDN TLD Practices in tabular format together with any rules applied to the registration of names containing those code points, before any such registration may be accepted.

5. All code points in a single label will be taken from the same script as determined by the Unicode Standard Annex #24: Script Names <<http://www.unicode.org/reports/tr24>>. Exceptions to this guideline are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. Even in the case of this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table is clearly defined.

6. Any information fundamental to the understanding of a registry's IDN policies that is not published by the IANA will be made directly available online by the registry. The registry should also encourage its registrars to call attention to these policies for all prospective IDN registrants. This documentation will include references to the linguistic and orthographic sources used in establishing policies and code point repertoires. If material is provided both via the IANA and other channels the registry must ensure that its substance is concordant across all platforms.

7. When a preexisting name requires a registry to make transitional exception to any of these Guidelines, the terms of that action will also be made readily available online, including the timeline for the resolution of such transitional matters. The excepted registrations themselves are, however, not part of this documentation. At the end of the transitional period, code points that are prohibited by IDNA2008 will not be permitted even by exception.

8. No label containing hyphens in the third and fourth positions will be registered unless it is a valid A-label, with reservation for transitional action in accordance with the preceding Guideline. Hyphens in these positions are explicitly reserved to indicate encoding schemes, of which IDNA is only one instantiation. These guidelines are not intended to assist with any other instantiations.

9. TLD registries should collaborate on issues of shared interest, for example, by forming a consortium to coordinate contact with external communities, elicit the assistance of support groups, and establish global fora.

### **Appendix 5.3: Summary of points raised at IDN Workshops**

<b>Workshop</b>	<b>Summary of major points / questions from the audience</b>
Shanghai, China, 30 October 2002	No transcript available
Rio de Janeiro, Brazil, 26 March 2003	No transcript available
Kuala Lumpur, Malaysia, 21 July 2004  Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/kualalumpur/captioning-idn-workshop-21jul04.htm">http://www.icann.org/meetings/kualalumpur/captioning-idn-workshop-21jul04.htm</a>	Amr Hashem (Nile Ventures IT Consulting) questioned whether IDNs were as big a necessity as was being assumed, or whether native users of non-Latin scripts had nonetheless ‘got used’ to ASCII labels. Naser Sulaiman (UAEnic) raised issues of defining a language, e.g. Arabic, and whether attempts to do so might be seen as ‘diluting’ the original language. Vittorio Bertola (ALAC) expressed concern about lack of co-ordination between various groups working on aspects of IDN policy and technology. Several questions on technical and operational matters were also raised.
Cape Town, South Africa, 1 December 2004  Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/capetown/captioning-idn-workshop-01dec04.htm">http://www.icann.org/meetings/capetown/captioning-idn-workshop-01dec04.htm</a>	Victor Wilson (ISOC-ZA) asked a question related to African languages, which he believed should / would be represented using the standard Latin character set. Sébastien Bachollet (Speednames Pte Ltd) favoured localisation in creating character sets. Roozbeh Pournader (Persian Domain Naes Project) questioned whether mixed scripts would be allowed. Ed Lewis (Neulevel) spoke of the difficulties of creating a single set of requirements for all IDNs and thus difficulties experienced by the IETF in creating a single specification. Michel Suignard (Microsoft) raised a technical issue.
Luxembourg City, Luxembourg, 13 July 2005  Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/luxembourg/captioning-idn-workshop-13jul05.htm">http://www.icann.org/meetings/luxembourg/captioning-idn-workshop-13jul05.htm</a>	Ram Mohan (panel member) expressed a view that it was ‘time to stop pussy footing around’ and get on with developing a best current practice. This was met with applause from the audience. Bruce Tonkin, speaking as an audience member / representative of Melbourne IT, supported Mohan’s statement and also warned of the dangers of mixing scripts.

	<p>Milton Mueller (academic) advocated separation of IDN TLD policy from ASCII TLD policy.</p> <p>Walter Wu (CNIC) advocated giving priority to IDN ccTLDs.</p> <p>Amadeu Abril I Abril (.org) asked whether it would be possible to establish a 'hierachy' of authoritative sources for language definition.</p> <p>Andrzej Bartosiewicz (.pl registry) asked a technical question related to browsers.</p>
<p>Workshop, Vancouver, Canada, 30 November 2005</p> <p>Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/vancouver/captioning-idn-workshop-30nov05.htm">http://www.icann.org/meetings/vancouver/captioning-idn-workshop-30nov05.htm</a></p>	<p>Mark Davis (IBM) advocated allowing only transliterations of existing ccTLDs in the first instance to avoid opening up a 'pandora's box' of political issues. Also questioned whether IDNs may lead to 'balkanisation' of the namespace.</p> <p>Oav Keren (Domain.net registrar), suggested parallel IDN TLDs for each ASCII gTLD/</p> <p>Gervase Markham (Mozilla Foundation) spoke of the usefulness of expanding the namespace to allow similarly named entities to coexist.</p> <p>A few questions were also asked on technical issues.</p>
<p>Public Forum, Wellington, New Zealand, 30 March 2006</p> <p>Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/wellington/captioning-icann-pub-forum-ii-30mar06.htm">http://www.icann.org/meetings/wellington/captioning-icann-pub-forum-ii-30mar06.htm</a></p>	<p>No questions on IDNs from the floor</p>
<p>Marrakesh, Morocco, 25 June 2006</p> <p>Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/marrakech/captioning-idn-25jun06.htm">http://www.icann.org/meetings/marrakech/captioning-idn-25jun06.htm</a></p>	<p>Michael Everson (linguist) questioned whether a new protocol could be developed rather than basing IDNs ultimately on ASCII.</p> <p>Sabine Dolderer (DENIC) defended the ASCII-based approach.</p> <p>Further discussion followed on this.</p> <p>John Klensin (IETF) raised danger of losing the principle of universal connectivity. Ram Mohan (AFILIAS) made a similar point.</p> <p>Several technical questions / comments made around this point.</p>

	<p>Mouhamet Diop (AfriNIC) argued that ICANN should focus on language communities rather than countries.</p> <p>Kelly Kang (GAC, S. Korea) spoke of the need to co-ordinate between ccNSO, GNSO and GAC.</p> <p>Jae Chul (Korea Internet &amp; Security Agency ) cited Korean ‘key word’ system.</p>
<p>Marrakesh, Morocco, 27 June 2006</p> <p>Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/meetings/marrakech/captioning-idn-ws-26jun06.htm">http://www.icann.org/meetings/marrakech/captioning-idn-ws-26jun06.htm</a></p>	<p>Highly technical session.</p> <p>Sabine Dolderer (DENIC) made a technical point.</p> <p>Sébastien Bachollet (Speednames Pte Ltd) suggested a new class of ‘linguistical’ TLDs alongside gTLDs and ccTLDs</p> <p>Hiro Hotta (JPRS) asked technical question related to IE7</p> <p>William Tan (NeuStar) asked about potential for accessing different scripts with a keyboard lacking those characters.</p>
<p>Sao Paulo, Brazil, December 2006</p> <p>Transcript retrieved 25 August 2011, from <a href="http://www.icann.org/en/meetings/saopaulo/captioning-idnworkshop-06dec06.htm">http://www.icann.org/en/meetings/saopaulo/captioning-idnworkshop-06dec06.htm</a></p>	<p>Amadeu Abril I Abril (.org) suggested basing sets of scripts upon 'scientific' classification of language groups.</p> <p>Werner Staub (CORE) asked whether the new gTLDs programme would be delayed until IDN testing was complete.</p> <p>Sophia Bekele (GNSO Council / NomCom) asked whether an alternative solution might be feasible based around making the DNS capable of handling Unicode characters directly rather than converting to and from ASCII.</p> <p>Subramanian Subbiah: (i-dns.net) argued that spoofing was much less of a problem if mixed scripts were not permitted. Also spoke of the need for ICANN to coordinate with local language communities.</p> <p>Werner Staub spoke of the need for registries to have registration policies to deal with issues such as spoofing.</p>
<p>Cairo, Egypt, November 2008</p> <p>Transcript retrieved 25 August 2011, from <a href="http://cai.icann.org/files/meetings/cairo2008/Cairo-IDNsAnOverview2Nov08.txt">http://cai.icann.org/files/meetings/cairo2008/Cairo-IDNsAnOverview2Nov08.txt</a></p>	<p>Britt Lysaa (Nokia) asked a question about timetable for IDNA revision.</p> <p>Christopher Crowther (Internetmedia.net) asked whether an IDN TLD would represent a new extension or a conversion of an existing extension.</p> <p>Matt Mansell (Mesh UK) asked whether application fees for IDN ccTLDs would be the same as for IDN gTLDs.</p> <p>Dr. Govind (GAC, India) asked whether</p>

	formal contracts would be required for IDN ccTLD operators.
Mexico city, Mexico At-Large Summit: Working Group 3: New gTLDs including IDN gTLDs Sunday, 01 March 2009	No transcript available
Sydney, Australia, 2009  Transcript retrieved 25 August 2011, from <a href="http://syd.icann.org/files/meetings/sydney2009/transcript-idn-cctld-fast-track-22jun09-en.txt">http://syd.icann.org/files/meetings/sydney2009/transcript-idn-cctld-fast-track-22jun09-en.txt</a>	<p>Eric Brunner-Williams (CORE) asked whether cost recovery could be made to reflect the time and value of work done on IDNs by entities other than ICANN. He also asked whether ICANN could take a role in developing variant tables.</p> <p>Werner Staub (CORE) commented that it was unfair to ask users of non-ASCII scripts to pay for the 'patch' that would allow them to use DNS. He also argued that 'variants' of TLDs are in fact separate TLDs.</p> <p>Edmon Chung (GNSO) asked whether the IDN guidelines need to address variants at the second level.</p> <p>Sivasubramanian Muthusamy (ALAC) asked whether the cost recovery model could be modified to reduce the cost to the end user.</p> <p>Andrey Kolesnikov (GAC, Russian Federation) believed the proposed cost model was fair. He also commented that contracts should be signed on paper and not just electronically. He further felt that unproblematic IDN ccTLDs should go ahead ASAP and not be delayed because of problems with certain scripts.</p> <p>Izumi Aizu (At-Large Japan) asked whether costs would be scaled or a flat rate for each applicant.</p> <p>Avri Doria (GNSO) asked what the process would be for making the decision whether to go live with the older or revised version of IDNA.</p> <p>Ravi Shanker (GAC, India) commented that high cost recovery fees could undermine the aim of overcoming the digital divide.</p> <p>Janis Karklins (GAC, Finland) commented that the entry fee may be prohibitive for some TLDs or for some applicants, and</p>

	<p>asked whether it could be subsidised or made voluntary.</p> <p>Steve DelBianco (Netchoice) suggested allowing a few large gTLD operators to join the Fast Track programme in order that they pay for cost recovery.</p> <p>Yalin Tang (CNNIC) commented that while ICANN had invested resources into the issue, so had the 'IDN community', and ICANN had a responsibility to get IDNs deployed as soon as possible. He also suggested delegating just simplified and traditional Chinese rather than all the many variants.</p> <p>for our Chinese speakers.</p> <p>Jonathan Shea (.hk registry) expressed surprise that ICANN was concerned about stability re variants, given that registries such as .hk had been handling these for years at the second level with no problems. He also urged ICANN, in implementing a cost recovery strategy, to take into account that many ccTLD operators were non-profit and some operating at a loss already.</p> <p>Manail Ismail (GAC, Egypt) also commented that the proposed cost recovery model could prove a barrier to applicants from developing countries.</p>
<p>Seoul, South Korea, 26 October 2009</p> <p>Transcript retrieved 25 August 2011, from <a href="http://sel.icann.org/meetings/seoul2009/transcript-idn-ccTLD-fast-track-26oct09-en.txt">http://sel.icann.org/meetings/seoul2009/transcript-idn-ccTLD-fast-track-26oct09-en.txt</a></p>	<p>Imran Ahmed Shah (Urdu Internet Community Pakistan) asked about procedures for assigning a ccTLD manager, ascertaining community support, dispute resolution and fee waiver.</p> <p>Andrey Kolesnikov (GNSO) asked what would be considered community support.</p> <p>Werner Staub (CORE) asked a question about variants.</p> <p>Izumi Aizu (Japan Internet Domain Name Council) asked a question about fees.</p> <p>Naomasa Maruyama (GAC, Japan) asked whether there would be a time limit for applications.</p> <p>Rahman Khanjohn (affiliation not established) asked if the ccTLD authority and the IDN ccTLD authority must be the same or if it could be two different organisations.</p>

**Appendix 5.4: Issues regarding IDN ccTLDs identified in ccNSO – GAC Issues Report on selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes.**<sup>100</sup>

**1. General issues regarding IDN ccTLDs**

Which ‘territories’ are eligible for an IDN ccTLD?

The existence of IDNs as ccTLDs assumes a direct relationship between an IDN TLD string and a ‘territory’ as in ASCII ccTLDs.

- a) Should this relationship be maintained?
- b) If so, should the ‘territories’ which are potentially eligible for IDN ccTLDs be exactly the same as the ‘territories’ that are listed in the ISO-3166-1 list?
- c) If not, should another list be used or should another mechanism be developed?
- d) Should anything be done about ccTLDs already being used as gTLDs?

Should an IDN ccTLD string be “meaningful”?

An ASCII ccTLD string ‘represents’ the name of a ‘territory’ based on its entry into the ISO 3166-1 list.

- a) Is there an obligation to make the IDN ccTLD string 'meaningful' in its representation of the name of a ‘territory’? For example, whereas .uk is 'meaningful' because it is a commonly used abbreviation for United Kingdom, .au is not 'meaningful' because the commonly used abbreviations for Australia are Oz or Aus.
- b) If so, how is “meaningful” determined and by whom?

How many IDN ccTLDs per script per ‘territory’?

Apart from some exceptions, there is one single ASCII ccTLD per listed ‘territory’.

- a) Should there similarly be only a single IDN ccTLD for a given script for each ‘territory’ or can there be multiple IDN ccTLD strings? For example, should there be only one equivalent of .cn in Chinese script for China or .ru in Cyrillic for Russia?
- b) Could there be several IDN strings for a ‘territory’ in a script? If so, who would determine the number and what are the criteria?
- c) If an IDN ccTLD string is not applied for, for whatever reason, should an IDN ccTLD string that could be associated with a particular ‘territory’ be reserved or protected in some way?

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<sup>100</sup> ICANN (2007). ccNSO-GAC Issues Paper: Selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes. 9 July 2007. Retrieved 31 August 2011, from <http://www.icann.org/en/topics/idn/ccnso-gac-issues-report-on-idn-09jul07.pdf>

### How many scripts per ‘territory’?

- a) Can a ‘territory’ apply for more than one IDN ccTLD string in different scripts if more than one script is used to represent languages spoken in that location? For example in Japan more than one script is used to represent the Japanese language. In other words, should there be a limit on the number of scripts each territory can apply for?
- b) In what circumstances would it be appropriate to seek to introduce a limit on the number of scripts a ‘territory’ may choose to introduce for a ccTLD or any TLD with a national connection?
- c) Can a ‘territory’ apply for an IDN ccTLD string even if the script is not used in a language with any ‘official status’ in that ‘territory’? For example, if the Kanji script is accepted under the IDNA protocol, can Australia apply for a representation of Australia in that script even though neither the script nor any language deriving from it has any 'official' status in Australia?
- d) If ‘official status’ is required who will define it and who will determine it in each case?

### Number of characters in the string?

Currently, ccTLD strings are limited to 2 US-ASCII characters and gTLDs to 3 or more. It is understood that abbreviations can be problematic for internationalized TLDs as abbreviations used in US-ASCII are not used on a global basis in all scripts. The underlying nature of IDN makes the actual string inserted in the DNS always longer than two characters when expressed in Unicode (due to the IDNA requirement to prefix internationalized labels with ‘xn—’). However, it is how the string appears in its non US-ASCII character set that is important. In this context:

- a) Should all IDN ccTLD strings be of a fixed length, for example by retaining the two-character limitation that applies to ASCII ccTLD labels, or can they be of variable length? If a variable string length is introduced for IDN ccTLDs, should it also be introduced for ASCII ccTLDs?
- b) Does moving outside the current 2 symbol limitation create any security, stability or integrity issues?
- c) Who determines the appropriate label used to represent a new IDN ccTLD string, and how are the set of characters used to represent this label selected?

### Are there any ‘rights’ attached to a given script?

In purely technical terms, a script is a collection of symbols. However, each of those collections of symbols when put together in particular ways produce the ‘languages’ of

groups of people sometimes defined by borders, although very often not. These groups are often referred to as language communities.

a) Should such groups (or their governments) have special rights regarding those scripts? For example, should the Korean language community be entitled to restrict the use of the Hangul script? If special rights exist what is the procedure to exert these rights and resolve conflicts?

b) Can anyone get acceptance of a script under the IDNA protocol or are there restrictions? For example, can a gTLD registry get the Kanji script accepted under the IDNA protocol? Should that use be vetted/approved by Japan? If yes, would the same requirement apply if a script is used in more than one ‘territory’

c) Should it be possible to adopt two or more ‘versions’ of a script with only minor differences for use under the IDNA protocol and are there issues or concerns should this occur?

## **2. Introduction of IDN ccTLDs**

Should a list of IDN ccTLD strings be mandated?

In the US-ASCII case, ccTLD strings are currently primarily based on the ISO 3166-1 Alpha 2 list. If a similar mechanism were adopted for IDN ccTLDs, this could mean that every ISO 3166 entry would have an equivalent IDN ccTLD string(s) to represent it.

a) Is such a list necessary?

b) Who would develop such a list?

c) Should such a list be mandated?

d) If yes, by whom?

e) Who would develop the criteria and relevant policies for identifying IDN ccTLDs?

f) Under what policy or authority would the list be created?

g) If additional criteria and or policies are required, who is responsible for formulating that policy?

What precedence should be given to ccTLDs in the IDN implementation process?

Who selects the IDN ccTLD string in the absence of a mandated list?

If IDN ccTLD strings are not going to come from a mandated list then, how does an IDN ccTLD string become designated as the string for a particular ‘territory’?

a) What are the criteria and policies to determine who can submit a request for the designation of an IDN ccTLD?

- b) Who will develop the criteria and policies for determining the designation of an IDN ccTLD?
- c) How will such issues as competing requests (both domestic and international) be dealt with?
- d) What will happen if 2 ‘territories’ are eligible for the same or confusingly similar strings for IDN ccTLD?

What coordination should exist between the different actors? The deployment of IDN ccTLDs will require coordination among various actors, within territories and ICANN constituencies. Irrespective of the methodology employed, some coordination questions must be addressed, such as:

- a) Who are the appropriate actors?
- b) What are their roles?
- c) Do the GAC ccTLD principles need to be revised in the light of the introduction of IDN ccTLDs?

### **3. Delegation of IDN ccTLDs**

Do existing ccTLD delegation policies apply to the delegation of IDN ccTLDs?

If not:

- a) Who can apply to have the IDN ccTLD delegated or to be the delegate for that ccTLD?
- b) Who decides on the delegation and in particular:
  - Are there specific reasons for deviating from the standard practice/guidelines that a zone should only be delegated with the support of the local internet community, which includes the government?
  - Is consent/involvement/knowledge of government required?
  - Is consent/involvement/knowledge of incumbent ccTLD manager required?
  - Is there any presumptive right of the ASCII ccTLD manager over a corresponding IDN ccTLD?
- c) Who will formulate the policy for these processes?
- d) Do existing US-ASCII ccTLD delegation policies for dealing with multiple applications, objections to applications or disputes apply to the same issues in the delegation of IDN ccTLDs? If not who will formulate the policies for these issues?

e) Taking into account all experiences ICANN has acquired - should there be an agreement between ICANN and the IDN ccTLD operator on the operation of the IDN ccTLD string?

#### **4. Operation of IDN ccTLDs**

Is the operation and management of an IDN ccTLD different to that of an existing US-ASCII ccTLD such that there are specific global technical requirements, in addition to the general IDN standards, needed for the operation of an IDN ccTLD? If so, how are those requirements developed and who would develop them?

## Appendix 5.5: Overview of Application Process for IDN ccTLD Fast Track

Source: ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. PP27-31. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf>

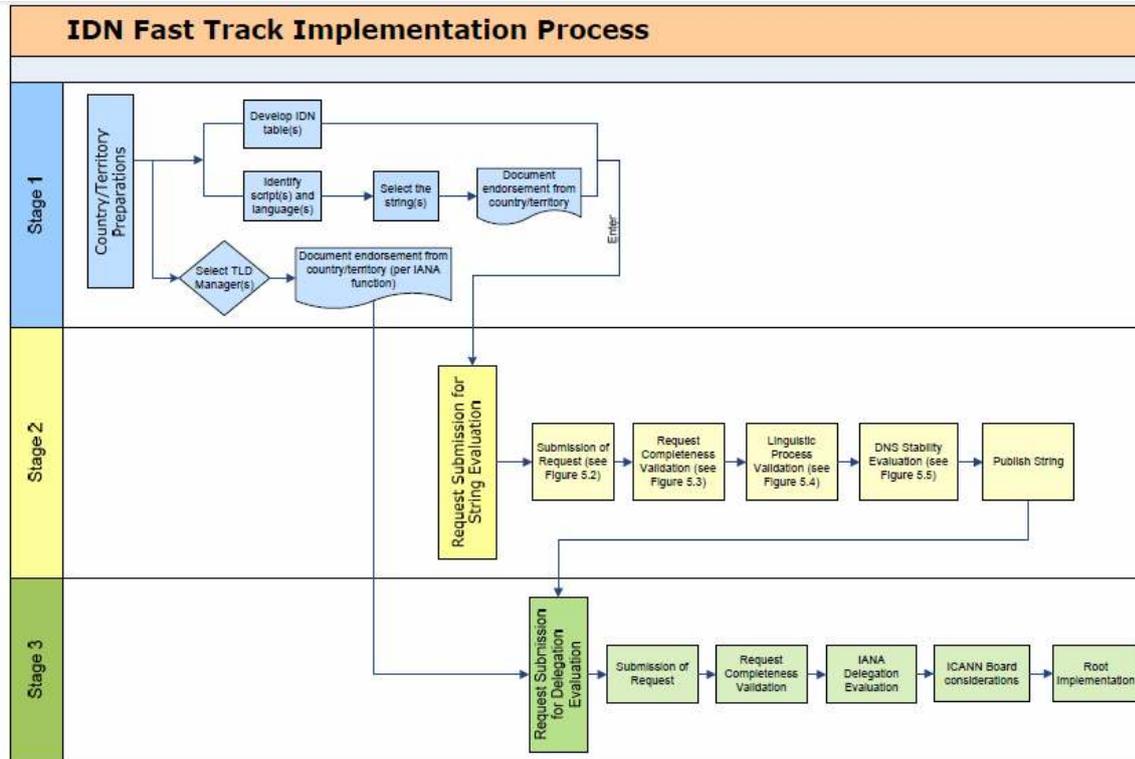


Figure 5.1: General Overview of the Fast Track Process; Stage 1: Preparation; Stage 2: Request Submission for String Evaluation; Stage 3: Request Submission for Delegation Evaluation.

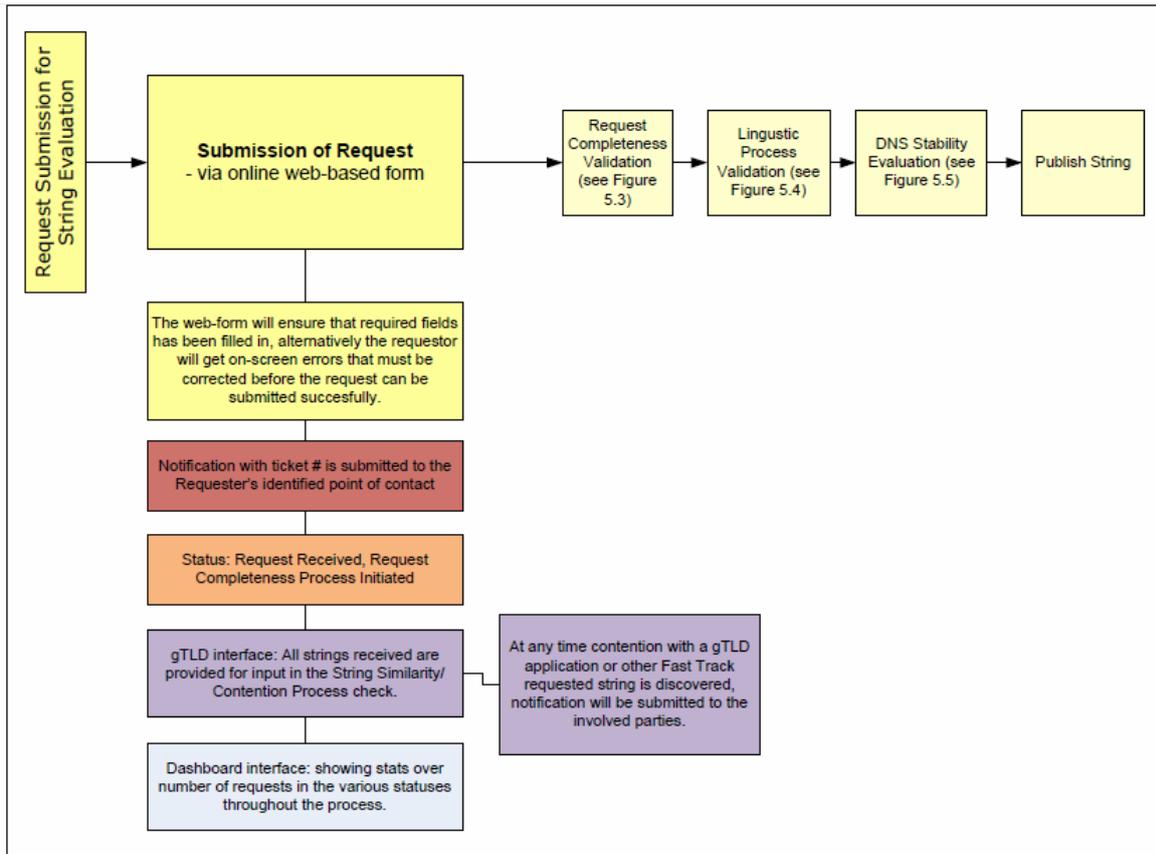


Figure 5.2: Stage 2: Submission of a Request for String Evaluation.

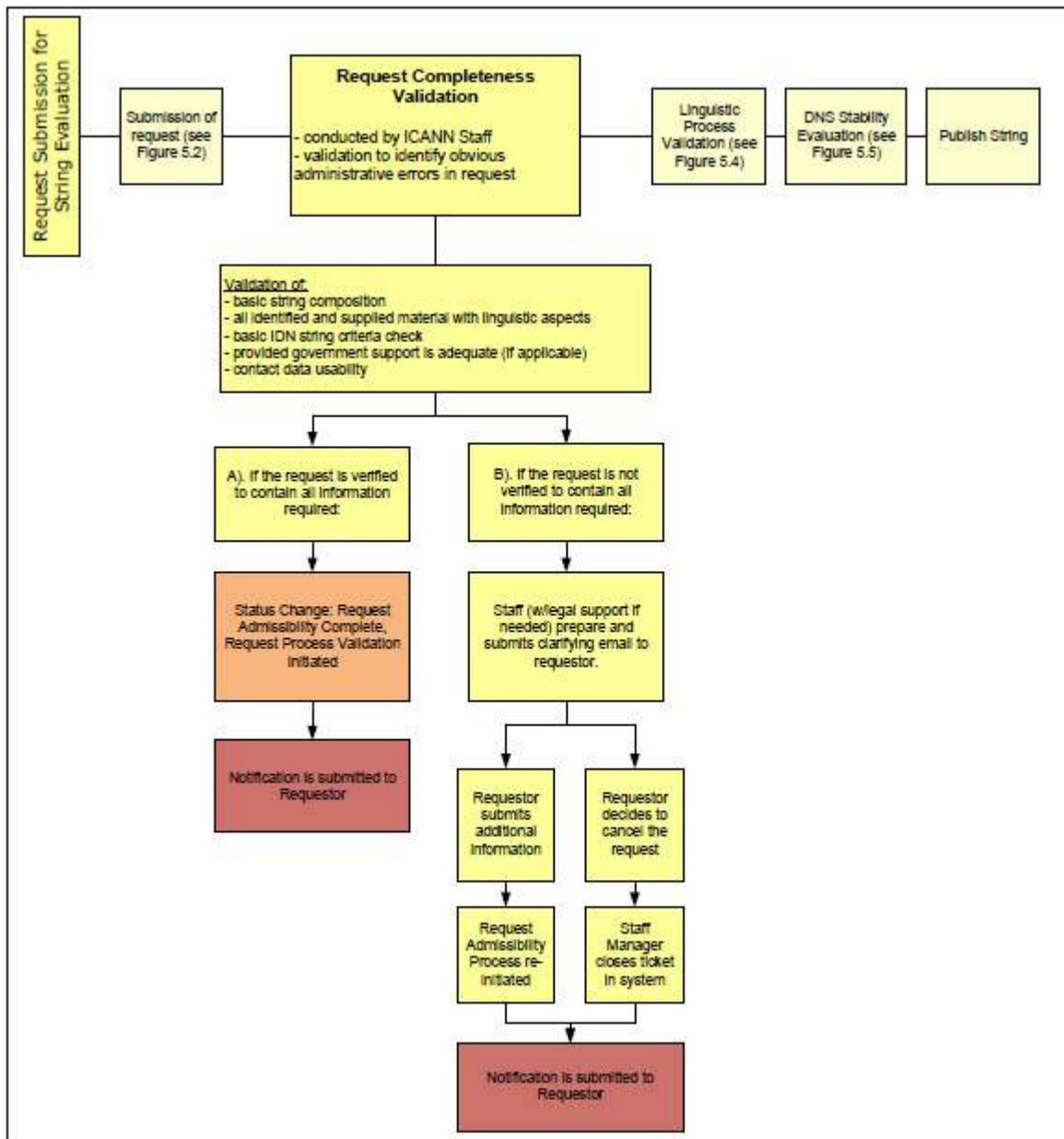


Figure 5.3: Stage 2: Request Completeness Validation.

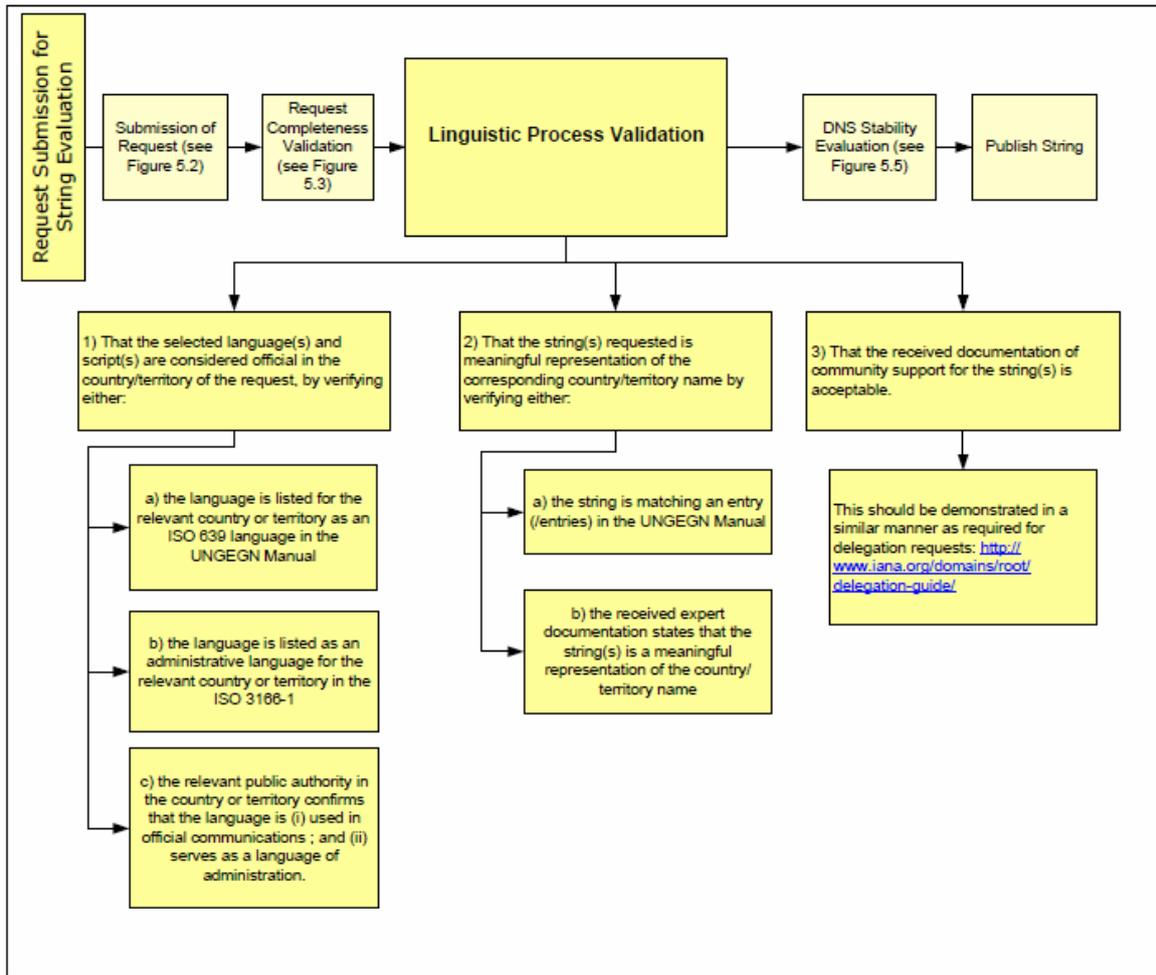


Figure 5.4: Stage 2: Linguistic Process Validation.

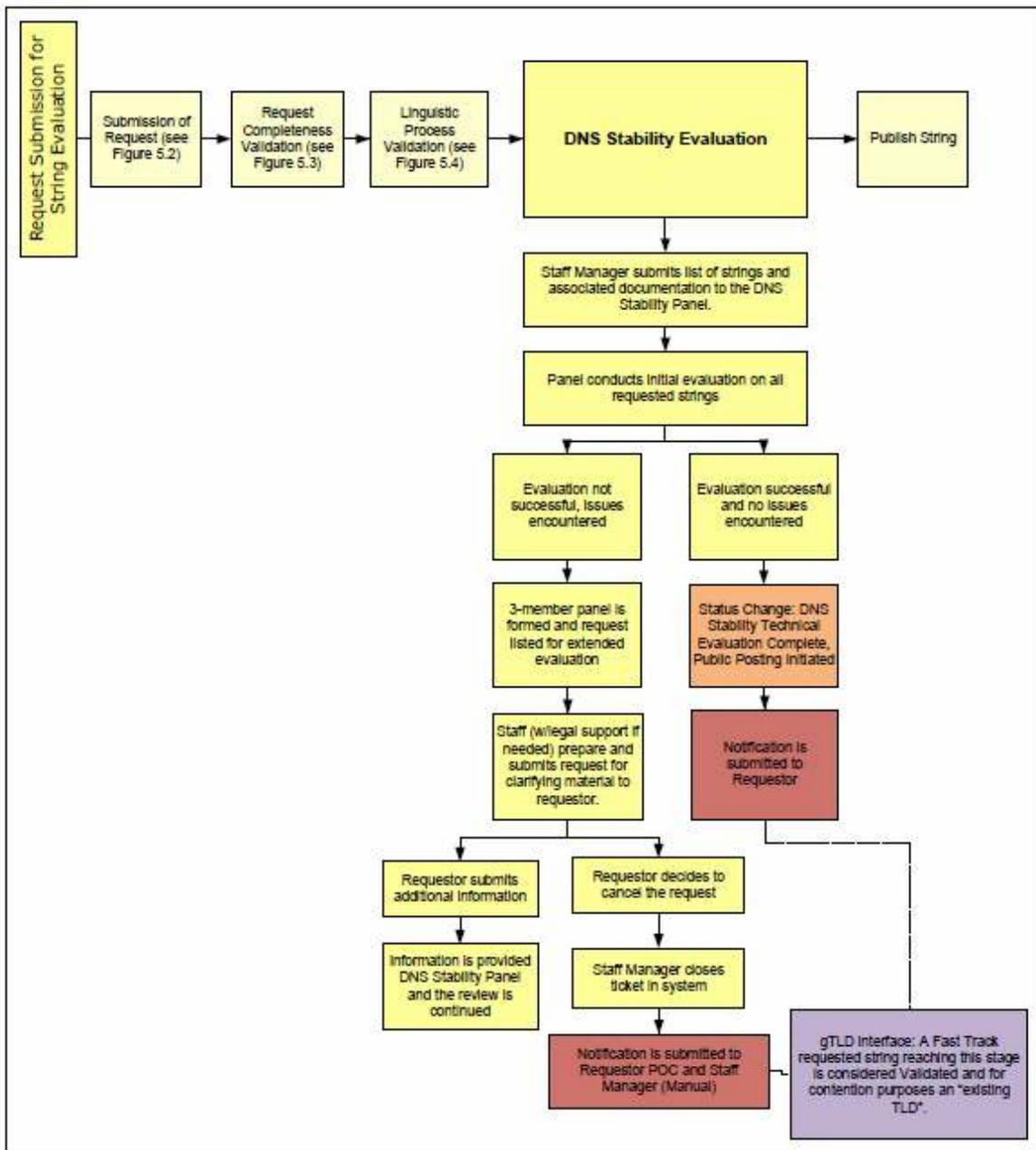


Figure 5.5: Stage 2: DNS Stability Evaluation.

**Appendix 5.6: Areas for discussion regarding IDN ccTLDs as identified in IDN ccPDP Final Issues Report (2 April 2009)**<sup>101</sup>

A. General issues regarding IDN ccTLDs

- Definition of IDN ccTLD
- String selection methodology
- Need for/possibility of creating an authoritative list of IDN ccTLD strings
- Criteria for IDN ccTLD string selection methodology
- Should an IDN ccTLD string be “meaningful”?
- How many IDN ccTLDs per ‘territory’?
- How many scripts per ‘territory’?
- Number of characters in the string?
- Are there any ‘rights’ attached to a given script?

B. Introduction of IDN ccTLDs

- Should a list of IDN ccTLD strings be mandated?
- What precedence should be given to ccTLDs in the IDN implementation process?
- Who selects the IDN ccTLD string in the absence of a mandated list?
- What coordination should exist between the different actors?

C. Delegation of IDN ccTLDs

D. Operation of IDN ccTLDs

E. Additional issues relating to Article IX of the ICANN bylaws

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<sup>101</sup>ICANN (2009). Final Issues Report on IDN ccPDP. 2 April 2009. Retrieved 29 July 2011, from <http://censo.icann.org/workinggroups/final-issues-report-idn-ccpdp-02apr09.pdf> PP5-6

## **Appendix 5.7A: Topics and Issues relating to the introduction and delegation of IDN ccTLDs**

(As set out in Draft Topic Paper: Internationalised Domain Names country code supporting organisation policy development process working group on Selection and Delegation of IDN ccTLDs. 16 October 2009. For full details see original document <sup>102</sup>)

1. Which ‘territories’ are eligible for an IDN ccTLD?
2. Should an IDN ccTLD string be “meaningful”?
3. How many IDN ccTLDs per ‘territory’?
4. Number of characters in the string?
5. Are technical requirements for the IDN ccTLD string needed?
6. Should a list of IDN ccTLD strings be mandated?
7. Who selects the IDN ccTLD string in the absence of a list?
8. Are there any ‘rights’ attached to a given script?
9. Delegation, Redelegation and retirement of IDN ccTLDs
10. Should precedence be given to ccTLDs under the overall policy?
11. What coordination should exist between the different actors?
12. Operation of IDN ccTLDs
13. Should there be a formal and financial relationship between ICANN and the IDN ccTLD under the policy?

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<sup>102</sup> ICANN (2009). Draft Topic Paper: Internationalised Domain Names country code supporting organisation policy development process working group on Selection and Delegation of IDN ccTLDs (IDNccPDP WG 1)16 October 2009. Retrieved 14 August 2011, from <http://ccnso.icann.org/workinggroups/idn-topic-paper-16oct09-en.pdf>

## **Appendix 5.7B Topics and Issues relating to the introduction and delegation of IDN ccTLDs**

(As set out in Draft Final topic paper WG 1 of the IDN ccPDP. 26 February 2010. For full details, see original document.<sup>103</sup>)

### **Topics and Issues relating to the introduction and delegation of IDN ccTLD**

1. Which ‘territories’ are eligible for an IDN ccTLD?
2. Should an IDN ccTLD string be limited to non Latin characters?
3. Should an IDN ccTLD string be “meaningful”?
4. How many IDN ccTLDs per ‘territory’?
5. Number of characters in the string?
6. Are technical requirements for the IDN ccTLD string needed?
7. Should a list of IDN ccTLD strings be mandated?
8. Who selects the IDN ccTLD string in the absence of a mandated list?
9. Should a list be created over time?
10. Are there any ‘rights’ attached to a given script?
11. General Technical requirements
12. Delegation, Redelegation and retirement of IDN ccTLDs
13. What coordination should exist between the different actors?
14. Operation of IDN ccTLDs
15. Should there be a formal and financial relationship between ICANN and the IDN ccTLD under the policy?
16. Should the overall policy be reviewed at regular intervals?

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<sup>103</sup> ICANN (2010). Draft Final topic paper WG 1 of the IDN ccPDP. 26 February 2010. Retrieved 14 August 2011, from <http://ccnso.icann.org/workinggroups/draft-final-topic-paper-wg1-26feb10-en.pdf>

## **Appendix 5.7C: Areas of agreement reached by IDN ccPDP Working Group 1 as of 29 November 2010.**

(As set out in IDN ccPDP Working Group 1 Progress Report: IDN ccTLD String Selection Criteria and Requirements. 29 November 2010.<sup>104</sup>)

### **Section 2. Overarching Principles**

- Association of the [IDN] country code Top Level Domain with a territory.
- [ASCII] ccTLD and IDN ccTLDs are all country code Top Level Domains.
- Preserve security, stability and interoperability of the DNS.
- The IDN ccTLD string should be non-contentious within the territory.
- Requests for the delegation of IDN ccTLDs should be an ongoing process and thus open to enter when ready. Currently the delegation of a ccTLD can be requested at any time, once all the criteria are met.
- The criteria to select the IDN ccTLD string should determine the number of eligible IDN ccTLDs per Territory, not an arbitrarily set number.

### **Section 3. Agreed Criteria for the selection of an IDN ccTLD.**

- A. An IDN country code Top Level Domain must contain at least one non-ASCII character.
- B. Eligibility only if name of territory listed on ISO 3166.
- C. The IDN ccTLD string must be a meaningful Representation of the name of a Territory.
- D. The meaningful Representation of the name of the Territory must be in a Designated Language of the Territory
- E. If the string applied for is not the long or short form of the name of a Territory then evidence of meaningfulness is required.
- F. Only one (1) IDN ccTLD string per Designated Language.
- G. The selected IDN ccTLD string must abide to all Technical Criteria for IDN ccTLD string.
- H. The IDN ccTLD string can not be confused with any combination of two ASCII letters [letters a-z] as or to be used by ISO 3166/MA (section 5.2 of ISO 3166-1:2006).

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<sup>104</sup> ICANN (2010). 29 November 2010. IDN ccPDP Working Group 1 Progress Report: IDN ccTLD String Selection Criteria and Requirements. Retrieved 16 August 2011, from <http://censo.icann.org/workinggroups/final-progress-report-idn-ccpdp-wg1-29nov10-en.pdf>

Decision 1. String Confusion with other TLD. String confusion issues can involve two or more strings that are identical or are so confusingly similar that they cannot coexist in the DNS, such as If a string resembles another visually then it is likely to cause deception or confusion. For the likelihood of deception or confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

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## **Appendix 5.8: GAC Interim Principles on IDN ccTLDs**

(As set out in GAC Communique XXXVII – Nairobi, 10 March 2010.<sup>105</sup>)

### **General Principles**

1. The main provisions of the GAC ccTLDs principles: "*Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains*" apply also for IDN ccTLDs. The current principles are intended to supplement the aforementioned principles insofar as non-ASCII ccTLDs are concerned.
2. The introduction and operation of IDN ccTLDs should not undermine the security and stability of the DNS. To this end, all actors, including TLD operators, ICANN and the relevant government should work together to ensure that the highest standards of TLD operation are achieved, taking account of best practices and internationally accepted technical standards where they exist.
3. All countries and distinct economies, listed in the International Standard ISO 3166-11 have equal rights to creating IDN ccTLDs that reflect their languages and scripts.
4. Ultimate public policy authority over the IDN ccTLD(s) of a country or distinct economy rests with the government or relevant public authority. How this authority is exercised, is determined by applicable law.
5. On receipt of an IDN ccTLD application, ICANN should ensure that either the proposal has the support of the Government or relevant public authority or that the Government or relevant public authority raises no objections to the application. In the event that such confirmation is not obtainable, ICANN should desist from the introduction of the proposed IDN ccTLD until such confirmation is obtained.
6. The number of IDN strings per territory should reflect the cultural and linguistic characteristics of the community concerned. A limit on the number of IDN strings per territory may only be considered if there are reasons to believe that some form of limitation on the overall size of the root zone file is necessary to preserve the stability of the DNS. If a limit is to be introduced, this should be done in agreement with the government or relevant public authority of the territory concerned, and adequate justification for such a limit should be made clear beforehand in order for territories to establish their priorities properly.
7. It is anticipated in most cases that the Government or relevant public authority will decide that one IDN ccTLD per script will be sufficient, but it should also be borne in mind that within some countries and distinct economies different scripts are in use and, in some cases, the same script is used in a number of widely used languages. In these cases the Government or relevant public authority may determine that more than one IDN ccTLD is necessary.

1 Codes for the representation of names and countries and their subdivisions – Part 1: Country Codes. The exception to this requirement is the additional eligibility of the European

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<sup>105</sup> ICANN (2010). GAC Communique XXXVII – Nairobi, 10 March 2010. Retrieved 12 August 2011, from [https://gacweb.icann.org/download/attachments/1540146/GAC\\_37\\_Nairobi\\_Communique.pdf?version=1&modificationDate=1312226773000](https://gacweb.icann.org/download/attachments/1540146/GAC_37_Nairobi_Communique.pdf?version=1&modificationDate=1312226773000)

Union, which has an exceptionally reserved code designated by the ISO 3166 Maintenance Agency

**IDN ccTLDs Strings**

8. It is anticipated that an IDN ccTLD string will normally:  
o be shortest meaningful representation of the name of the territory  
GAC Communiqué—Nairobi 5

o not be restricted to a fixed length, its maximum length being set by the prevailing technical standards with stability, security, integrity and usability in mind

9. Given the different form that IDN ccTLDs will take and the absence of an equivalent of the ISO 3166-1 list used for ASCII ccTLDs, the experience of relevant international organizations<sup>2</sup> should be taken into account.

10. Only the Government or the relevant public authority of the country or distinct economy concerned, representing all relevant stakeholders within its jurisdiction, can provide authoritative advice to ICANN on the legitimacy of any application for an IDN ccTLD.

11. An IDN ccTLD string that refers to a specific country or distinct economy, even if unapplied for, should be reserved for it.

2 Example, UN Conference on the Standardization of Geographic Names, UNESCO and ITU

### **IDN ccTLDs Scripts**

12. Nobody has property rights over a script. Some scripts are commonly used to write more than one language and should be available to be used for IDN ccTLD purposes in each of those languages.

13. It is recommended that each language community develop one language table for its script. Language tables, after elaboration, should be deposited with IANA and posted for public use by any registry with no restriction in any sense.

14. The latest available version of Unicode in use should be complete, including all scripts, and constantly upgraded with newer versions to help include maximum character sets of any language and ensure a strong and dynamic variant table to handle security issues.

### **Stakeholders**

15. Relevant actors for international coordination include:

- o Concerned governments
- o Relevant international organizations within their respective mandates
- o Standardization bodies
- o Language experts
- o Language communities and local users
- o ICANN SOs/ACs
- o ISOC (chapters)
- o IETF
- o Unicode consortium

16. All relevant actors should participate in a public and inclusive consultation process, at the international level, and work towards evolving a consensus for IDN ccTLDs formulation from the point of view of technical and operational stability, security as well as addressing public-policy issues.

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### **Introduction and Delegation of IDN ccTLDs**

17. Procedure for delegation of an IDN ccTLD should follow GAC ccTLDs principles: *"Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains"*.

18. A mandated list / reference table of strings representing the IDN ccTLDs of countries and distinct economies, as listed in the ISO 3166-13, would facilitate management and would ensure predictability of the IDN ccTLD system.

19. Competing or confusingly similar requests should be dealt with on a case by case basis and resolved in consultation with all concerned stakeholders.

20. Policies for dealing with multiple applications, objections to applications or disputes that are currently applied for ASCII ccTLDs should be equally applied to IDN ccTLDs.

21. The decision regarding whether an existing ASCII ccTLD manager should also be the operator of a corresponding IDN ccTLD is a matter to be decided by the national/local Internet community, including the government or relevant public authority, subject to applicable legislation. In cases of dispute, ICANN should seek authoritative advice from the government or relevant public authority.

22. There should be some form of transparent communication as appropriate between ICANN and any IDN ccTLD registry to define their respective roles and responsibilities.

3 Codes for the representation of names and countries and their subdivisions – Part 1: Country Codes. The exception to this requirement is the additional eligibility of the European Union, which has an exceptionally reserved code designated by the ISO 3166 Maintenance Agency GAC Communiqué—Nairobi 7

## **Appendix 5.9A: Summary of Public Comments Periods on IDNs**

### Initial Public Comments Period (February 28th - March 14th 2001)

(Archived at <http://forum.icann.org/idn1/> Accessed 11 July 2011)

76 comments were submitted during this period by 31 individual posters. One of these ('cats') appeared to be a spammer and did not post anything on-topic.

16 of the 31 posters were identified only by a screen name and did not state their full name, background or affiliation, making it difficult to break the comments down by interest group (See Appendix 5.9B). Of the 15 that could be identified, 9 represented private companies of one sort or another, one of which was a gTLD registry and two registrars. There were also two comments from academics.

Only three posters opposed the introduction of IDNs. Marc Persuy (a network engineer) cited trademark and malicious use concerns. 'Flo' and 'Integrator' cited concerns about incompatibility with the existing ASCII-based namespace.

Considerable discussion in this PCP revolved around the Verisign testbed, particularly the issue of whether the 'testbed' was actually the de facto commercial launch of a live system under another guise. Seven respondents expressed concern that VeriSign was attempting to prematurely launch a live system and capture the market before the IETF had produced a standard.

'Interdomain' (a registrar) and 'webpit' favoured deletion of the 'test' registrations on conclusion of the test, however this was opposed by 'journalism' and 'tomsey'.

Alexander Svensson (private individual), Friedrich Kisters (Human Bios GmbH) 'fncohen' and 'KMalorny' were heavily critical of Verisign's initiative, which they saw as an attempt to stake a premature claim to the IDN market without regard for the proper standardisation process. However, a few posters (such as 'tomsey') defended the Verisign testbeds. Marc Schneiders (NCUC) suggested that ICANN was not showing enough leadership on the issue.

Other than the Verisign testbed, various other issues relating to IDNs were also raised in the PCP. The potential for new cybersquatting opportunities presented by IDNs was raised by Marc Persuy, 'journalism', 'interdomain', 'webpit' and Young-Eum Lee (an academic, Korea National Open University).

'Interdomain' and 'webpit' proposed that the testbed registrations should be deleted at the conclusion of the test and an intellectual property preregistering or sunrise process (as the new gTLDs) held for subsequent IDN registrations. 'Journalism' (identity unknown) argued that the UDRP should be sufficient protection, and while agreeing that a sunrise period 'would have made sense', he disagreed with the proposal to delete 'testbed' registrations. Young-Eum Lee (an academic, Korea National Open University) likewise criticised the way the process had been handled, but did not think deletion of the registration database was practical. James Seng (i-DNS) argued that the UDRP was not capable of handling IDNs yet.

Many of these issues raised in this initial PCP went on to become significant points of debate during the policy development process, particularly issues relating to cybersquatting and spoofing. In that sense the PCP can be said to have either anticipated or informed the subsequent debate.

#### PCP on draft IDN policy (13-24 March 2003)

(Archived at <http://forum.icann.org/riodejaneiro/idn-comments/general/index.html> Accessed 11 July 2011)

5 posts were submitted by 5 individual posters (plus two further posts by two additional posters shortly after the official PCP closing date). Six of the posters represented private companies, of which three were ccTLD registries or associations of ccTLD registries, one was a gTLD registry and one was a registrar.

Neil Edwards, commenting on behalf of Verisign, was highly critical of the draft Guidelines, arguing that the policy should not be mandatory for registry operators and that ICANN was proposing to supplement the IETF standard with 'new conditions that significantly exceed the scope of that standard'. Edwards also criticised ICANN for lack of transparency in producing the recommendations. These comments by Edwards may be as reflective of the ongoing struggle between Verisign and ICANN that was occurring at this time, with Verisign continuing to resist ICANN centralisation of policy. However, Edwards was to some degree supported by the representative of JPNIC, the Japanese ccTLD registry ('Marayuma'), who argued that all guidelines apart from point 1 should be recommendations, not mandatory. By contrast, 'Masilva', representing Interdomain, a Spanish registrar, argued that in order to avoid confusion between registrants and end users, make ICANN role credible, and tackle cybersquatting, it was essential that these mandatory requirements exist. Hiro Hotta (Japan Registry Services) also approved of the draft guidelines.

'Masilva' and Peter Gustav Olson (a lawyer, Plesner Svane Grønberg) strongly favoured sunrise provisions for IDN registrations. Masilva and AM (amitdotbiz) also addressed the issue of whether testbed registrations would be retained, with AM recommending that they should be.

The IDN Guidelines version 1.0, as endorsed by the Board on 27 March<sup>106</sup> and finalised on 20<sup>th</sup> June<sup>107</sup>, showed no major changes from the draft IDN policy<sup>108</sup> discussed in this PCP. No sunrise period was implemented. The Board resolution seems to suggest that the Guidelines would be mandatory for registries offering IDNs. The issue of testbed registrations was not tackled at this time. Thus, it would be fair to say that the comments submitted in this PCP had no significant discernable effect on policy outcomes.

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<sup>106</sup>ICANN (2003). Minutes of regular meeting of the Board, 27 March 2003. Retrieved 4 August 2011, from <http://www.icann.org/en/minutes/minutes-27mar03.htm>

<sup>107</sup> ICANN (2003). Guidelines for the Implementation of Internationalized Domain Names. Version 1.0. 20 June 2003. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-20jun03.htm>

<sup>108</sup>ICANN (2003). 'ICANN Rio de Janeiro Meeting Topic: Internationalized Domain Names.' 13 March 2003. Retrieved 6 August 2011, from <http://www.icann.org/en/meetings/riodejaneiro/idn-topic.htm>

### PCP on draft IDN Guidelines version 2.0 (20 September-20 October 2005)

(Archived at <http://forum.icann.org/lists/idn-guidelines> Accessed 11 July 2011)

There were ten posts by ten individual posters during the official comments period. Of these, 5 could not be identified. Three comments were received from private companies, including one from a ccTLD registry. There were also comments from the Internet Architecture Board (IAB) and the International Trademarks Association (INTA).

Michael Heltzer of INTA made the case for stronger trademark protection mechanisms for IDNs particularly strengthened WHOIS. Danny Younger (background / affiliation not disclosed) favoured making an exception to the rule against mixing two distinct scripts in IDN labels, arguing that this should not be applied to verified trademark owners, who may wish to run a multilingual promotion campaign with local phrases mixed with trademarks in English. Paul Hoffman (background / affiliation not disclosed) and ‘showker’ (Spam Trackers) argued that stronger enforcement of the Guidelines plus the establishment of clear penalties for breaches must be established. Michael Heltzer, Paul Hoffman, ‘showker’, Neil Harris (Media channel Limited) and Gervase Markham (background / affiliation not disclosed) felt that stronger measures to tackle spoofing using IDN labels were required. Abdulaziz Al-Zoman raised the issue of IDN TLDs, arguing that IDN TLD policy should concentrate on ccTLDs first. Comments from ‘r&d afrac’ (background / affiliation not disclosed) and Leslie Daigle (IAB) addressed technical / script encoding issues.

Apart from some changes in wording, the finalised version 2.0 of the Guidelines<sup>109</sup> was substantially the same as the draft<sup>110</sup> discussed in this PCP. There were no changes to trademark protections or enforcement mechanisms. Thus, the comments submitted in this PCP do not appear to have had any significant effect upon policy outcomes.

### PCP on IDN Guidelines version 2.1 (27 February 2006 – open)

(Archived at <http://www.icann.org/topics/idn/fora.htm> Accessed 11 July 2011)

In the Public Comments period on version 2.1, no comments appear to have been posted on the indicated board, suggesting that the amendment was not controversial.

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<sup>109</sup> ICANN (2005). Guidelines for the Implementation of Internationalized Domain Names. Version 2.0. 8 November 2005. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-14nov05.htm>

<sup>110</sup> ICANN (2005). Guidelines for the Implementation of Internationalized Domain Names. Draft Version 2.0. 20 September 2005. Retrieved 6 August 2011, from <http://www.icann.org/en/general/idn-guidelines-20sep05.htm>

PCP on Autonomica test plan (5 - 19 December 2006)

(Archived at <http://forum.icann.org/lists/idn-tests-comments/> Accessed 11 July 2011)

Only two people commented. Stephane Bortzmeyer (privately employed network engineer) questioned why the test was necessary, reasoning that since IDN labels are stored in the DNS as ASCII labels like any others, and IDN processing is done only by client-side applications, not at the nameserver level, there seemed to be nothing to test. Jaeyoun Kim (National Internet Development Agency of Korea) stated that the test plan was “very well designed”, but, like Bortzmeyer, noted that since the test was simply insertion of ASCII punycode strings into a simulated root zone, there was unlikely to be an adverse effect on the root server. He advised that ICANN should also test the performance of IDN-aware client-side applications, such as web browsers and e-mail clients.

PCP on IDN Guidelines version 2.2 (11 May 2007 – open – ended )

(Archived at <http://forum.icann.org/lists/idn-guidelines/> Accessed 12 July 2011)

A Public Comments Period on the new guidelines was announced from 11 May 2007. However, no comments appear to have been submitted on the indicated board after 11 May.

PCP on IDNC Working Group Draft Final Report of Recommendations for IDN ccTLD Fast Track Mechanism<sup>111</sup> (13 - 23 June 2008)

(Archived at <http://forum.icann.org/lists/idn-ccTLD-fast-track/> Accessed 12 July 2011)

Five responses were received in this period, from four distinct individuals. These included a member of ICANN staff, an advisor to the Urdu Internet Council, a private individual, and an unidentified individual. There were no major objections to the principle of ‘Fast Track’.

Imran Ahmed Shah (Urdu Internet Council) raised the issue of fees, arguing that the ‘Fast Track’ approach may result in disproportionately high fees for early applicants, as ICANN sought to recover costs from the first round of applicants (such as policy development costs, the costs of all relevant meetings and the configuration of the root servers). He recommended developing a mechanism to spread cost recovery over a longer period of time so that the full costs were not borne by the earliest applicants. Shah also recommended that IDN ccTLDs should not be restricted to two characters as with ASCII ccTLDs; and that IDN ccTLD registries should be required to be local organisations based in the relevant country or territory.

Paul Hoffman (identity not disclosed) recommended that Guiding Principle D (Fast Track only for non-Latin scripts) could be dropped, arguing that it was inherently unfair to many countries whose country names in their native languages, for example Norway, could

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<sup>111</sup> <http://censo.icann.org/workinggroups/idn-ccTLD-fast-track-draft-final-report-recommendations-13jun08.pdf>

otherwise meet all the other guiding principles. Hoffman also opposed the ‘no mixed scripts’ rule. Robert Hoggarth (ICANN staff) posted a summary of some input received from various groups and fora, including the RyC, the Arabic team for domain names, and various ICANN public meetings. This input suggested general support for the principles of Fast Track, though with ongoing discussion around various points of policy, particularly technical issues and language / script definitions. Michael D. Palage (private individual) questioned why the public comment period had been restricted to ten days on this occasion.

None of the proposals made in this PCP appear to have been incorporated into the finalised version of the Final Report.<sup>112</sup>

PCP on the Final Report of IDNC Working Group on ccTLD "Fast Track" Mechanisms<sup>113</sup>  
(15 July - 15 August 2008).

(Archived at <http://forum.icann.org/lists/idn-ccTLD-fast-track/> Accessed 12 July 2011)

8 posts were submitted by 8 individual posters. Three of these represented private companies, including a ccTLD registry. There were also comments from the Jordanian National Information Technology Center, the Asia-Pacific Top-Level Domains Association (APTLD, an organisation mainly of ccTLD registries), the GNSO Council and one private individual, as well as one unidentified poster.

There were no major objections to the principle of fast track, however both Jaser Elmorsy (bluebridge.net) and Andrew Mack (AMGlobal Consulting) advocated that certain gTLDs included in the fast track as well. Mack argued that limiting fast track to ccTLDs would give governments too much power in the near term. Jonathan Shea (APTLD) advised that the delegation process for new IDN ccTLDs should not be used to ‘force’ ccTLD registries to enter into contractual agreements with ICANN. This was supported in this by Abdulaziz Al-Zoman (SaudiNIC). Shea argued that a ccTLD “represents sovereignty or a territorial/national right and cannot be subjected to a contract with a corporation under the laws of another country”.

Ghazwa Malhas (National Information Technology Center / Jordan) and Abdulaziz Al-Zoman (SaudiNIC) raised the issue of contracts between ICANN and IDN ccTLD registries, arguing that these should not be a mandatory requirement for the delegation of the ccTLD (note that this would mirror existing policy for ASCII TLDs; for existing ccTLDs, unlike gTLDs, formal Registry Agreements between ICANN and the registry are voluntary).

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<sup>112</sup> ICANN (2008). Discussion Draft of Interim Report of IDNC WG for Public Comments. 13 June 2008. Retrieved 12 August 2011, from <http://ccnso.icann.org/workinggroups/idn-ccTLD-fast-track-draft-final-report-recommendations-24jun08.pdf>

<sup>113</sup> ICANN (2008). Discussion Draft of Interim Report of IDNC WG for Public Comments. 13 June 2008. Retrieved 12 August 2011, from <http://ccnso.icann.org/workinggroups/idn-ccTLD-fast-track-draft-final-report-recommendations-24jun08.pdf>

Public Comments Period on the ccTLD Fast Track Draft Implementation Plan (23 October 2008 - 7 January 2009).

(Archived at <http://forum.icann.org/lists/ft-implementation/> Accessed 12 July 2011)

There were 15 comments posted by 14 individual posters. These included 3 private companies of which two were ccTLD registries and one a registrar. There were also comments from the GNSO Council, the Registrars Constituency, three national governments or their agencies, the APTLD and one private individual. The other four posters could not be identified.

A significant point of contention in this PCP concerned the question of application fees for prospective IDN ccTLD registries. Manal Ismail (Egyptian GAC Representative), Mohammed El-Bashir (State of Qatar, Supreme Council of Information and Communication Technology), Abdulaziz Al-Zoman (SaudiNIC), El Maayati Afaf (identity not disclosed) and Ibaa Oueichek (Arab Team for Domain Names and Internet Issues) argued that registry contributions to ICANN's costs should be voluntary, while Avri Doria (GNSO Council) and Clarke D. Walton (Registrars Constituency) favoured mandatory charges. The final policy outcome on this point was that financial contributions were deemed 'expected' but not mandatory.<sup>114</sup>

Manal Ismail, Erin Chen (Taiwan Network Information Centre), Abdulaziz Al-Zoman and Ibaa Oueichek recommended that national governments should be given the final word on whether a given IDN ccTLD should go ahead and that this should be made explicit in the policy. This became the case in the final policy.<sup>115</sup>

Clarke D Walton advocated that 'Fast Track' should be extended to certain IDN gTLDs. This did not occur in the final policy.

Manal Ismail and Ibaa Oueichek argued against mandatory formal registry contracts for IDN ccTLDs. Mohammed El-Bashir favoured a light weight' contractual relationship, while Jonathan Shea (APTLD) and Abdulaziz Al-Zoman felt that for those operators who do not want to exchange formal contracts documents with ICANN, a commitment to the stability and security of the Internet, including compliance with the IDNA Guidelines and Protocols, should be sufficient. Avri Doria (GNSO Council) and Clarke D. Walton (Registrar Constituency) likewise argued that registries must commit to IDNA standards and the IDN

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<sup>114</sup> ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf> P43

<sup>115</sup> ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-cctld-implementation-plan-16nov09-en.pdf>

Guidelines. The final policy mandated a minimum commitment to follow the IDNA standards and IDN Guidelines, but did not mandate a formal registry agreement.<sup>116</sup>

PCP on revision to the Draft Implementation plan for the Fast track process 18 February-6 April 2009

(Archived at <http://forum.icann.org/lists/ft-implementation/> Accessed 12 July 2011)

A total of 7 responses were received from 7 individual posters. These included one private company (a ccTLD registry), the International Trademark Association (INTA), the Arabic Script IDN Working Group (ASIWG), two national governments / governmental agencies, one GNSO Council member and one poster who could not be identified.

Ken Stubbs (GNSO Council) pointed to the financial costs of the process, which he claimed were “well into seven figures”, and argued that this should be shifted as much as possible onto the main beneficiaries, the ccTLD registries. Eric Brunner-Williams (identity not disclosed) made some technically related suggestions for changes in the text. Naveed-ul-Haq (Pakistan Telecommunication Authority) requested a clear timetable and statement of likely costs to the ccTLD registries. A cost analysis was ultimately provided in Module 8 of the final Implementation Plan.<sup>117</sup> An exact timetable for the process was not given.

Paul Szyndler (.au Domain Administration) argued that ICANN staff ‘should endeavour to finalise outstanding details, including information on “meaningfulness” requirements, and the finalised structure and role of the DNS Stability Technical Panel.’ This was ultimately dealt with in Module 4 of the final Implementation Plan.<sup>118</sup> Szyndler was otherwise complimentary of the process. Manal Ismail (Egyptian GAC Representative) recommended ‘that there be collaboration among communities sharing scripts, or where particular confusability exists between characters across the used languages, to develop IDN tables and associated policies’ and recommended that ICANN establish a clear process for submission of language/script tables developed by language communities sharing the same language/script. Similarly, Ram Mohan (Afilias / ASIWG) made some recommendations for a procedure for drawing up language / script tables through collaboration with language communities and references to ‘authoritative’ locally based expert groups, and argued that no IDN TLD should be launched prior to the creation of an authoritative and complete table for that language / script. This issue was dealt with by Module 3 of the final Implementation Plan, which encouraged co-operation between such communities in developing such tables.<sup>119</sup> Claudio DiGangi (International Trademark Association) asserted that ICANN should recommend the use of a Dispute Resolution Provider (DRP) to resolve disputes arising from

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<sup>116</sup> ICANN (2009). Final Implementation Plan for IDN ccTLD Fast Track Process. 16 November 2009. Retrieved 12 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTLD-implementation-plan-16nov09-en.pdf> P12

<sup>117</sup> ICANN (2009). Proposed Final Implementation Plan for IDN ccTLD Fast Track Process. 30 September 2009. Retrieved 22 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTLD-implementation-plan-30sep09-en.pdf> PP53-56

<sup>118</sup> ICANN (2009). Proposed Final Implementation Plan for IDN ccTLD Fast Track Process. 30 September 2009. Retrieved 22 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTLD-implementation-plan-30sep09-en.pdf> PP15-16

<sup>119</sup> ICANN (2009). Proposed Final Implementation Plan for IDN ccTLD Fast Track Process. 30 September 2009. Retrieved 22 August 2011, from <http://www.icann.org/en/topics/idn/fast-track/idn-ccTLD-implementation-plan-30sep09-en.pdf> P7-12

the registration of domain names within the IDN ccTLD registry. No such recommendation was made in the final Implementation Plan. Paul Szyndler (.au Domain Administration) raised the contracts issue, arguing that contracts should be voluntary only. As discussed, this was the eventual outcome on this issue.

PCP on additional update to the Fast Track Process Implementation Plan (3<sup>rd</sup> revision): 31 May-15 July 2009

(Archived at <http://www.icann.org/en/announcements/announcement-31may09-en.htm>. Accessed 12 July 2011)

There were 10 posts by 10 individual posters.<sup>120</sup> These were comprised of representatives of four private companies, including two ccTLD registries, two national governments / governmental agencies, the Chinese Domain Name Users Alliance, the Arab Team for Domain Names and Internet Issues, and two individuals who could not be identified.

The question of application fees was again raised, with Abdulaziz Al-Zoman (SaudiNIC), Ibaa Oueichek (Arab Team for Domain Names and Internet Issues) and Manal Ismail (Egyptian GAC Representative) advocating that contributions should be voluntary and Tan Yaling (China Internet Network Information Center) favouring mandatory fees. As discussed, the final policy on this issue was that fees were deemed 'expected' but not mandatory.

The contracts issue was also raised again, with Abdulaziz Al-Zoman, Manal Ismail, Ibaa Oueichek and Ramesh Kumar Nadarajah (APTLTD) arguing against mandatory contracts. Ismail however agreed that applicants must indicate an intention to adherence to standards. Mohammed El-Bashir (Qatar Supreme Council of Information and Communication Technology) favoured a 'lightweight' agreement. As discussed, the final policy on this issue was an avoidance of mandatory contracts but acceptance of certain minimum requirements, including the IDN Guidelines and IDNA standard, was mandated.

PCP on proposed Final Implementation Plan for the IDN ccTLD Fast-Track Process (30<sup>th</sup> September – 30<sup>th</sup> October 2009)

(Archived at <http://www.icann.org/en/public-comment/public-comment-200907.html#fast-track> Accessed 12 July 2011)

No comments appear to have been received during the specified period.

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<sup>120</sup> ICANN. (2009). "Public Comment: Fast Track Implementation (3rd Revision): 31 May 2009." Retrieved 18 June, 2009, from <http://www.icann.org/en/announcements/announcement-31may09-en.htm>.

### PCPs on work of ccNSO IDN ccPDP Working Group

A Public Comments Period was announced on the draft topic paper between 20th October and 3rd November 2009.<sup>121</sup> However, no relevant comments appear to have been made on the specified board (<http://forum.icann.org/lists/idn-ccpdp/>) during that time period.

A further PCP was announced on the progress report between 29th November 2010 and 14th January 2011.<sup>122</sup> However, once again no comments were submitted to the specified board (<http://forum.icann.org/lists/idnpdpwg1-progressreport/>).

### PCP on Draft IDN Guidelines version 3.0 (27 July – 26 August 2011)

(Archived at <http://forum.icann.org/lists/idn-guidelines-v3-revision/> Accessed 12 July 2011)

Only two people commented in the specified period.

Simon Josefsson (network security consultant) raised some technical points. Hugo Salgado (NIC Chile) advised inclusion of a recommendation for registries/registrar to warn registrants about lack of global support in IDN client software, to avoid possible litigation by dissatisfied registrants.

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<sup>121</sup> ICANN (2009). Announcement: ‘Public Comments Requested on Draft Topic Paper for Policy on the Introduction of IDN ccTLDs’. 20 October 2009. Retrieved 9 August 2011, from <http://ccnso.icann.org/announcements/announcement-20oct09.htm>

<sup>122</sup> ICANN (2010). Announcement: ‘IDN PDP Working Group 1 Publishes its First Progress Report.’ Retrieved 9 August 2011, from <http://ccnso.icann.org/announcements/announcement-29nov10-en.htm>

## **Appendix 5.9B: Statistical breakdown of public comments on IDNs**

### Breakdown of public comments on IDNs by background / affiliation of poster

(Note that some posters fall into more than one category; for example a registrar is also a private company; therefore totals will exceed number of actual posts)

	PCP 28/2/01 - 14/3/01	PCP 13/3/03 - 24/3/03	PCP 20/9/05 - 20/10/05	PCP 5/12/06 - 19/12/06	PCP 13/6/08 - 23/6/08	PCP 15/7/08 - 15/8/08	PCP 23/10/08 - 7/1/09	PCP 18/2/09 – 6/4/09	PCP 31/5/09 - 15/7/09	PCP 27/7/11 - 26/8/11	TOTAL
<b>Academics</b>	2	0	0	0	0	0	0	0	1	0	3
<b>Intellectual property interests</b>	0	0	1	0	0	0	0	1	0	0	2
<b>Private companies</b>	15	6	3	0	0	3	3	1	4	0	35
<b>gTLD registries</b>	2	1	0	0	0	0	0	0	0	0	3
<b>ccTLD registries / registry associations</b>	0	3	1	0	0	2	3	1	3	1	14
<b>Registrars / registrars associations</b>	5	1	0	0	0	0	1	0	0	0	7
<b>ICANN staff</b>	0	0	0	0	1	0	0	0	0	0	1
<b>Technical NGOs</b>	0	0	0	0	2	0	0	1	1	0	4
<b>Other NGOs</b>	1	0	0	0	0	0	0	0	0	0	1
<b>Regional IGOs</b>	0	0	0	0	0	0	1	0	1	0	2
<b>Internet governance bodies e.g. IETF, IAB</b>	0	0	1	0	0	0	0	0	0	0	1
<b>National governments / governmental agencies</b>	0	0	0	2	0	1	4	2	2	0	11
<b>GNSO Council</b>	0	0	0	0	0	1	1	0	0	0	2
<b>GNSO constituencies</b>	1	0	0	0	0	0	1	0	0	0	2
<b>Private individuals</b>	4	0	0	1	1	1	0	0	0	1	8
<b>Unidentified / affiliation not stated</b>	51	1	5	0	1	1	4	2	2	0	67
<b>ALAC</b>	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	81	12	11	3	5	9	18	8	14	2	163

<b>Number of actual comments</b>	76	7	10	3	5	8	15	7	10	2	143
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IDNs: Breakdown of individual public commenters by background / affiliation

(Note that some posters fall into more than one category; for example a registrar is also a private company; therefore totals will exceed number of actual individual commentators)

	PCP 28/2/01 - 14/3/01	PCP 13/3/03 - 24/3/03	PCP 20/9/05 - 20/10/05	PCP 5/12/06 - 19/12/06	PCP 13/6/08 - 23/6/08	PCP 15/7/08 - 15/8/08	PCP 23/10/08 - 7/1/09	PCP 18/2/09 - 6/4/09	PCP 31/5/09 - 15/7/09	PCP 27/7/11 - 26/8/11	TOTAL
Academics	2	0	0	0	0	0	0	0	1	0	3
Intellectual property interests	0	0	1	0	0	0	0	1	0	0	2
Private companies	10	6	2	0	0	3	3	1	4	0	29
gTLD registries	1	1	0	0	0	0	0	0	0	0	2
ccTLD registries / registry associations	0	3	1	0	0	2	3	1	3	1	14
Registrars / registrars associations	2	1	0	0	0	0	1	0	0	0	4
ICANN staff	0	0	0	0	1	0	0	0	0	0	1
Technical NGOs	0	0	0	0	1	0	0	1	1	0	3
Other NGOs	1	0	0	0	0	0	0	0	0	0	1
Regional IGOs	0	0	0	0	0	0	1	0	1	0	2
Internet governance bodies e.g. IETF, IAB	0	0	1	0	0	0	0	0	0	0	1
National governments / governmental agencies	0	0	0	1	0	1	3	2	2	0	9
GNSO Council	0	0	0	0	0	1	1	0	0	0	2
GNSO constituencies	1	0	0	0	0		1	0	0	0	2
Private individuals	1	0	0	1	1	1	0	0	0	1	5
Unidentified / affiliation not stated	16	1	5	0	1	1	4	2	2	0	32
ALAC	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>34</b>	<b>12</b>	<b>10</b>	<b>0</b>	<b>4</b>	<b>9</b>	<b>17</b>	<b>8</b>	<b>14</b>	<b>0</b>	<b>112</b>

Number of actual posters	31	7	10	2	4	8	14	7	10	2	95
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# **Appendix to Chapter 6**

## **Appendix 6.1 Working Group A membership**

- Jonathan Cohen (IPC)
- Mark Partridge (IPC)
- Susan Anthony (IPC)
- Michael Heltzer (IPC)
- Ted Shapiro (IPC)
- Peter Dengate Thrush (IPC)
- Randy Bush (NCC)
- Kathy Kleiman (NCC)
- David Maher (NCC)
- Amadeu Abril i Abril (RC)
- Ken Stubbs (RC)
- Jon Englund (BCC)
- Luis H. de Larramendi (BCC)
- Hirofumi Hotta (ISPC)
- Dr. Willie Black (ccTLDC)

Source: ICANN (1999). Results of DNSO Names Council Teleconference on June 11th, 1999. Retrieved 18 September 2011, from <http://www.dns0.org/dns0/notes/19990612.NCtelecon.html>

**Appendix 6.2: Positions of the GNSO Constituencies on UDRP Review (August 2003).**

As set out in Staff Manager's Issues Report on UDRP Review, 1 August 2003.

*Non-Commercial Users* – Place great emphasis on procedural safeguards and substantive protections for registrants making legitimate noncommercial or fair use of domain registrations.

*Commercial Users* – Want a economical, streamlined, and reliable remedy against domain registrations made in bad faith to misleadingly divert customers.

*Intellectual Property Interests* – Stress the importance of protections against cybersquatting and bad-faith registrations intended to tarnish trademarks.

*ISPs* – Not directly interested, except in their general status as commercial enterprises.

*Registrars* – Appreciate a standardized dispute-resolution policy that is fair to their customers and that keeps registrars out of the role of party or arbiter in domain disputes.

*gTLD Registries* – Registry operators are rarely (but increasingly) drawn directly into disputes over domain registrations, and thus share registrars' interests in a standard and fair policy.

Source: ICANN (1999). Staff Manager's Issues Report on UDRP Review. 1 August 2003.

Retrieved 14 September 2011, from <http://www.icann.org/en/gnsso/issue-reports/udrp-review-report-01aug03.htm>

### **Appendix 6.3: List of speakers at Webinar on the Current State of the UDRP (10 May 2011).**

Source: Webinar on the Current State of the UDRP - Agenda and additional information.  
Retrieved 22 September 2011, from  
<https://community.icann.org/display/gnsoudrpd/Webinar+on+the+Current+State+of+the+UDRP>

**Moderator** – Margie Milam, ICANN Staff

#### **UDRP Providers**

Erik Wilbers, World Intellectual Property Organization  
(WIPO)

Kristine Dorrain, National Arbitration Forum  
(NAF)

Dennis Cai, Asian Domain Name Dispute Resolution Center (ADNDRC)

Tereza Bartoskova, Czech Arbitration Court Arbitration Center for Internet Disputes  
(CAC)

#### **ICANN Compliance Staff**

Khalil Rasheed

#### **Registrar Stakeholder Group**

Statton Hammock, Network Solutions

#### **Panelists**

Czech Arbitration Court Panelist - Mathew Harris

ADNDRC Panelist- Neil Brown

NAF Panelist- James Carmody

WIPO Panelist-David Bernstein

WIPO Panelist-Tony Willoughby

#### **Complainants/Counsel**

Aimee Gessner, BMW  
Paul McGrady

**Respondents/Counsel**

John Berryhill

Ari Goldberger

**Academic Speakers**

Konstantinos Komaitis, University of Strathclyde

Cédric Manara, EDHEC

### **Appendix 6.4: Summary details of sample of 250 UDRP case histories**

Chosen at random from online case history databases provided by WIPO (100 cases), NAF (100 cases) and ANDRC (50 cases).

#### WIPO cases

<b><u>CASE NUMBER</u></b>	<b><u>DOMAIN</u></b>	<b><u>PARTIES</u></b>	<b><u>WINNER</u></b>	<b><u>NOTES</u></b>
Case No. D2000-0020	saint-gobain.net	Compagnie de Saint Gobain v. Com-Union Corp	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-0381	sydkraft.com	Sydkraft AB v. Control Alt Delete	C	Complainant (trademark owner) wins  3 member panel
Case No. D2000-0621	wrightandlato.com	Wright & Lato, Inc. v. Michael L. Epstein	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-0521	hifog.com	Marioff Corporation Oy v. Ultra Fog AB	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-0995	komatsuparts.com komatsu-parts.com	Komatsu Ltd. And Komatsu America International Company v. RKWeb Ltd.	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-1088	Quote-smith.com	Quotesmith.com Inc. v. James Noble (Domain For Sale.com)	C	Complainant (trademark owner) wins    Single member panel

Case No. D2000-1244	vestel.com	Vestel Elektronik Sanayi ve Ticaret AS v. Mehmet Kahveci	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-1575	collegesummit.com collegenetsummit.com	College Summit, Inc. v. Yarmouth Educational Consultants, Inc.	C	Complainant (trademark owner) wins  Single member panel
Case No. D2000-1687	reinfoink.com	RE Infolink v. Nathan Frey d/b/a 123 Mail	R	Respondent wins despite complainant having trademark – though trademark registered after domain name  3 member panel
Case No. D2000-1814	harina-pan.com mazeite.com procria.com arrozprimor.com  mazorca.com  harinapromasa.com  ricarepa.com	Refinadora de Maíz Venezolana, C.A. ("REMAVENCA") and C.A. Promesa ("PROMESA") v. Jaime Rentería	C	Complainant (trademark owner) wins  Single member panel
Case No. D2001-0300	systema.com	Systema Limited v. Willie Byrne	C	Complainant (unregistered service mark owner) wins  Single member panel  Interesting case because complainant had no registered trademark, however unregistered service mark treated as equivalent

Case No. D2001-0605	rewe.com	REWE-Zentral AG v. Fahmi Banafa	C	Complainant (trademark owner) wins Single member panel
Case No. D2001-0894	milbanktweed.com.	Milbank, Tweed, Hadley & McCloy LLP v. John Zissu	C	Complainant (unregistered service mark owner) wins Single member panel
Case No. D2001-1177	bauhaus.com	Bauhaus AG, Zweigniederlassung Mannheim v. Robert Desideri	R	Respondent wins 3 member panel
Case No. D2003-1178	aracruz.com	Aracruz Celulose S/A v. CM Banco de Servicos SC Ltda	C	Complainant (trademark owner) wins Single member panel
Case No. D2001-1400	panasonic.net.	Matsushita Electric Industrial Co., Ltd., v. O Eunjung	C	Interesting because it infers bad faith from non-response Complainant (trademark owner) wins Single member panel
Case No. D2001-1475	cellexc.com	Caleel+Hayden L.L.C. v. Jaye Pharmacy	R	Respondent wins 3 member panel
Case No. D2001-1484	jcb-equipment.com, jcbplant.com, jcb-plant.com, jcb-sales.com, jcbspares.com, jcb-	J C Bamford Excavators Limited v. MSD (Darlington)	C	Complainant (trademark owner) wins

	spares.com, jcbequipment.uk.com, jcb-equipment.uk.com, jcbfinance.uk.com, jcb- parts.uk.com, jcbplant.uk.com, jcb- plant.uk.com, jcbs.uk.com, jcbsales.uk.com, jcb- sales.uk.com, jcbspares.uk.com, jcb- spares.uk.com;	Limited		Single member panel
Case No. D2002-0001	Nokiaheaven-uk.com	Nokia Corporation v. Nick Holmes t/a EType Media	C	Complainant (trademark owner) wins  Single member panel
Case No. D2002-0027	186k.org	186K.Net, Co v. Christopher Rinaldi	R	Respondent wins  3 member panel
Case No. D2002-0207	bingogala.com bingogala.net galaslots.com galagold.com	Gala Holdings Limited v. Richard Chambers	R	Respondent wins  Trademark owner loses  3 member panel
Case No: D2002-0329	providencejournal.com	Belo Corp. v. George Latimer	C	Complainant (trademark owner) wins  Single member panel
Case No. D2002-0448	www.freemandecorating.com	Freeman Capital Company v. ONScreen Business Communications	C	Complainant (trademark owner) wins

				Single member panel
Case No. D2002-0741	attvideophone.biz, attphone.biz, attvideophone.info, attphone.info, attcredit.biz, attmobile.biz, attcredit.info and attmobile.info	AT&T Corp v All Time Talk Cellular and All Over Land	C	Complainant (trademark owner) wins  Single member panel
Case No. D2002-0856	potsdam.com, potsdam.net, potsdam.org, potsdam.info	City of Potsdam v. Transglobal Networx Inc.	C	Trademark owner wins – on the basis of trademark ONLY – DOES NOT SET A PRECEDENT for place names  Complainant (trademark owner) wins  Single member panel
Case No. D2002-0950	samclubcredit.com	Wal-Mart Stores, Inc. v John Zuccarini d/b/a RaveClub Berlin	C	Complainant (trademark owner) wins  Single member panel
Case No. D2002-1134	juanvaldez.org	National Federation of Coffee Growers of Colombia v. Daniel Harrison	C	Complainant (trademark owner) wins  Single member panel
Case No. D2003-0280	rbcentura.com	Royal Bank of Canada v. Party Night Inc.	C	Complainant (trademark owner) wins  Single member panel
Case No. D2003-0336	bellsothuh.net	BellSouth Intellectual Property Corporation v. Phayze Inc.	C	Complainant (trademark owner) wins

				Single member panel
Case No. D2003-0463	terrellowens.com	Terrell Eldorado Owens v. Aran Smith d/b/a Sportsphenoms.com and/or Sportsphenoms	C	<p>Interesting because a well-known person's name is treated as a trademark</p> <p>Seems straightforward since registrant had no interests and defaulted anyway</p> <p>Complainant wins</p> <p>Single member panel</p>
Case No. D2003-0473	wzbhrocks.com	Great Scott Broadcasting v. FIFC sa aka Netfisher aka Erik Simmons	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
Case No. D2003-0695	betandwincasino.com	BET and WIN Interactive Entertainment AG v. Jonas Lindstedt	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
Case No. D2003-0800	wwwbetstraightforward.com.	The Sporting Exchange Limited v. Grand Slam Co.	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
Case No. D2003-0908	bayaspirina.com	Bayer AG v. Daniel H. Davies, Interplanetarium Corp.	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>

Case No. D2003-1007	amazoy.com	The Shelburne Company d/b/a Zoysia Farm Nurseries v. Smith Turf Farms	C	Complainant (trademark owner) wins  Single member panel
Case No. D2003-1013	wwwredeglobo.com	TV Globo Ltda. v. Alvaro Collazo	C	Complainant (trademark owner) wins  Single member panel
Case No. D2004-1041	wwwichotelsgroup.com wwwintercontinental.com	Inter-Continental Hotels Corporation v. Cheap-Hotel-Room, Inc.	R (split decision)	Split decision  Respondent wins  Service mark not deemed to be equivalent to trademark in this case  Single member panel
Case No. D2003-1049	yallapepsi.com	PepsiCo, Inc., v. Samtech	C	Complainant (trademark owner) wins  Single member panel  Single member panel
Case No. D2004-0091	achannel.com	Craig Media, Inc. v. Kim Hyungho	R	Case dismissed / respondent retains name  Single member panel
Case No. D2004-0138	unisyiconsulting.com	Unisys Corporation v. Unisys Consulting, LLC	C	Complainant (trademark owner) wins  Single member panel

Case No. D2004-0855	invamune.com	Bavarian Nordic A/S v. Henrik Olsen, The Vamune Family	C	Complainant (trademark owner) wins Single member panel
Case No. D2004-0908	wwwikea.com	InterIKEA Systems B.V. v. Michael Huang	C	Complainant (trademark owner) wins Single member panel
Case No. D2004-1009	hamburgerhabit.com	Habit Holding Co., L.L.C. v. None / Michael Pimentel	C	Complainant (trademark owner) wins Single member panel
Case No. D2004-1025	wedgewoodchina.com	Wedgwood Ltd. Corp. v. JIT Limited	C	Complainant (trademark owner) wins Single member panel
Case No. D2004-1049	moncler.com	Moncler S.p.A. v. Bestinfo	C	Complainant (trademark owner) wins Single member panel
Case No. D2004-1081	nativestyles.net nativestyles.org	Rudy Rojas v. Gary Davis	R	Panel clearly did not want to get involved in what is clearly a very complex broader business dispute. Case dismissed 3 member panel
Case No. D2004-1105	cambolero.com	Campero International, Corp. v. Jordan Data Communication Services Company	C  C	Complainant (trademark

				owner) wins 3 member panel
Case No. D2005-0084	lcia.org	LCIA (London Court of International Arbitration) v. Wellsbuck Corporation	C	Complainant (trademark owner) wins 3 member panel
Case No. D2005-0134	waterfordchina.com	Waterford Wedgwood plc. v. Namia Limited	C	Complainant (trademark owner) wins Single member panel
Case No. D2005-0211	generic-cialis.com	Lilly Icos LLC v. Silagra World	C	Complainant (trademark owner) wins Single member panel
Case No. D2005-0282	alsa.com	Automóviles de Luarca, S.A. v. NUCOM, Domain Name Brokers	R	This effectively sanctions domain name speculation under certain circumstances Respondent wins Trademark owner loses Single member panel
Case No. D2005-0459	meridienwedding.com.	Société des Hôtels Méridien v. Mr. Richard Kaminskas	R	Respondent wins despite not submitting a response 'meridien' is a generic word and meridianwedding is not trademarked Trademark owner loses Single member panel

Case No. D2005-0697	stephenfossler.com and stephenfosslercompany.com	Stephen Fossler Company v. LaPorte Holdings	C	Complainant (trademark owner) wins Single member panel
Case No. D2005-0934	prudentialbankplc.com	The Prudential Assurance Company Limited v. Osaro Godwin	C	Complainant (trademark owner) wins Single member panel
Case No. D2005-1047	laserenisima.com	Mastellone HNOS. S.A. v. Link Comercial Corp.	C	Complainant (trademark owner) wins Single member panel
Case No. D2005-1322	arizonarepublicdelivery.com  arizonarepublicsubscriptio	Media West-DMR, Inc., Media West-GSI, Inc., Media West-INI, Inc., Media West-PNI, Inc., Des Moines Register and Tribune Co., Gannett Satellite Information Network, Inc., Indiana Newspapers, Inc., Phoenix Newspapers, Inc., Gannett Co. Inc. v. Phil Nagy	C	Straightforward case apart from the multiple complainant aspect + the number of names involved  Complainant(s) (trademark

n.com  
  
cincinnatiquirerdelivery.com  
  
cincinnatiquirersubscription.com  
  
desmoinesregisterdelivery.com  
  
desmoinesregistersubscription.com  
  
indianapolisstarnewsdelivery.com  
  
indianapolisstarnewssubscription.com  
  
myusatodaysubscription.com  
  
orderarizonarepublic.com  
  
ordercincinnatiquirer.com  
  
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owners) win  
  
Single member panel

Case No. D2006-0026	om usatodaydelivery.com usatodaysubscription.net usatodaysubscriptiononline.com cloer.com	Cloer Elektrogeräte GmbH v. Motohisa Ohno	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0126	delongsportswear.com	DeLong Sportswear, Inc. v. LaPorte Holdings	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0320	funtomas.com	Tomas Sziranyi v. RegisterFly.com	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0370	lotrfanclub.com	The Saul Zaentz Company v. Siarhei Chyzhevich	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0680	checksunimited.com	Paper Payment Services, LLC v. Web Domain Names	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0912	porsheci.com	Dr. Ing. h.c. F. Porsche AG v. ANC Online Avrasya Bilisim Tekn San ve Dis Tic A S	C	Complainant (trademark owner) wins

				Single member panel
Case No. D2006-1238	uwindsor.com	The University of Windsor v. Modern Empire Internet Limited	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-1492	nationwideinsurancequote.com	Nationwide Mutual Insurance Company v. Henry Adams	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-1618	pamperedchef.mobi and thepamperedchef.mobi	Columbia Insurance Company v. Fred Sacco	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-0032	adidas.mobi	Adidas AG v. Zhifang Wu	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-0039	atlascopco24.com	Atlas Copco Aktiebolag v. Andreas Clara	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-0400	bangbusters.com ibangbus.com www-bangbros.com xxxbangbus.com	Ox Ideas, Inc. v. Wan-Fu China, Ltd.	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-0688	mastercard-applications.com	MasterCard International Incorporated v. Unicorn Multi-	C	Complainant (trademark owner) wins

		Media, Inc.		Single member panel
Case No. D2007-1000	superbowlxliv.com	National Football League v. Exotic Design Group	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-1321	pga2012.com	The Professional Golfers Association of America v. RW Smith	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-1558	honda-jp.org	American Honda Motor Co., Inc. v. Honda Automobile Company	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-1726	linak-israel.com	Linak A/S v. Elsar Ltd.	R	Respondent wins Trademark owner loses Single member panel
Case No. D2007-1924	tatarealty.com	Tata Sons Limited v. Imtiaz Kalwar	C	Complainant (trademark owner) wins Single member panel
Case No. D2001-0626	royalbankofscotlandtenerife.com.	The Royal Bank of Scotland Group plc and The Royal Bank of Scotland plc v. "Christopher Graham" or "John Graham" dba GRA	C	Complainant (trademark owner) wins

		Marketing CL		Single member panel
Case No. D2001-0643	iittala.com.	Designor OY AB v Bamse Enterprises	C	Complainant (trademark owner) wins Single member panel False registration details used as evidence of bad faith
Case No. D2003-0802 77	swatchnews.com and swatchresearch.com are registered with Tucows, Inc. The disputed domain names swatchdiscovery.com, swatchdiscovery.net and swatchdiscovery.org are registered with Innerwise, Inc. d/b/a ItsYourDomain.com. The disputed domain names swatchnews.net, swatchnews.org, swatchresearch.net and swatchresearch.org are registered with @com Technology LLC.	SWATCH AG v. Stefano Manfroi	C	Complainant (trademark owner) wins 3 member panel
Case No. D2005-0877	greentyre.com	Green Tyre Company Plc. v. Shannon Group	R	Respondent wins despite not submitting a response Trademark owner loses Single member panel
Case No. D2006-0802	harrodsoflasvegas.com	Harrods Limited v. New ForSale (HARRODSOFLAS VEGAS-COM-	C	Complainant (trademark owner) wins

		DOM)		Single member panel
Case No. D2006-1360	hibbetsportinggoods.com	Sports Holdings, Inc. v. WhoisGuard Protection	C	Complainant (trademark owner) wins Single member panel
Case No. D2007-0008	berlitzlanguagecourse.info	Berlitz Investment Corporation v. Katelin Adkins	C	Complainant (trademark owner) wins Single member panel
Case No. D2000-1012	geocities-yahoo.com	Yahoo! Inc. and GeoCities v. Roger Campanera Renom	C	Complainant (trademark owner) wins 3 member panel
Case No. D2001-1041	jonesapparelgroup.com	Jones Apparel Group Inc .v. Jones Apparel Group.com	C  C	Complainant got a second attempt having failed in a previous case Complainant (trademark owner) wins Single member panel
Case No. D2000-1010	babyrus.com	Geoffrey, Inc., v. Russian Baby	C	Complainant (trademark owner) wins Single member panel
Case No. D2000-1015	lockheedsucks.com lockheedmartinsucks.com	Lockheed Martin Corporation v. Dan Parisi	R	Interesting that there was a dissenting opinion, but verdict is consistent with the other 'sucks' cases

				Respondent wins Trademark owner loses Multi-member panel with dissenting opinion
Case No: D2002-0201	janus.info	Janus Interantional Holding Co. v. Scott Rademacher	C	Interesting case as janus is the name of a greek god - seems quite generic Complainant (trademark owner) wins Single member panel
Case No. D2002-0301	ingrammicro.org and ingrammicro.net	Ingram Micro, Inc. v. Ingredients Among Modern Microwaves	R	Interesting that trademark owner lost – because other cases seem to suggest that illegitimate registration in itself is grounds for bad faith finding.  Respondent wins despite failure to submit a response Trademark owner loses Single member panel
Case No. D2003-0217	gayselfpic.com	Bret Kelly v. Web Ventures	C	Contradictory outcome to the previous case Complainant (trademark owner) wins Single member panel
Case No. D2003-0255	1verio.com	Verio Inc. v Sunshinehh	C	Complainant (trademark owner) wins Single member panel Single member panel
Case No. D2004-	d-online.com	Deutsche Telekom	R	Respondent wins

0102		AG v. foxQ		Trademark owner loses Single member panel
Case No. D2003-0362	ritzcasinoclub.com	Ellerman Investments Limited and The Ritz Hotel Casino Limited v. Al Cleary	C	Complainant (trademark owner) wins Trademark owner wins Single member panel
Case No. D2006-0523	rymanauditorium.c	Gaylord Entertainment Company v. Nevis Domains LLC	C	Complainant (trademark owner) wins Single member panel
Case No. D2006-0300	assetloanco.net	Asset Loan Co. Pty Ltd v. Gregory Rogers		Interesting take on the criticism site as legitimate use of name Also interesting that it admits there is lack of consensus view on this issue Complainant (trademark owner) wins 3 member panel
Case No. D2007-1427	edmudns.com, edmunods.com, edmundsds.com and emdunds.com	Edmunds.com, Inc. v. Keyword Marketing Inc. a/k/a Marketing Total S.A. a/k/a Domain Drop S.A.	C	Complainant (trademark owner) wins Single member panel

Case No. D2000-0243	cbs.org,	CBS Broadcasting, Inc. v. Gaddoor Saidi	C	Complainant (trademark owner) wins  Single member panel
Case No. D2001-0903	okidataparts.com	Oki Data Americas, Inc. v. ASD, Inc.	R	Raises the difficult question of whether an authorised sales or service agent of trademarked goods can use the trademark at issue in its domain name, and goes to a lot of trouble to define when and under what circumstances this is permissible  Trademark owner loses  Respondent wins  Single member panel
Case No. D2002-0095	experiancredit.com, experiancredit.net and experiancredit.org	Experian Information Solutions, Inc. v. Credit Research, Inc.	C	Complainant (trademark owner) wins  Single member panel
Case No. D2002-0484	complexionrx.com.	Complexions Rx, Inc. v. Julie Hogan	C	Complainant (trademark owner) wins  Single member panel
Case No. D2004-0481	porsche-buy.com and porschebuy.com	Dr. Ing. h.c. F. Porsche AG v. Del Fabbro Laurent	R	Respondent wins  Trademark owner loses  Single Member panel
Case No. D2005-0130	walmartfacts.biz	Wal-Mart Stores, Inc. v. Jeff Milchen	C	‘Protest’ name transferred – but respondent wasn’t actually using it  Complainant (trademark

				owner) wins Single member panel
D2008-1025	sonyholland.com	Sony Corporation	R	Respondent wins Trademark owner loses 3 member panel

NAF cases

<u>CASE NUMBER</u>	<u>DOMAIN</u>	<u>PARTIES</u>	<u>WINNER</u>	<u>NOTES</u>
FA94659	eshow.com	C = 3Z Productions LLC  R - GlobalDomain	R	Service mark 'owner' loses, no trademark  Respondent wins  Single member panel
FA003000094237	sahajmarj.org	C = Shri Ram Chandra Mission (California)  R= Shri Ram Chandra Mission (India)	R	Respondent wins  Single member panel  Respondent had been using the mark in India since 1945 + could document this  Complainant held US trademark
FA0008000095475	chefsdepot.net	C = M&T quality Restaurant Supply  R = UPI Inc. Commerce	C	Complainant (trademark owner) wins  Single member panel
FA0009000095575	alravista.com altaviasta.com altaviosta.com	C = AltaVista Company  R= Orbyt Web Solutions d/b/a Net Meter	C	Complainant (trademark owner) wins  Single member panel
FA0007000095159	labportal.com lab-portal.com	C=American Medical Laboratories, Inc  R=David A. Colondres	C	Complainant (trademark owner) wins  Single member panel

FA00020000935 48	zaploan.com	C=Amerikor Mortgage, Inc.  R=Robert D Bowman	C	Complainant (trademark owner) wins  Single member panel
FA00060000950 68	knowwhatyouown.com	C=Calvert Group, Ltd.  R=Joseph Pagano, Jr.	C	Complainant (trademark owner) wins  Single member panel
FA00050000948 91	cumberlandswan.com	C=Cumberland Swan Holdings, Inc.  R=Jeff Sizemore	C	Complainant (trademark owner) wins  Single member panel
FA00030000943 33	bassets.com	C=Steven H. Schimpff  R=Jerry Sumpton	C	Interesting case in that it spells out some trademarks are more entitled to protection than others  Respondent wins  Trademark owner closes  3 member panel
FA00040000943 87	penthouse.net	C=General Media Communications, Inc  R=JMR Creations	C	Complainant (trademark owner) wins  Single member panel
FA#92532	golferswarehouse.com	C=Golfers' Warehouse Inc.  R=Dan Lynch	C	Complainant (trademark owner) wins  Single member panel
FA00050000949 32	sandalsvactations.com	C=Gorstew Limited, Jamaica, and Unique Vacations, Miami,.	C	Complainant (trademark owner) wins

		R= Florida Vacations		Single member panel
FA00080000954 15	800BEACHES.COM	C=Gorstew Limited,Jamaica,, and Unique Vacations, Miami  R= Broker4domains.com ,	R	Respondent wins  Trademark owner loses  Single member panel
FA00050000947 33	casinohollywood.com	C=Hollywood Casino Corporation  R=B.F. LLC	C	Complainant (trademark owner) wins  Single member panel
FA00080000953 46	ITH.COM	C=ITH GmbH  R= First American	C	Complainant (trademark owner) wins  Single member panel
FA00070000952 42	JEWELERY.COM	C=Jewelry.com  R= Idealab!	R	Fell down on 'service mark' – too generic  Respondent wins  Single member panel
FA00030009437 9	MILKYWAYMIDNIGH T.COM	C=Mars Inc.  R= J.C. Candy Store	C	Complainant (trademark owner) wins  Single member panel
FA00020000936 77	MCKENNAANDCUNE O.com	C= McKenna & Cuneo, L.L.P.  R=NameIsForSale.co	C	Complainant (trademark owner) wins  Single member panel

		m		
FA00060000950 14	LITTLEFOLKART.COM	C=Mitchell D. Salzman  R= Sam Nassab	R	Very interesting case – even anomalous?  Finds respondent has legitimate interests – even though he isn't using the name?  Does not find bad faith – even though he offered to sell it for \$150,000?  Respondent wins  Trademark owner loses  Single member panel
FA00040000944 49	msdwprivateequity.com msdwipe.com	C= MORGAN STANLEY DEAN WITTER & CO.  R= SYED HUSSAIN CPIC Net	C	Complainant (trademark owner) wins  3 member panel
FA00020000943 11	blueridgeknife.com	C=Phillip S. Martin, dba Blue Ridge Knives  R=Deon Carpenter		Complainant (trademark owner) wins  3 member panel
FA 0006000094963	quirkmazda.com quirkvolkswagen.com	C= Quirk Works, Inc.  R=Michael J. Maccini	C	Interesting case – protest site that was ruled against  Compare to cases where protest site was upheld  Complainant (trademark owner) wins  Single member panel
FA00070000953 14	thecaravanclub.com	C= The Caravan Club, England  R= MRG Sale	C	Complainant (trademark owner) wins  Single member panel
FA00080000955	prudentialamerica.com	The Prudential Insurance Company	C	Straightforward case

09	prudentialbrazil.com	of America R= J.J. Corp		Single member panel
FA000 2000094204	sidchrome.com	C=UNC-TV R= Gary Tilton	C	Complainant (trademark owner) wins Single member panel
FA01030000968 41	panamericanlife.com panamlife.com	C= Pan-American Life Insurance Company R= Hampton New Media	C	Complainant (trademark owner) wins Single member panel
FA01030000969 34	cytodine.com cytodyne-technologies.com	C=Cytodyne Technologies, R= INetSources	C	Complainant (trademark owner) wins Single member panel
FA01040000970 31	dykemagossett.com	C=Dykema Gossett PLLC R= DefaultData.com and Brian Wick	C	Complainant (trademark owner) wins Single member panel
FA01040000970 78	mindazzle.com	C=MindDazzle InterActive v R=Mindfire	R	Service mark' holder loses Respondent wins Single member panel
FA01040000970 90	egeorgeharrison.com	C=George Harrison R=IWebAddress.com	C	Complainant (trademark owner) wins Single member panel
FA01050000971 62	aircanda.com	C=Air Canada R= John Zuccarini	C	Complainant (trademark owner) wins Single member panel
FA01050000973 09	ezloanmart.com	C=Dollar Financial Group Inc. R=EZLoanmart	C	Complainant (trademark owner) wins Single member panel
FA01050000973 29	pleasantonautomall.com	C=The Hendrick Automotive Group (d/b/a Pleasanton	R	

		Automall) R=Orbit Productions		Respondent wins Single member panel
FA01060000973 77	bioxide.com	C= United States Filter Corporation  R= Purlzer Corporation	R	Trademark owner loses  Respondent wins Single member panel
FA01060000977 22	digitalagent.com	C= Digital Agent, Inc.  R= DTA Digital Talent Agent	R	Respondent wins  No trademark Single member panel
FA01070000980 56	thegalluppoll.com	C= Gallup Inc.  R=Eric Keller	C	Complainant (trademark owner) wins  3 member panel
FA01080000996 02	cityofdearborn.com	C= City of Dearborn  R= Dan Mekled d/b/a ID Solutions	R	Again geographical place not acceptable as a mark  Respondent wins 3 member panel
FA01090001001 45	kvuu.com and wgir.com	C=Clear Channel Communications, Inc  R=Russx Casting Company aka ForSale	C	Complainant (trademark owner) wins  Single member panel
FA01100001002 48	mountainmud.com mountain-mudd.net mountain-mudd.org mountain- manufacturing.net,mounta inmanufacturing.org mountainmud.org	C= Mountain Mudd LLC  R= Roy Snowden dba World Media International Inc dba Emerald Coast	C	Complainant (trademark owner) wins  Single member panel

		Manufacturing Inc		
FA01120001027 26	amerisourcebergen.com amerisource-bergen.com	C=Amerisourceberge n Corporation  R=Yongseok Kwon	C	Complainant (trademark owner) wins  Single member panel
FA01120001031 27	idlj.com	C=DLJ Long Term Investment Corporation  R=Nucom Domain Name Brokers	R	Trademark owner loses  Respondent wins  Single member panel
FA02010001035 76	albertsonsrx.com	C=Albertson's Inc.  R= RXFILLS.NET	C	Complainant (trademark owner) wins  Single member panel
FA02010001039 85	212postcard.com, and 212postcards.com	C=Next Printing and Design, Inc. dba 212Postcards  R=Craig Singer	C	Complainant (trademark owner) wins  Single member panel
FA02010001041 87	tweetsierailroad.com	Tweetsie Railroad, Inc. v. Amer-Con Industries	C	Complainant (trademark owner) wins  Single member panel
FA02020001051 82	patrickjaguar.com	C= Patrick Jaguar, LLC d/b/a Patrick Jaguar  R= Alex Bruzas	C	Complainant (trademark owner) wins  Single member panel
FA02030001057 63	Aolmalls.com aolmalls.net aolmarketplace.com aolmarketplace.net aolbingo.net	C=America Online, Inc..  R= USACOOP.COM	C	Complainant (trademark owner) wins  Single member panel

		a/k/a Bingo Giant		
FA02030001058 91	ankofamerica.com	C=Bank of America Corporation .  R= ANKOFAMERICA. COM	C	Complainant (trademark owner) wins  Single member panel
FA02030001059 78	wwwaa.com	C= American Airlines, Inc., Dallas  R= Registrant Co., Seoul	C	Interesting because AA mark is used not just by American airlines but by automobile association, alcoholics anonymous, etc.  Nonetheless the respondent had no rights in it  Complainant (trademark owner) wins  Single member panel
FA02040001090 30	northshoretowers.com, northshoretowers.net, northshoretowers.biz, and northshoretowersinfo.com	C=North Shore Towers Apartments, Inc.  R= Erik Kroll	C	The claim to a trademark seems tenuous  However little doubt respondent was using name to mislead  Complainant (trademark owner) wins  Single member panel
FA02040001093 71	bankofamerica.com	C=Bank of America Corporation  R= ThadZeus	C	Complainant (trademark owner) wins  Single member panel
FA07100010889 89	egpedia.com	C= Expedia, Inc.  R= Ashraf Sello c/o EgyptShop Trade	C	Complainant (trademark owner) wins  Single member panel
FA05110005974 96	everythingcooking.com	C=Cooking.com, Inc	C	Seems dubious – 'cooking' is a generic word

		R= EverythingForSaleOnline c/o Domain Registration		Complainant (trademark owner) wins Single member panel
FA0801001139798	citifoundation.com	C=Citigroup Inc and Citigroup Foundation R= Western Data Exchange c/o P K Montgomery	C	Complainant (trademark owner) wins Single member panel
FA0801001130680	robedikappa.us	C=Basic Trademark S.A. R= Antares S.p.A c/o Germano Armani	C	Complainant (trademark owner) wins Single member panel
FA0801001128245	hustlertube.com	C=LFP IP, LLC and L.F.P., Inc. R=Gallery Traffic Service c/o Mark Hurson	C	Complainant (trademark owner) wins Single member panel
FA0801001126341	caesarstower.com, caesarstowers.com, caesarpalacetower.com, caesarpalacetowers.com, and caesarpalacetowerslasvegass.com	C=Caesars World, Inc. R= Marcel July Ra Christian Kaldenhoff c/o mar-motorcycle replacement airshields GmbH	C	Complainant (trademark owner) wins Single member panel
FA0712001125092	aquentfinancial.net	C=Aquent LLC R= Maison Tropicale S.A	C	Complainant (trademark owner) wins Single member panel

FA07100010939 13	imageshack.com	C=ImageShack Corp.  R= Steven Baxt	R (Split decision)	1 dissenting panellist  Both respondent + complainant have a trademark both of which registered after the domain name  Respondent wins  3 member panel with dissenting opinion
FA07100010880 44	phoenixlifeinsurancecompany.com	C=Phoenix Life Insurance Company  R= Belize Domain WHOIS Service Lt	C	Complainant (trademark owner) wins    Single member panel
FA07090010821 60	rockresort.com	C=RockResorts International LLC & The Vail Corporation  R= HempWorld, Inc. c/o Matthijs Huijgen	C	Complainant (trademark owner) wins    Single member panel
FA07090010806 47	chervontexacocards.com	C=Chevron Intellectual Property LLC  R= Domain Admin c/o Match Domains LLC	C	Complainant (trademark owner) wins    Single member panel
FA07080010658 37	bostonlimos.com	C=Manny Pasha  R= John Koveos c/o bostonlimos	Dismissed	Panel didn't want to get involved in what is clearly a wider business dispute    Case dismissed
FA07080010609 92	googledatadrive.com, googlenetstorage.com, googlewebdrive.com, googlewebstorage.com, mygoogledrive.com, and mygooglestorage.com	C=Google Inc.	C	Complainant (trademark owner) wins

		R= Patrick Babaian		Single member panel
FA0708001058767	dransfieldandross.com, dransfieldross.com, and dransfield-ross.com	C=Dransfield and Ross Ltd.  R= N.S. Wolf & Assoc. c/o Nathan Wolf	C	Complainant (trademark owner) wins  Single member panel
FA0707001045852	morganstanleyclientserver.com, morganstanleyclientservices.com, and mydeskmorganstanley.com	C=Morgan Stanley  R= Domain Park Limited	C	Complainant (trademark owner) wins  Single member panel
FA0707001045128	1800sendftds.com	C=Florists' Transworld Delivery, Inc.  R= Mike Lopez	C	Complainant (trademark owner) wins  Single member panel
FA0612000868825	medhelp.com	C=Med Help International, Inc.  R=[Unknown Registrant]	R	Respondent wins  'Service mark' holder loses  Single member panel
FA0612000864072	deltasigmatheta.com	C=Delta Sigma Theta Sorority, Inc.  R= Minerva Computer Services	C	Interesting illustration of what is and is not considered bona fide use  Complainant (trademark owner) wins  Single member panel
FA06120008615	boycottplanetfitness.com	C-PFIP, LLC	C	'Protest' site ruled against – justified on the grounds that it

94		R= Vendetta Marketing		is not merely a protest site but has commercial motivations  Complainant (trademark owner) wins  Single member panel
FA0611000853698	worldofproducts.com	C=Specialty Merchandise Corp.  R=Roswell, Jo-Ann	C	Complainant (trademark owner) wins  Single member panel
FA0611000846759	popular-mortgage.info	C=Popular, Inc.  R= Terence Tan c/o Success Junction Group	C	Seems a bit dubious – ‘popular’ is a generic term  However the respondent had voluntarily agreed to transfer  Complainant (trademark owner) wins  Single member panel
FA0611000832376	netzerodsl.com	C=NetZero, Inc.  R=Digi Real Estate Foundation	C	Complainant (trademark owner) wins  Single member panel
FA0611000831079	wwwlcitigroup.com	C=Citigroup, Inc.  R=50.com domain/web design/web	C	Complainant (trademark owner) wins  Single member panel
FA0610000827683	myfinalfour.com	C=The National Collegiate Athletic Association  R= Allen Terjesen	C	Complainant (trademark owner) wins  Single member panel
FA0610000823263	growerflower.com	C=Buy Easy Ltd.	C	Complainant (trademark owner) wins

		R= TTY c/o Sunny Adal		Single member panel
FA0610000819788	epxedia.com, expedial.com and expeida.com	C=Expedia, Inc. (Chicago)  R= Expedia Inc. (Washington)	C	Complainant (trademark owner) wins  Single member panel
FA0609000791433	bayloraid.com, baylorfan.com, baylorgrapevinehospital.com, baylorhospitaldallas.com, baylormedicalcenter.com, and baylormedicalschool.com	C=Baylor University, Austin, Texas  R=Baylor University, Waco, Texas	C	Complainant (trademark owner) wins  Single member panel
FA0608000785136	yaffa.com	C=Basic Line, Inc. v. Isaac Shepher	C	Complainant (trademark owner) wins  Single member panel
FA0608000782912	liquidsplenda.com	R=McNeil Nutritionals, LLC v. Steven Odinetz	C	Complainant (trademark owner) wins  Single member panel
FA0607000758981	lifestylelounge-travel.com	C=Summit Group, LLC. v. LSO, Ltd	C	Complainant (trademark owner) wins  Single member panel
FA0607000765307	basketball-goals.com	R=Bryan Kilpatrick v. Jeff McDonald	R	Respondent wins  No real trademark or service mark involved  Single member panel
FA06070007550	inphonictruth.com	C=InPhonic Inc..	C	Complainant (trademark

		R= Rick Rahim and BusinessVentures.com		owner) wins  Single member panel
FA0607000744613	campuscircle.com	C=Campus Circle, Incorporated.  R= MustNeed.com	C	Complainant (trademark owner) wins  Single member panel
FA0606000741852	goldmansex.com	C=Goldman, Sachs & Co.  R= NA	C	This seems somewhat dubious decision  Goldmansex hardly confusingly similar to goldmansachs – average internet user unlikely to mistake one for the other  Complainant (trademark owner) wins  Single member panel
FA0606000740329	enterprisecar-rental.com	C=Enterprise Rent-A-Car Company  R= Craig Chamberlain	C	Complainant (trademark owner) wins  Single member panel
FA0606000736647	Prudentialappraisals.com	C=The Prudential Insurance Company of America .  R= Stephen Keohane	C	Complainant (trademark owner) wins  Single member panel
FA0606000733016	herbalifestore.com	C=Herbalife International of America, Inc.,  R= Ratio WebServices c/o Daniel Reimann	C	Complainant (trademark owner) wins  Single member panel
FA06060007285	nike-cancer-bracelets.com	C=Nike, Inc.	C	Complainant (trademark

56		R= SEM Hosting Inc		owner) wins  Single member panel
FA0606000724509	greenpc.com	C=GREENPC INC.  R=Lee Joohee	C	Complainant (trademark owner) wins  Single member panel
FA0605000715052	quickerloans.net	C=Quicken Loans Inc.  R= Keith Davies	C	Seems like typosquatting, on the other hand 'quickerloans' seems like a fairly obvious name for a loans service  Complainant (trademark owner) wins  Single member panel
FA0511000601455	myxbox.com	C=Microsoft Corporation  R= Woo Seungchul	C	Complainant (trademark owner) wins  Single member panel
FA0511000593114	sportbeans.com	C=Jelly Belly Candy Company, Inc.  R= Rich Schallmo	C	Complainant (trademark owner) wins  Single member panel
FA0510000589501	beatthebookstore.com	C=Beat the Bookstore, LLC  R= May Enterprise	C	Complainant (trademark owner) wins  Single member panel
FA0509000567039	teensmart.com	C=Advanced Drivers Education Products and Training, Inc.  R= Michelle L. Samonek, of McDonough Holland & Allen	R	Interesting that it finds a portal / links to be legitimate use – some cases have not  Respondent wins  3 Member panel
FA05080005503	homedepotsucks.com	C=Homer TLC, Inc.	R	Protest site upheld – 'sucks'

45		R=GreenPeople		<p>added to domain name</p> <p>Respondent was actively using the name for protest site</p> <p>Trademark owner loses</p> <p>Respondent wins</p> <p>Single member panel</p>
FA0604000671304	mymorganstanleyplatinum.com	<p>C=Morgan Stanley</p> <p>R= Meow</p>	C	<p>Strange case - raised issue of whether a cat can hold a domain name</p> <p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
FA0604000672431	safeguard-storage.com	<p>C=Safeguard Operations, LLC</p> <p>R=Safeguard Storage</p>	R	<p>Respondent wins</p> <p>Trademark owner loses</p> <p>Single Member panel</p>
FA0503000436735	indb.com	<p>C=IMDb, Inc.</p> <p>R= Seventh Summit Ventures</p>	R	<p>Illustrates how trademarks registered after the domain name are not accepted</p> <p>Surprising though that indb is not considered confusingly similar to imdb</p> <p>Respondent wins</p> <p>Trademark owner loses</p> <p>3 Member panel</p>
FA0204000109386	whirlpoolparts.com and kitchenaidparts.com	<p>C=Whirlpool Properties, Inc. &amp; Whirlpool Corporation</p> <p>R= Ace Appliance Parts and Service</p>	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>

FA11020013742 40	golddustwest.org	C= Gold Dust West Casino  R= Michael Barnett	C	Straightforward cybersquatting case – meets all criteria  Complainant wins  Single member panel
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ANDRC CASES

<u>CASE NUMBER</u>	<u>DOMAIN</u>	<u>PARTIES</u>	<u>WINNER</u>	<u>NOTES</u>
CN-0800209	ruyanstore.com	C =Beijing SBT RUYAN Technology & Development Co.  R=Marios Papanikolaou	C	Complainant (trademark owner) wins  Single member panel
CN-0800208	chinauniopay.com	C=CHINA UNIONPAY CO., LTD.  R=DEMAND DOMAINS, INC.	C	Complainant (trademark owner) wins, but respondent had already agreed to transfer  Single member panel
CN-0700147	<a href="http://airchina.org">airchina.org</a>	C=Air China Limited  R=Interxis Technologies BVBA (Kurt Briers)	C	Complainant (trademark owner) wins  Single member panel
CN-0700137	carlylechina.com	C=T.C.Group, L.L.C  R=Chen Derong	C	Complainant (trademark owner) wins  Ample evidence of bad faith  Multimember panel
CN-0800195	biamp.net	C=Biamp Systems Corporation, Rauland-Borg Corporation  R=Shanghai Bipai Dianzi	C	Interesting defence, but ultimately shown to be false since the complainant did have a foothold in the Chinese market long before 2004  Complainant (trademark owner) wins  Single member panel
CN-0800198	<a href="http://redoffice.com">redoffice.com</a>	C=Beijing Redflag CH2000 Software	C	At first finding of no legitimate interests seems

		Co., Ltd. R=Li Li		<p>suspect since the name was apparently being used for a nonprofit site</p> <p>However, is justified in the following grounds: <b>The evidence submitted by the Complainant shows that the disputed domain name, since its registration in 2004, has not been used at least until April 2008. This led the panel to infer that the website for non-profit purpose was developed only after the dispute was brought.</b></p> <p>Complainant (trademark owner) wins</p>
				Single member panel
CN-0800193	boschhk.com	C=Robert Bosch GmbH R=GUANG ZHOU BOSCHHID AUTO SUPPL	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
CN-0700153	<a href="http://epson-paper.com">epson-paper.com</a>	C=精工爱普生株式会社 R=Wuxi Tenw Information Tec Co. Ltd.	C	<p>Straightforward case</p> <p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
CN-0600102	.inachina.com	C=Schaeffler KG INA R=warren	C	<p>Complainant (trademark owner) wins</p> <p>3 Member panel</p>
CN-0700134	<a href="http://cqtv.com">cqtv.com</a>	C=Chongqing Broadcasting Group	R	Takes Chinese law interpretation that if a trademark is not registered, it is not valid

		R=Qi Zhong Yan		Respondent wins Complainant loses, no trademark  Complaint fell down on criterion 1  3 member panel
CN-0700131	<a href="http://kraus-naimer.net">kraus-naimer.net</a>	C= Kraus & Naimer Gesellschaft m.b.H  R= Xu Peng Cheng	C	Complainant (trademark owner) wins  Single member panel
CN-0800187	<a href="http://592.com">592.com</a>	C=Zhai Zuolian  R= Chenmin	R	Failed on lack of trademark  Respondent wins  Single member panel
CN-0600114	<a href="http://asics-3c.com">asics-3c.com</a>	C=Asics Corporation  R= Asics Chen	C	Complainant (trademark owner) wins  Single member panel
CN-0700156	<a href="http://myteaforte.com">myteaforte.com</a>	C=Xinmin Cui  R= Lulin Gao	C	Complainant (trademark owner) wins  Single member panel
HK-0800183	<a href="http://likashing.org">likashing.org</a>	C= (1)Li Ka Shing ; (2) Li Ka Shing Foundation  R=Chui Siu Cheung of Bookmarkking Info.	C	Straightforward case – but respondent had in any case already agreed to the transfer  Common law trademark is recognised here. Reason - panel abiding by Hong Kong law, which does recognise common law trademarks.  Complainant (trademark owner) wins  Single member panel
HK-0800164	<a href="http://duoleshi.net.net">duoleshi.net.net</a>	C=Imperial Chemical	C	Complainant (trademark

		Industries Plc  R=YingGuo DuoLeShi Paint Co., Ltd.		owner) wins  Single member panel
HK-0800159	<a href="http://chinaiveco.com">chinaiveco.com</a>	C= Iveco S.p.A.  R=Nanjing Guoyuan Tech Ltd.	C	Complainant (trademark owner) wins  Single member panel
HK-0800155	<a href="http://shrue.com">shrue.com</a>	C=Shure Incorporated  R=Zhang Jia Bin	C	Complainant (trademark owner) wins  Single member panel
HK-0700150	<a href="http://desciclopedia.org">desciclopedia.org</a>	C=Carl Austin Bennett  R=Domain Park Limited	C	Seems a somewhat questionable decision – in that the trademark seems to have been filed after the domain name. Moreover panel does not explain why the trademark rights still stand under this circumstance.  Notwithstanding the fact that it wasn't used / offered to the public for sale, a convincing case doesn't seem to have been made on point 1.  Complainant (trademark owner) wins  Single member panel
HK-0700147	<a href="http://welovehongkong.com">welovehongkong.com</a>	C=Excellent Management Limited  R=Vich Marco	R	Interesting, but ultimately straightforward enough – the complainant failed to prove criterion 1  Interesting also that the panel stated it regretted the decision

				<p>since it believes that the complainant has a better claim to the name, but this isn't what matters – under the rules the case must fail</p> <p>Therefore respondent wins, complainant loses</p> <p>No trademark involved</p> <p>3 member panel</p>
HK-0700141	<a href="http://baiweiwine.com">baiweiwine.com</a>	<p>C=Anheuser-Busch, Inc</p> <p>R=Mr Zhao Tianhu</p>	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
HK-0700135	<a href="http://saia-borgess.com">saia-borgess.com</a>	<p>C=Saia-Burgess Electronics Holding AG</p> <p>R=Yueqingshi Kaidaliyibiao Co., Ltd</p>	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
HK-0700134	<a href="http://nvidia.mobi">nvidia.mobi</a>	<p>C=Nvidia Corporation</p> <p>R=施?? Shi ShuaiDong</p>	C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
HK-0700119	<a href="http://hkjmarksix.com">hkjmarksix.com</a>		C	<p>Complainant (trademark owner) wins</p> <p>Single member panel</p>
HK-0700116	<a href="http://theta-world.com">theta-world.com</a>	<p>C=Thetaworld Corporation</p> <p>R=Daniel Albrecht</p>	R	<p>Trademark registered 5 years after the domain name – so hard to find bad faith</p> <p>Respondent wins DESPITE not submitting a response</p> <p>Trademark owner loses</p> <p>Single member panel</p>

HK-0400044	<a href="http://citysuper.com">citysuper.com</a>	C=City Super Limited R=C.K. Li	C	Complainant (trademark owner) wins  3 Member panel
HK-0400047	<a href="http://plan-in.com">plan-in.com</a> <a href="http://qds-net.com">qds-net.com</a>	C=Plan In Interior & Contracting Co Ltd R=Ashura Lee	C C	Complainant (trademark owner) wins  Single member panel
HK-0400050	<a href="http://51botox.com">51botox.com</a>	C=Allergan, Inc  R=Shanghai Ilongen Bio Technology, Co., Ltd		Complainant (trademark owner) wins  Single member panel
HK-0400051	<a href="http://woerma.com">woerma.com</a>	C=WAL-MART Stores, Inc.  R=Weiqiu Zhong	C	Demonstrates that Chinese language equivalents of English-language trademarks are protected under the UDRP  Interesting also because the 'trademark' was in fact unregistered at the time of the domain name registration – yet protected – unlike some other cases – though was a well-known mark in China  Complainant (trademark owner) wins  Single member panel
HK-0400054	<a href="http://cathaypacificairline.com">cathaypacificairline.com</a>	C=Cathay Pacific Airways Limited R=Tang Nguyen	C	Complainant (trademark owner) wins  Single member panel
HK-0400055	<a href="http://page.com">page.com</a>	C=Sung Ok Cho  R=Korean Online Web Agency	R	Interesting case, but predictably it fell down straightaway on criterion 1.  Not the kind of thing the UDRP was intended to deal with.

				Complaint dismissed Complainant loses No trademark involved Single member panel
HK-0600084	<a href="http://asiabase.com">asiabase.com</a>	C=Asia Base A/S  R=Wah Ching Kwok	C	Correctly states that paragraph 4 a.(i) of the Rules does not require that rights need to be registered  (So why did earlier cases apparently require it?)  Complainant (trademark owner) wins  Single member panel
HK-0600083	<a href="http://chipmos.com">chipmos.com</a>	C=ChipMOS Technologies Inc.  R=Charles Yeh	C	Complainant (trademark owner) wins  Single member panel
HK-0600080	<a href="http://hennessy-cn.com">hennessy-cn.com</a>	C=Societe Jas Hennessy & Co  R=汕头市潮南区嘉柔化妆品有限公司	C	Complainant (trademark owner) wins  Single member panel
HK-0600079	<a href="http://randyhanger.com">randyhanger.com</a>	C=Randy Hangers, LLC  R=Chunshui Co. Ltd.	C	Complainant (trademark owner) wins  Single member panel
HK-0600078	<a href="http://tvclub.com">tvclub.com</a>	C=Television Broadcasts Limited  R=Chen Hua Zhong	C	Complainant (trademark owner) wins  Single member panel
HK-0600077	santonprene .com	C= Clifford Chance Advanced Elastomer Systems L.P  R= Li Ming	C	Straightforward case – apart from no confirmed ID on registrant  Complainant (trademark

				owner) wins Single member panel
CN-1000395	fuanna.com	C= Shenzhen Fuanna Bedding and Furnishing Co.,Ltd  R= CDN Properties Incorporated	C	Complainant (trademark owner) wins  Single member panel
HK-0500061	<a href="http://smartone-vodafone.com">smartone-vodafone.com</a>	C=SmarTone Mobile Communications Ltd. and Vodafone Group plc  R=Ho S	C	Complainant (trademark owner) wins  Single member panel
HK-0500064	<a href="http://cathypacific.com">cathypacific.com</a>	C=Cathay Pacific Airways Limited  R=Cathypacific Web Master	C	Complainant (trademark owner) wins  3 member panel
HK-0500066	<a href="http://ascotsports.com">ascotsports.com</a>	C=Pintas Consulting Group Sdn Bhd  R=hong ong	R	Failed on criterion 1 – DID NOT prove a service mark  Single member panel
HK-1100362	<a href="http://americaneagleboot.com">americaneagleboot.com</a>	C=Retail Royalty Company & AEO Management Co.  R=zhang han	C	Complainant (trademark owner) wins  Single member panel
HK-0600090	<a href="http://winghangbank.com">winghangbank.com</a>	C=Wing Hang Bank Limited  R=Richard Feldman	C	False registration details as one reason for bad faith  Otherwise straightforward  Complainant (trademark owner) wins  Single member panel
HK-0600092	<a href="http://macaus10t.com">macaus10t.com</a>	C=Sociedade de Lotarias e Aposta	C	Complainant (trademark owner) wins

		R=Xu Ming		Single member panel
CN-1000375	<a href="http://inlacoste.com">inlacoste.com</a>	C=LACOSTE S.A  R=Eyu Lang	C	Complainant (trademark owner) wins  Single member panel
HK-0600107	<a href="http://marrybrown.com">marrybrown.com</a>	C=Marrybrown Fried Chicken  R=Rare Domain DotCom		Complainant (trademark owner) wins  Single member panel
HK-0700113	<a href="http://manthiri.com">manthiri.com</a>	C=Sea N See Private Ltd.  R=iPlanet Network	C	Complainant (trademark owner) wins  Single member panel
HK-0700115	<a href="http://sydus.com">sydus.com</a>	C=Sydus Pte Ltd.;Saumil Nanavati  R=Jeonggon Seo	C	Complainant (trademark owner) wins  Single member panel
HK-0700112	<a href="http://palmrite.com">palmrite.com</a>	C=Dipped Products Limited  R=Mr. Eddy Tsai/Palmrite Corp	C	Complainant (trademark owner) wins  Single member panel
HK-1100367	<a href="http://olayclub.net">olayclub.net</a>	C= The Procter & Gamble Company  R= olayclu	C	Complainant (trademark owner) wins  Single member panel  Name not being used + this used as evidence of bad faith based on precedent.

## **Appendix 6.5: WG-A recommendations and the Names Council vote on each**

### **Working Group-A Recommendation**

1. Generally, the recommendations of Chapter 3 of the WIPO Report relating to Uniform Dispute Resolution Procedures (UDRP) should be put into place as soon as possible after the ICANN Board meeting in Santiago, Chile, subject to recommendation 2 [sic, 4]) below, and all Registrars should be required to adopt a UDRP, namely, that recommended by WIPO, until such time as ICANN decides that it should be replaced.

2. The DNSO recommends the adoption and implementation of a uniform Dispute Resolution Policy. Such DRP should be uniform across current gTLDs, approved by ICANN and implemented on a gTLD wide level in a uniform way.

3. Uniformity should affect both material or substantive rules as well as procedural rules with an effect on substantive rights of the parties. Some minor, administrative, differences could be implemented in procedures followed by different UDRP Service Providers. In this regard we recommend that ICANN establishes an accreditation process for DRP Service providers based on objective criteria, and that all accredited DRP Service Providers should be incorporated by the Registration Authorities in their Domain Name Registration Agreements with registrants.

4. For at least the balance of 1999, this UDRP should apply only to bad faith / abusive domain name registrations (cybersquatting) on a mandatory basis, but without precluding the parties' ability to litigate the dispute. Further, once proof of litigation is submitted to the WIPO panel, it should immediately cease its decisionmaking process pending the outcome of the litigation.

However, in light of the procedural and substantive concerns enumerated below that have been expressed by Respondents to the WGA RFC process, it is recommended these concerns should be referred back

### **Names Council Vote**

Unqualified yes: 11  
Yes with dissent: 3 (gTLD reps.)  
No: 1 (ccTLD rep.)  
Not voting: 2 (ccTLD reps.)

One late vote: Yes

Unqualified yes: 11  
Yes with dissent/comment: 4 (3-gTLD reps., 1-ccTLD rep.)  
No: 0  
Not voting: 2 (ccTLD reps.)

One late vote: Yes

Unqualified yes: 12  
Yes with dissent: 3 (gTLD reps.)  
No: 0  
Not voting: 2 (ccTLD reps.)

One late vote: Yes

Unqualified yes: 10  
Yes with dissent/comment: 5 (3-gTLD reps.; 1-ccTLD; 1- IPC)  
No: 0  
Not voting: 2 (ccTLD reps.)

One late vote: Yes

to WIPO for its reconsideration for a short, thirty day period. WIPO should be asked to call for an expert group of arbitrators and IP practitioners to work with it on an urgent basis to clarify the procedural implications of these concerns. WIPO's recommendations and conclusions in relation to these issues should then be put back before ICANN for evaluation by way of this, or another WG established for this purpose, for a two week period, before being implemented. However, this should not delay implementation of the WIPO UDRP.

[These concerns may be summarized:

- a. Need for a "user's guide" describing the process
- b. Need to accord SLD holder with a reciprocal right to appeal, using a legally adequate mechanism
- c. Need for future refinement of process timetable, including mechanism extensions
- d. Consideration of future development of substantive rules of decision independent of law of any particular nation
- e. Need for a more clearly articulated standard of proof to be used in deciding whether a registration was abusive.]

5. It is recommended that early in 2000, WIPO should be asked to provide a timetable in which it can make available its UDRP with an adequate number of arbitrators from a number of different countries who speak a cross section of languages, trained in online arbitration, making it possible to offer these dispute resolution services on a voluntary basis to disputants having trademark / domain name disputes. It is recommended that such voluntary dispute resolution shall not preclude access to courts unless both parties to the dispute contract out of such access, in which case the results of the online dispute resolution process will be final and binding.

Unqualified yes: 13  
Yes with dissent: 0  
No: 2  
Not voting: 2 (ccTLD reps.)  
One late vote: Yes

**Appendix 6.6: Summary of key points from public comments on establishment of a UDRP (August-September 1999)**

Source: ICANN public comments forum on UDRP establishment. Retrieved 19 September 2011, from <http://www.icann.org/en/comments-mail/comment-udrp/current/maillist.html>

<b>Position</b>	<b>Poster / affiliation</b>
<p>Outright opposition to principle of UDRP</p>	<p>David Schutt (Speco, Inc.);            Shari Steele (Electronic Frontier Foundation);            Carl Oppedahl (Background not disclosed);            Judith Oppenheimer (Consumer rights campaigner);            biker (Background not disclosed);            Michael Walker (Background not disclosed);            L &amp; P Nelson ((Background not disclosed);            Mikki Barry (Domain Name Rights Coalition);            Mark Duane ('online entrepreneur');            Terry Seale (Background not disclosed);            Theresa Amato (Consumer Project on Technology);            Maren S. Leizaola (Background not disclosed);            Matt Hooker            Webmaster@Net-Speed.com;            Celeste Brunson (Background not disclosed);            Dennis Schaefer (Background not disclosed);            Dan Parisi            WhiteHouse.com</p>

<p>No opposition to principle, but opposition to / proposed amendments to specific proposals</p>	<p>KathrynKL@aol.com (NCUC);  Barbara Simons (Association for Computing Machinery);  Mark Perkins (Secretariat of the Pacific Community Library);  A. Michael Froomkin(Professor of Law, University of Miami);  Russ Smith  <a href="http://consumer.net">http://consumer.net</a>;  Steve Hoss;   (hoss.com)  Sandra Murray (Background not disclosed);  Alan Smith  (supermarketpromotions.com);  Steven A. Jackson (Background not disclosed);  Tony Klinkert (Background not disclosed);  John Gilmore (Background not disclosed);  Mheltzer (INTA);  Douglas W. Kim  <a href="mailto:dwk@techattorney.com">dwk@techattorney.com</a>;  Mark Babiarz (Background not disclosed);  David Post -- Temple Univ. School of Law;  Mark Leventhal (Background not disclosed);  Charles Peterson (Background not disclosed);  Atsuo Torii(Hitachi, Ltd.);  Tepper, Maury (Glaxo Wellcome Inc.);  Curt Krechevsky  (Reebok International Ltd).;  John M. Jacobs (background not disclosed);  Toshi Tsubo (JPNIC);  Philip Davison (Gateway, Inc.);  Fred Carl III  (Bayer Corporation);  Kathryn Barrett Park, (NBA Properties, Inc);  Milton Mueller (Associate Professor, Syracuse University, School of Information Studies);  Sarah Deutsch (Bell Atlantic);</p>
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	<p>Fausett (Fausett, Gaeta &amp; Lund, LLP);  Anne Lucey (Viacom Inc.);  Scott B. Schwartz (Intel Corporation);  Caroline G. Chicoine (Blackwell Sanders Peper Martin Lawyers);  David Lizmi (background not disclosed);  Jonathan Weinberg  (Professor of Law, Wayne State University);  Tsuyoshi ONODERA (Japanese Patent Office);  Lee Schroeder (AIPLA);  Susan Anthony (MCI WorldCom);  Rita Rodin (AOL);  Tomohiro Nakamura (The Japan Intellectual Property Association);  Christopher Zaborsky (Background not disclosed)</p>
<p>No opposition to principle, but specific proposals of are seen as favouring trademark interests to an excessive degree</p>	<p>KathrynKL@aol.com (NCUC);  Barbara Simons (Association for Computing Machinery);  Mark Perkins (Secretariat of the Pacific Community Library);  Steve Hoss  (hoss.com);  John Gilmore (Background not disclosed);  Tony Mackay (Background not disclosed);  Mark Babiarz (Background not disclosed);  Jonathan Weinberg  Professor of Law, Wayne State University;  A. Michael Fromkin(Professor of Law, University of Miami);</p>
<p>Unqualified support for proposals</p>	<p>J. Scott Evans (INTA)  Jeffrey R. Kuester (Kuester Law)  B. Clark (Background not disclosed)</p>

<p>Supporting stronger trademark protections than those currently proposed</p>	<p>Mheltzer (INTA)  Douglas W. Kim  <a href="mailto:dwk@techattorney.com">dwk@techattorney.com</a>  Tepper, Maury (Glaxo Wellcome Inc.)  Curt Krechevsky  (Reebok International Ltd).  John M. Jacobs (background not disclosed)  Philip Davison Gateway, Inc.  Fred Carl III  Bayer Corporation  Kathryn Barrett Park  NBA Properties, Inc  Sarah Deutsch  Bell Atlantic  Anne Lucey  Viacom Inc  Scott B. Schwartz  Intel Corporation  Caroline G. Chicoine Blackwell  Sanders Peper Martin Lawyers  Lee Schroeder AIPLA</p>
<p>Criticising policy development process for not being sufficiently representative</p>	<p>KathrynKL@aol.com (NCUC)  Association for Computing Machinery;  Mark Perkins (Secretariat of the Pacific Community Library);  Joop Teernstra (Cyberspace Association);  Frederick W. Weingarten (American Library Association);  Raul Echeberria (Foro Latinoamericano de Redes);  Jim Fleming (Background undisclosed);  Alejandro Pisanty;  Russ Smith (<a href="http://consumer.net">http://consumer.net</a>);  David Post -- Temple Univ. School of Law;  Jeff Williams (INEGroup);  Matt Hooker;  Webmaster@Net-Speed.com;  A. Michael Froomkin  Professor of Law  University of Miami School of Law;  Jonathan Weinberg  Professor of Law, Wayne State University</p>

<p>NCUC should have been involved in drafting the policy</p>	<p>KathrynKL@aol.com (NCUC);  Association for Computing Machinery;  Mark Perkins (Secretariat of the Pacific Community Library);  Joop Teernstra (Cyberspace Association);  Frederick W. Weingarten (American Library Association);  Raul Echeberria (Foro Latinoamericano de Redes);  Jim Fleming (Background undisclosed);  Jeffrey Graber (Association of Internet Professionals);  Ellen Rony (Author);  A. Michael Froomkin (Professor of Law University of Miami School of Law);  Jonathan Weinberg (Professor of Law, Wayne State University)</p>
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**Appendix 6.7: Summary of major points raised in Public Comments Period on eUDRP proposals (12 July-12 August 2009).**

Source: ICANN Public Comments forum on eUDRP Proposals. Opened 12 July 2009.  
 Accessed 17 September 2011, at <http://forum.icann.org/lists/eudrp/>

<b>Position</b>	<b>Taken by (posters)</b>
Support for eUDRP	Kristine Dorrain (NAF); George Kirikos (Leap of Faith Financial Services Inc); Marco Rinaudo (Internet.bs Corp. - ICANN Accredited Registrar); Nick Wenban-Smith (Nominet UK) ; Steve Metalitz (IPC); Patrick M. Flaherty (Verizon); Zbynek Loebl (Czech Arbitration Court); Jérôme Rhein (F. Hoffmann-La Roche AG); Claudio DiGangi (International Trademark Association); Douglas M. Isenberg (GigaLaw); Philip S. Corwin (Internet Commerce Association); Yvette Wojciechowski (Fairwinds Partners LLC); James M. Bladel (GoDaddy); Sandrine Gerber (Droit & Affaires internationales)
Opposition to eUDRP	
Not clearly for or against the principle	Vijaya Sree Nidadhavolu (background not disclosed); Alexandre FOUCHER (Cecurity.com); Steve BILLON (ChamberSign France); Mr Michele Neylon (Blacknight Solutions)<not support it as it is>; Frank Michlick (DomainCocoon Inc)

<p>Safeguards must be taken to ensure respondents have actual notice of a proceeding</p>	<p>George Kirikos (Leap of Faith Financial Services Inc)  Vijaya Sree Nidadhavolu  Mr Michele Neylon (Blacknight Solutions)  Frank Michlick (DomainCocoon Inc.)  Sandrine Gerber  Institut Fédéral de la Propriété Intellectuelle  Sandrine Gerber (Droit &amp; Affaires internationales)</p> <p>Philip S. Corwin (Internet Commerce Association)  James M. Bladel (GoDaddy)</p>
<p>Hard copy of complaint must be issued to respondents</p>	<p>Vijaya Sree Nidadhavolu  Frank Michlick (DomainCocoon Inc.)  Sandrine Gerber  Institut Fédéral de la Propriété Intellectuelle  Douglas M. Isenberg (Gigalaw)  Philip S. Corwin (Internet Commerce Association)  James M. Bladel (GoDaddy)  Sandrine Gerber (Droit &amp; Affaires internationales)</p>

**Appendix 6.8: Summary of key points raised in Public Comments Period on Preliminary Report on the State of the UDRP. 15 May – 22 July 2011.**

Source: ICANN Public Comments Forum on Preliminary Report on the State of the UDRP. Opened 24 July 2011. Accessed 18 September 2011, at <http://forum.icann.org/lists/prelim-report-udrp/>

<b>Position</b>	<b>Taken by</b>
Support for immediate UDRP review	RySG; Danny Younger (Online journalist / former DNSO member); NCUC; Konstantinos Komaitis (Academic, University of Strathclyde); George Kirikos (Leap of Faith Financial Services Inc.); Philip S. Corwin (Virtualaw LLP, acting on behalf of Internet Commerce Association); David Simon (Teaching Fellow, Harvard Law School)
Opposition to immediate UDRP review	Sarah B. Deutsch (Verizon); Fritz E. Attaway (Motion Picture Association of America, Inc.); Rebecca Sandland (on behalf of International Federation of Intellectual Property Attorneys); Claudio Digangi (INTA); Elizabeth Cummings (Coalition Against Domain Name Abuse); Steve DelBianco (Business Constituency); Russell Pangborn (Microsoft); Kristine Dorrain (NAF); Brian Beckham (WIPO); Luca Barbero (MARQUES); David Taylor (Hogan Lovells LLP); Steven J. Metalitz (Coalition for Online Accountability); J Scott Evans (IPC); Frederick Felman (Markmonitor); Adam Scoville (RE/MAX, LLC); Susan Kawaguchi (Facebook Inc.); ICANN At-Large Staff

<p>Support for (or states not in opposition to) a UDRP review at some future time</p>	<p>Russell Pangborn (Microsoft); Luca Barbero (MARQUES); J Scott Evans (IPC); David Taylor (Hogan Lovells LLP); Rebecca Sandland (on behalf of International Federation of Intellectual Property Attorneys); Frederick Felman (Markmonitor)</p>
<p>Advocating substantive change to UDRP</p>	<p>Konstantinos Komaitis (Academic, University of Strathclyde); George Kirikos (Leap of Faith Financial Services Inc.); David Simon (Teaching Fellow, Harvard Law School)</p>
<p>Advocating procedural change to UDRP</p>	<p>Sarah B. Deutsch (Verizon); Elizabeth Cummings (Coalition Against Domain Name Abuse); Steven J. Metalitz (Coalition for Online Accountability); Philip S. Corwin (Virtualaw LLP, acting on behalf of Internet Commerce Association); Susan Kawaguchi (Facebook Inc.); Cruquenaire Alexandre (Professor,) University of Namur, Belgium; ICANN At-Large Staff; Konstantinos Komaitis (Academic, University of Strathclyde); George Kirikos (Leap of Faith Financial Services Inc.); David Simon (Teaching Fellow, Harvard Law School); Rebecca Sandland, on behalf of International Federation of Intellectual Property Attorneys</p>