

DESIGNING NON-NATIONAL SYSTEMS: THE CASE OF THE  
UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

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## INTRODUCTION

The rapid development of digital technologies is profoundly altering the means by which transborder disputes are settled and, in turn, how rules governing transborder activity are developed. A defining characteristic of digital technologies is their ability to transcend territorial boundaries, thereby challenging the unfettered jurisdiction of any single nation-state and complicating the application and enforcement of existing legal rules. Disputes implicating such technologies account for an increasingly significant portion of commercial litigation, and digital commerce has become a central feature of contemporary economic activity. National governments and private parties have thus come under pressure to find new ways to cut through the complex, cross-border disputes of the type that digital technologies engender.

Can existing lawmaking and dispute settlement mechanisms handle these growing pressures? The number of institutions operating outside the confines of national borders have become more numerous and heterogeneous in the last decades of the twentieth century. Indeed, their growth appears exponential.<sup>1</sup> Whether created by governments<sup>2</sup> or by private parties,<sup>3</sup> however,

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1. See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 44-58 (1999) (discussing profusion of venues for institutional and ad hoc arbitration); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 121-23 [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] (1999) (discussing recent growth in number of international courts and tribunals); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 298-99 (1999) [hereinafter Helfer, *Forum Shopping*] (discussing expansion of fora in which international human rights claims can be reviewed).

2. Dispute settlement institutions created by governments include permanent judicial bodies expressly empowered to hear claims concerning violations of treaties and more informal quasi-judicial tribunals or review bodies, whose interpretive and remedial powers are more ambiguous. Compare, e.g., Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055 (establishing International Court of Justice), and Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, [hereinafter DSU], and Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement]; and Legal Instruments—Results of the Uruguay Round, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 31, 33 I.L.M. 112 (1994) (establishing WTO dispute settlement panels and Appellate Body), and Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Eur. T.S. No. 155 (establishing permanent European Court of Human Rights), with, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, 59, U.N. Doc. A/6316, 999 U.N.T.S. 171 (entered

inter-national dispute settlement mechanisms (broadly construed as encompassing classical international,<sup>4</sup> supranational,<sup>5</sup> and anational<sup>6</sup> mechanisms) share a common characteristic, one that might be termed “deliberative construction.” International dispute settlement mechanisms do not spring up overnight. Instead, they are carefully built, often with agonizing slowness, through a process of give-and-take among negotiators wrangling over the subject

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into force Mar. 23, 1976) (establishing U.N. Human Rights Committee), *and* International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 212-38 (entered into force Jan. 4, 1969) (establishing the Committee on the Elimination of Racial Discrimination).

3. Institutional and ad hoc arbitration are the principal mechanisms by which private parties settle their differences internationally. *See, e.g.*, the International Chamber of Commerce (ICC), *at* <http://www.iccwbo.org> (last visited Oct. 2, 2001); the London Court of International Arbitration (LCIA), *at* <http://www.lcia-arbitration.com/lcia> (last modified May 24, 2001); the International Centre for Settlement of Investment Disputes (ICSID), *at* <http://www.worldbank.org/icsid> (last visited Oct. 2, 2001). For a complete list of institutional and ad hoc arbitration options, see <http://www.internationaladr.com/coordina.htm> (last visited Oct. 2, 2001). For a discussion of how international arbitration operates, see *infra* Part II.B.

4. The term “international” generally refers to the classic public international law paradigm that conceives of international law and its institutions as exclusively affecting nation-states. *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 59 (4th ed. 1990) (“It is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane.”).

5. The term “supranational” is “typically used to identify a particular type of international organization that is empowered to exercise directly some of the functions otherwise reserved to states.” Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 287 (1997). These functions are exercised in part by forming linkages with private parties, including individuals, groups, corporations, and voluntary organizations. Supranational adjudication, therefore, has been defined as

adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties—whether between a private party and a foreign government, a private party and her own government, private parties themselves, or, in the criminal context, a private party and a prosecutor’s office.

*Id.* at 289.

6. The term “anational” has frequently been used to describe efforts to “de-localize” commercial arbitration between private parties in different jurisdictions and to reduce the control that national legal systems exercise over such arbitration. Hans Smit, *A-National Arbitration*, 63 *TUL. L. REV.* 629, 631 (1989). From a broader perspective, two features have historically distinguished anational laws and institutions from international and supranational ones. First, anational institutions (including their dispute settlement mechanisms) are created principally by private parties with no or only limited assistance from states. Second, anational laws are not always an autonomous body of rules distinct from national law; rather they often incorporate or draw upon one or more national law sources. *Id.* at 632-33.

matter of disputes, the procedures for adjudicating them, the identity of parties who can bring claims, and the authority of the decision makers who will rule on those claims.<sup>7</sup>

Deliberative construction also allows governments and private parties the time to create checking mechanisms to control the power of international dispute settlement decision makers and to maintain the fidelity of those decision makers to the goals of the institution's founders. These checking mechanisms, in turn, prompt decision makers to adopt methodologies that internalize those goals. Deliberate speed thus serves to legitimize international institutions, which lack the intrinsic authority of national institutions of democratic states.<sup>8</sup>

Yet even when slowly and carefully built, international dispute settlement structures still intrude on national sovereignty by supplanting (or rivaling) the role of national courts or the use of national laws as rules of decision. And parties to international disputes often have a choice of venues where their controversy might be decided.<sup>9</sup> As a result, international institutions exert only a tenuous hold on actors, and maintaining legitimacy and the appearance of legitimacy is crucial to their success.<sup>10</sup> The jurists, arbitrators, and experts who serve on international dispute settlement bodies are aware of these concerns and respond to them by adopting incrementalist decision-making strategies. That is, they typically seek to build their authority slowly by paying careful

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7. Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 896 (2000) ("The actual process of treaty negotiation begins with months or even years of preparatory work."); Kal Raustiala, *Democracy, Sovereignty, and the Slow Pace of International Negotiations*, 8 INT'L ENVTL. AFF. 3 (1996) (noting the slow pace of international negotiation and lawmaking).

8. See Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 503-15 (2000) [hereinafter Dinwoodie, *A New Copyright Order*].

9. See, e.g., YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 7 (1996) (noting the "competition" among different arbitral centers); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 770 (1999) (noting that states that are parties to the NAFTA and the WTO Agreement may choose the dispute settlement mechanism of either body as a forum in which to commence proceedings).

10. See *infra* Part III.B.1. (discussing the importance of legitimacy to international dispute settlement).

attention to the written agreements that created them and by adhering closely to the mandates given by those who constructed the institution.<sup>11</sup> In addition, it often takes years for a functioning dispute settlement institution to reach maturity, attracting a steady diet of cases and developing a reputation as a place where controversies can be handled fairly and effectively.<sup>12</sup>

For social activity such as digital commerce that reinvents itself on a daily basis, however, reliance on leisurely processes to address

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11. For recent examples, see *Waste Mgmt., Inc. v. United Mexican States ICSID* (W. Bank No. ARB(AF)/98/2 ¶¶ 8-9 (June 2, 2000) (strictly interpreting conditions precedent to NAFTA chapter 11 dispute settlement and dismissing claim where claimant had not fully complied with those conditions); *Southern Bluefin Tuna Case* (Austl. and N.Z. v. Japan), Award on Jurisdiction and Admissibility, Aug. 4, 2000 (ICSID panel refusing to exercise jurisdiction over claims based on overlapping fisheries conservation treaties where one treaty arguably required consent of all contesting parties); *Robert Azinian v. United Mexican States ICSID* (W. Bank), No. ARB(AF)/97/2 (Nov. 1, 1999) (first NAFTA chapter 11 dispute settlement decision, construing expropriation narrowly and refusing to exercise jurisdiction over breaches of concession agreements); *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R ¶¶ 151-56 (Oct. 12, 1998) (WTO Appellate Body crafting a balancing test between the right of WTO members to preserve exhaustible natural resources and the duty to respect the trade rights of other members); *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (WTO Appellate Body, Dec. 19, 1997) (WTO Appellate Body reminding the first WTO TRIPS dispute settlement panel that the agreement of the parties as expressed in the treaty is paramount in interpreting the TRIPS agreement).

12. See REDFERN & HUNTER, *supra* note 1, at 50 & n.76 (noting that as of 1996, International Chamber of Commerce handled 9000 arbitration cases since its founding in 1923, of which more than 5000 were filed after 1980); Philip Alston, *Effective Function of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. ESCOR, 53d Sess., Agenda Item 15 ¶ 7, U.N. Doc. E/CN.4/1997/74 (1996) (noting recent increases in the number of communications being processed under the various United Nations human rights complaints procedures); Robert Y. Jennings, *The International Court of Justice after Fifty Years*, 89 AM. J. INT'L L. 493, 497-505 (1995) (noting recent growth in the docket of the International Court of Justice and discussing proposals to alleviate it); *The European Court of Human Rights: Historical background, organisation and procedure* ¶¶ 6-7 at <http://www.echr.coe.int/eng/EDocs/InfodocRevised2.htm> (last visited Oct. 2, 2001) (discussing large increase in Court's case law in 1980s after Court's founding in 1950s). See generally Katrina C. Szakal, *Book Annotation: Manual on International Courts and Tribunals*, 32 N.Y.U. J. INT'L L. & POL. 829, 858 (2000) ("International judicial institutions, some in place since the end of World War II, have seen their dockets expand greatly, and new courts and tribunals have been created to address specific aspects of international law and to hear cases arising under various international conventions and treaties."). One exception to this trend occurs in special-purpose tribunals and claims commissions, which receive an initial flurry of claims and then spend years adjudicating them and issuing only a select number of decisions on the merits. REDFERN & HUNTER, *supra* note 1, at 59 & nn. 17-18 (discussing the Iran-United States Claims Tribunal and the United Nations Compensation Commission).

transborder issues is particularly inapt and inept. Yet any attempt to establish too swiftly an institution to resolve such conflicts, or the too rapid enhancement by such an institution of its powers to deal with the new issues raised by digital activity, would clash with the deliberative construction and incrementalist decision-making qualities that have historically characterized international dispute settlement. Far more ominously, such efforts also may subvert both the legitimacy of international systems and the ability to create checking mechanisms that constrain the authority of dispute settlement decision makers.

In this Article, we address the challenge confronting private parties and governments seeking to resolve the problems of inherently transborder activity such as that generated by digital technologies.<sup>13</sup> We explore and critically assess the rapid growth of a new form of lawmaking, which we call “non-national,”<sup>14</sup> that has developed contrary to the traditional premises of deliberative construction and incrementalist decision making and that, in less than two years, has established itself as the leading exemplar for resolution of transborder problems.<sup>15</sup> The Uniform Domain Name

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13. The Internet almost necessitates a non-national mindset. However, although digital activities have been a precipitating factor in the recent development of non-national lawmaking, we do not restrict our analysis to laws affecting on-line activities. Many transborder events or disputes implicate normative and pragmatic issues that are similar to those that Internet-based disputes have forced us to consider. Indeed, an undernoted service of the Internet may have been to cast light on the false premises of existing analyses of the off-line world. Cf. André Lucas, *Aspects de Droit International Privé de la Protection d'Oeuvres de Droits Connexes Transmis Par Réseaux Numériques Mondiaux* [Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks], WIPO Doc. No. GCPIC/1, ¶ 8 (Nov. 25, 1998) (“It is indeed the great achievement of [the] Internet, after satellites, to have created an obligation to rediscover the international aspects of this discipline, too long masked, by overshooting the timid territorialism ....”).

14. In this Article, we use the term “non-national” to refer to lawmaking and dispute settlement structures that arise outside the sphere in which the nation state operates (both internally and in its relations with other states). Non-national lawmaking, like national lawmaking, has several institutional components. Here, we focus primarily on the dispute settlement mechanisms of non-national systems. These mechanisms themselves possess the capacity to make law through the generative power of adjudication. And by their reflection on (and of) the process by which they were created, they influence and offer insights into the broader lawmaking process. For a discussion of the diverse elements that comprise non-national systems, see *infra* Part II.A. and III.A. (discussing hybridization of non-national rules and their enforcement through private technologies).

15. Cf. Council for Trade-Related Aspects of Intellectual Prop. Rights, WTO, *Electronic Commerce Work Programme: Submission from Australia*, Doc. No. IP/C/W/233, ¶ 44 (Dec. 7,

Dispute Resolution Policy (UDRP or the Policy) was promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN)<sup>16</sup> in late 1999 to govern a narrow class of conflicts between domain name registrants and trademark owners.<sup>17</sup> The UDRP is a new legal creature unlike any of its international dispute settlement antecedents. It is a hybrid system containing an amalgam of elements from three decision-making models—judicial, arbitral, and ministerial—and it draws inspiration from international and national legal systems. However, 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.

It should come as no surprise that intellectual property law is providing the paradigm for new legal regulation of the transborder issues raised by digital technologies. Nowhere is the pressure to devise new lawmaking and dispute settlement mechanisms more keenly felt than in intellectual property law.<sup>18</sup> Intellectual property rights are at the heart of cyberspace: they protect the computer code that forms the architecture of cyberspace, the text, images, and sounds that comprise the bulk of on-line content, and the symbols that guide consumers through the maze of e-businesses.<sup>19</sup> However,

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2000) [hereinafter *Electronic Commerce Work Programme*] (suggesting that the UDRP has “arguably become a de facto international standard” for the resolution of cybersquatting disputes), available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/W233.doc>; WIPO.

16. ICANN is a not-for-profit corporation that was created by the U.S. government to operate the domain name system, among other things, in accordance with parameters set by the Commerce Department. Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (1998). As explained more fully below, it authorizes individual registrars to issue domain names in the generic top level domain names, and the administration of country code top level domains is delegated by ICANN (formerly by the Internet Assigned Numbers Authority) to authorities (“managers”) in the relevant country. See *infra* Part I.B.3.

17. Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter Policy]; Rules for Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> [hereinafter UDRP Rules].

18. See Torsten Bettinger & Dorothee Thum, *Territorial Trademark Rights in the Global Village – International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet (Part One)*, 31 I.I.C. 162, 163 (2000) (“Hitherto, the most frequent cause of legal disputes on the internet has been the infringement of trademark rights.”).

19. See WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE* (1995); LAWRENCE LESSIG, *CODE, AND OTHER LAWS OF CYBERSPACE* (1999); Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*,

the very same technologies that make intellectual property rights an increasingly pervasive part of a digitally networked world also enable infringements of those rights on a massive scale, generating new tensions between intellectual property owners and users over the allocation of legal entitlements and the proper definition of legitimate, noninfringing on-line activities.

Yet the international intellectual property system has historically, and paradoxically, been territorial in nature. Rather than developing a worldwide dispute resolution mechanism or a globally uniform intellectual property code, states that are parties to the major intellectual property treaties adopted a more decentralized approach during more than a century of incremental treaty revisions. They consigned the day-to-day enforcement of intellectual property rights to private party actions before national courts applying treaty-inspired domestic intellectual property laws and conflicts rules.<sup>20</sup> Serious and systemic treaty breaches were reserved for state-to-state dispute settlement mechanisms, such as the one now operated under the auspices of the World Trade Organization.<sup>21</sup> Such a system may function effectively when the key acts relating to intellectual property ownership and infringement can be localized within a particular national jurisdiction, but it is ill-suited

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84 IOWA L. REV. 611 (1999) (discussing effect of technological advances on trademark law); Sabra Chartrand, *Trademarks Gain Attention as Passports to the Internet and for a Critical Vote Ahead in Congress*, N.Y. TIMES, Sept. 25, 2000, at C8 (noting the increasingly important role of trademarks to Internet commerce because of the effect that trademark ownership has on the ability to obtain corresponding domain names).

20. The "inspiration" came in the form of substantive minimum standards of protection embodied in the treaties. See generally Dinwoodie, *A New Copyright Order*, *supra* note 8; Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIP Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 367 (1998) [hereinafter Helfer, *Adjudicating Copyright Claims*]. Adherent states are, however, free to provide protection in excess of the minimum standards. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 1C; LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994), art. 1(1).

21. See WTO Agreement, *supra* note 2. Leading pre-TRIPS international intellectual property agreements permitted a claim for violation of the treaty to be referred to the International Court of Justice. Berne Convention for the Protection of Literary and Artistic Works (1971 Paris text), 1161 U.N.T.S. 3, art. 33; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, art. 28, 21 U.S.T. 1583, 828 U.N.T.S. 305. However, because of a lack of effective enforcement mechanisms, no state invoked the dispute settlement provisions. J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 339 n.17 (1997).

to address the kinds of fast-developing, multi-jurisdictional conflicts that digital technologies can engender.<sup>22</sup> Indeed, the speed with which transborder conflicts now arise, both in the intellectual property context and elsewhere, suggests that a leisurely pace of lawmaking and institution building may simply be inadequate to the challenges at hand.

Precisely because of its departure from preexisting (and slower) models of lawmaking, the UDRP has received widespread press coverage and public scrutiny.<sup>23</sup> It has already been touted by scholars and policy makers as a model for settling cyberspace intellectual property disputes generally<sup>24</sup> (including digital copyright),<sup>25</sup> and even for all Internet-related disputes.<sup>26</sup> Demand to

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22. For a recent discussion, see American Bar Association Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* 120-31 (July 11, 2000), reprinted at 55 BUS. LAW. 1801 (2000) [hereinafter Cyberspace Jurisdiction Project]; Dinwoodie, *A New Copyright Order*, supra note 8, at 483-85 (discussing the need for dynamism in international copyright law); *id.* at 490-94 (discussing the limits of the classical model of public international copyright law).

To some extent, developments in EU intellectual property demonstrate that public international lawmaking can respond effectively to the demands of digital technologies. But intellectual property lawmaking in the EU is markedly different in character from the classical form of international intellectual property lawmaking found at the global level. *Id.* at 495-97. To replicate the EU developments globally would require structural political reforms, including the transfer of sovereignty and the establishment of standing institutions, which almost no country would currently contemplate. And there would be no guarantee that what has worked well in a relatively homogenous region such as the EU could do so in a more diverse global setting. See generally THE EU, THE WTO AND THE NAFTA: TOWARD A COMMON LAW OF INTERNATIONAL TRADE (J.H. Weiler ed., 2000).

23. See, e.g., Susan Carpenter, *Who Owns Your Name? Usually, It's Whoever Registered It First*, NEWSDAY, Sept. 27, 2000, at C14; Jeri Clausing, *In New Forum for Domain Name Disputes, Trademark Holders Dominate*, N.Y. TIMES, CyberLaw Journal, May 19, 2000, available at <http://www.nytimes.com/library/tech/00/05/cyber/cyberlaw/19law.html>; Orrie Dinstein & Elisabeth Cappuyns, *Pitfalls in ICANN's Domain Name Dispute Policy*, N.Y.L.J., Sept. 19, 2000, at 1; *ICANN Call It What I Want*, THE ECONOMIST, Sept. 9, 2000, available at 2000 WL 8143536; Clive Mathieson, *Easy Group plays down domain name setback*, THE TIMES OF LONDON, Sept. 21, 2000, at 33; Jon Swartz, *Profiteers Get Squat for Web Names: Cybersquatters Lose Intellectual Property Rulings*, USA TODAY, Aug. 25, 2000, at 1B; *Wall Street Journal wins domain name case*, THE TORONTO GLOBE & MAIL, Sept. 21, 2000, at T2.

24. See, e.g., Victoria Carrington, *Internet needs fast, fair dispute resolution process*, THE LAWYERS WEEKLY, Nov. 17, 2000 (asking "whether the UDRP system that is now confined to bad faith registrations ought to be and/or is capable of being expanded to include a broader range of intellectual property disputes that take place on the Internet").

25. Some have suggested that a system modeled on the UDRP would supplement or even supplant national court adjudication of the copyright infringement issues raised by the "notice and takedown" rules imposed upon Internet Service Providers in the United States and

extend the UDRP is likely only to increase as the pressures of globalization and the digital economy render traditional forms of lawmaking less practical and less normatively compelling.

At present,<sup>27</sup> however, the UDRP covers only a narrow segment of the myriad of intellectual property disputes currently percolating in cyberspace. In essence, the UDRP establishes fast and inexpensive on-line procedures<sup>28</sup> that allow trademark owners to

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Europe. For further discussion, see *infra* Part III.A.

26. See Cyberspace Jurisdiction Project, *supra* note 22, ¶ 1.4.7 (describing UDRP as a “promising example” for creating “new forms of dispute resolution” by private parties and governmental bodies for Internet disputes that cross national borders). See also *Hearings Before the Subcomm. on Telecommunications of the House Comm. on Energy and Commerce*, 107th Cong. (2000) (testimony of D. Vinto G. Cerf, Chairman of ICANN) (referring favorably to unnamed commentator who labeled the UDRP as “widely viewed as a model of dispute resolution for the 21st Century”); *Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Mark A. Thurman of the American Intellectual Property Law Association) (“The UDRP is a good example of an administrative procedure specifically developed for the Internet context. The efficacy of this administrative procedure suggests that similar procedures might be effective in resolving other types of Internet disputes.”); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) [hereinafter Froomkin, *Wrong Turn in Cyberspace*] (suggesting both extended and novel applications of ICANN’s private lawmaking model); *House Subcommittee Explores Internet Jurisdiction Issues*, 1 INTERNET L. & BUS. 822, 824 (2000) (reporting testimony of government officials concerning development of “private sector codes of conduct” for on-line consumer transactions enforced through alternative dispute resolution mechanisms); Tim Cole, *ICANN Domain Name Dispute Policy - Year One*, METRO. CORP. COUNS. 31 (2001) (Assistant Director of Arbitration for National Arbitration Forum heralding UDRP “as a model of dispute resolution for the 21st Century: a system specifically designed to serve specific parties with specific issues”).

27. Within six months of the commencement of proceedings under the UDRP, the World Intellectual Property Organization (WIPO) announced that it was undertaking a study of the proposed expansion of the Policy at the behest of a number of countries. WIPO has just issued its final report recommending some expansion of the UDRP. See WIPO, *The Recognition of Rights and the Use of Names in the Internet Domain Name Process, Report of the Second WIPO Internet Domain Name Process* (Sept. 3, 2001) [hereinafter *Final Report, Second WIPO Internet Domain Name Process*], available at <http://wipo2.wipo.int/process2/report/pdf>. For further discussion of WIPO’s lawmaking role with respect to the domain name system, see *infra* Part I.B.3.

28. Digital filing of pleadings and e-mail communication between the dispute settlement panel and the parties is the norm. The cost of initiating the proceeding ranges from \$750 and \$2000 per challenged domain name for a one-person panel and \$2200 to \$4500 for a three-person panel. Procedural rules and timetables are strictly enforced, with most decisions issued within 45 days of the filing of a complaint. For details concerning each of the four UDRP dispute settlement providers, see <http://www.arbforum.com/domains/domain-rules020101.asp> (last visited Oct. 3, 2001); <http://arbiter.wipo.int/domains/rules/supplemental.html> (last visited Oct. 3, 2001); [http://www.cpradr.org/ICANN\\_RulesAndFees](http://www.cpradr.org/ICANN_RulesAndFees).

recapture domain names held by persons who register and use domain names containing those marks in bad faith.<sup>29</sup>

Although the substantive content of the UDRP raises important issues of intellectual property law, we are concerned primarily with the process by which the UDRP was created, the way in which it is operating, and the conditions necessary for its replication.<sup>30</sup> Therefore, while recognizing the important interconnections between substance and process, Part I provides an historical overview of the UDRP's genesis: from the initial proposal by a consortium of Internet stakeholders, to its advocacy by the United States government, to its study by the World Intellectual Property Organization (WIPO), and the final revisions and implementation by ICANN. We also explain in Part I how the UDRP evolved from three different decision making models: adjudication, arbitration, and ministerial decision making. Although the drafters of the UDRP chose this hybrid structure to suit the needs of its inherently transborder setting, they did not foresee that the blending of these three systems would produce a confused mandate for UDRP panels.

Part II builds upon this insight by explaining the problematic nature of the checking functions within the UDRP. It contrasts the new hybrid dispute settlement system with its separate arbitral, ministerial, and judicial antecedents, noting in each case the inadequate or skewed checking functions established to control UDRP panels. We contend that the conceptual blurring of checking mechanisms created strong incentives for panelists to eschew incrementalist decision-making methods and inevitably gave momentum to the development of the Policy beyond its purportedly limited scope.

In Part III, we first address whether the UDRP can be applied in the absence of exclusive technological control of the type that ICANN now exercises over the domain name system. We conclude

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htm (last visited Oct. 3, 2001); and [http://www.eresolution.ca/services/dnd/p\\_r/supprules.htm](http://www.eresolution.ca/services/dnd/p_r/supprules.htm) (last modified Sept. 23, 2001).

29. The UDRP rests upon several central concepts defined in the Policy, principally "bad faith" registration and "use" by persons who have no "rights or legitimate interests" in a domain name. For a discussion of these terms, see *infra* Part I.B.3.

30. Cf. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 796 (1999) (attempting to "shift the focus of private international law scholarship from substantive law to the lawmaking process").

that such technological control is a sufficient but not a necessary condition for replicating the UDRP. But such replication should not occur without first questioning how a non-national paradigm ought to be structured. In particular, we identify the conceptual variables that will affect the viability of all non-national structures. These variables primarily flow from our analysis of the UDRP, but they have relevance far beyond that context. Indeed, legitimate and effective non-national structures cannot be developed without first giving careful attention to the parameters within which such structures operate, and to their relationship with national, international, and supranational institutions that until now have been the sole mechanisms for regulating transborder conduct.

#### I. HYBRID NON-NATIONAL SYSTEMS: THE EXAMPLE OF THE UDRP

In this Part, we present a historical overview of the UDRP's formation. In particular, we focus on how its progenitors came to establish a hybrid decision-making structure that draws on elements found in arbitration, adjudication, and ministerial decision-making systems. We also illustrate the complex interplay between government and private lawmaking bodies that characterized the UDRP's evolution. In doing so, we contrast the drafters' official history, which emphasizes the openness of the lawmaking process that created the UDRP, with the views of critics who challenge its legitimacy. Before turning to these narratives, we first explain the context in which trademark-domain name disputes arise.

##### *A. Framing Trademark-Domain Name Conflicts*

The need for domestic and international laws to regulate the interface between trademarks and domain names arises from the complex nature of domain names. Domain names designate Internet Protocol addresses used by computers linked to the Internet, and they may also act as source-identifiers (i.e. as trademarks).<sup>31</sup> Indeed,

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31. Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1, ¶ 30 (Spring 1995), at <http://www.richmond.edu/JOLT/v1i1/burk.html> ("Domain names ... appear to be both names and addresses; they both locate and identify Internet resources."); Marshall Leaffer, *Domain Names, Globalization*

existing trademarks can be registered as domain names.<sup>32</sup> However, various aspects of the domain name system pit that system against basic principles of trademark law. The low cost of domain name registration relative to the costs of building goodwill in a trademark, the uniqueness of each string of alphanumeric characters as an Internet address, and the global Internet presence that each address establishes, have spawned repeated conflicts between the owners of trademarks and domain name registrants. It is, however, the first-come-first-served registration policy for second level domain names<sup>33</sup> in the three principal Generic Top Level Domains (gTLDs)<sup>34</sup> that is the primary cause of conflict. This policy permits ownership of a domain name incorporating a trademarked term to reside in someone other than the relevant mark owner.

Reconciling the competing interests of trademark owners and domain name registrants has not proved an easy task, either nationally,<sup>35</sup> or internationally.<sup>36</sup> The territorial nature of trademark rights, the lack of a single body of rules governing trademark-

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*and Internet Governance*, 6 IND. J. GLOBAL LEGAL STUD. 139, 145 (1998) (domain names both designate where information is to be sent on the Internet and they often “indicate origin”).

32. See generally Graeme B. Dinwoodie, *(National) Trademark Laws and the (Non-National) Domain Name System*, 21 U. PA. J. INT’L ECON. L. 495 (2000) [hereinafter Dinwoodie, *National/Non-National*].

33. Registration by individuals or corporations occurs with respect to the second level domain names, that is, the part of the domain name appearing before the top level domain name. For example, in the domain name coke.com, “coke” is the second level domain name and .com is the generic top level domain. No single individual owns the top level domains.

34. The present generic top level domain names include .edu, .com, .gov, .org, .net, .int, and .mil, although ICANN has approved the creation of a variety of new top level domain names. In addition to the generic top level domains, domain names can be registered in country code top level domains (ccTLDs). The administration of ccTLDs is delegated by ICANN (formerly by the Internet Assigned Numbers Authority) to authorities in the relevant country. See generally Diane Cabell, *Foreign Domain Name Disputes 2000*, 17 COMPUTER & INTERNET LAW. 5 (Oct. 2000).

35. Even within the United States, which has the most developed body of case law concerning domain name conflicts, courts have struggled to adapt traditional trademark doctrines such as likelihood of confusion, dilution, and trademark fair use to the domain name system. See Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149, 151, 154 (2000) (noting the mixed success by U.S. trademark owners seeking to use “the trademark law already on the books” to challenge ownership of domain names assigned under the first-come-first-served policy).

36. See WIPO Joint Resolution on Well-Known Marks, Joint Resolution Concerning Provisions on the Protection of Well-Known Marks, General Report of the Assemblies of the Member States of WIPO, 34th Annual Meeting, Doc. A/34/16 ¶¶ 171-83 (Sept. 1999) (adopting provisions on the use of well-known marks in domain names).

domain name disputes, the difficulty of locating registrants, and the possibility that different domain name registrants own multiple iterations of a preexisting mark all make the prospect of litigating before national courts protracted, expensive, and perhaps even futile. Not surprisingly, trademark owners have expressed interest in streamlined and inexpensive non-national dispute settlement alternatives, particularly for disputes with a class of domain name registrants known as cybersquatters.<sup>37</sup>

This demand for non-national cybersquatting dispute resolution has persisted even as national legislatures have enacted new statutes specifically to combat cybersquatting,<sup>38</sup> and national courts have applied existing unfair competition laws against it.<sup>39</sup> Two reasons in particular explain this continued pressure. First, the ability of national law to reach domain name registrants located in foreign jurisdictions is unsettled and controversial.<sup>40</sup> Second,

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37. In its narrowest incarnation, cybersquatting is the act of registering a second level domain name that utilizes a preexisting trademark for the exclusive purpose of selling that domain name to the trademark owner for a profit. J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 25.69.1, 25.77 (1999). In courts, legislatures, and commentaries, cybersquatting has provoked an almost moral outrage and is often labeled as a form of blackmail, ransom, or piracy that is a clear abuse of the domain name system. *See id.* § 25.77 (characterizing cybersquatting as “ransoming [a domain name] back to the legitimate owner”); Litman, *supra* note 35, at 155 (noting that “domain name speculators struck courts as profoundly offensive”).

38. *E.g.*, Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1536 (codified at 15 U.S.C. § 1125(d) (Supp. V 1999)).

39. Dinwoodie, *National/Non-National*, *supra* note 32, at 508 n.43 (citing cases from China, France, Germany, India, and the United Kingdom). *See also Domain Name Cybersquatter Loses in Groundbreaking Japanese Litigation*, 15 WIPO REP. 7 (2001) (same under Japanese Unfair Competition Law); *Seoul District Court Enjoins Use of Mastercard Domain Name*, 14 WIPO REP. 394 (2000) (reporting the use of Korean unfair competition law against cybersquatting of registrations in the Korean country code domain).

40. For example, U.S. courts may not exercise personal jurisdiction over foreign registrants merely because they have registered a domain name with a registrar based in the United States. *See Heathmount A.E. v. Technodome.com*, 106 F. Supp. 2d 860 (E.D. Va. 2000). For this reason, among others, Congress extended the basic cause of action available under the ACPA to such registrations based upon the attachment jurisdiction of the courts. *See* 15 U.S.C. § 1125(d) (1994 & Supp. V 1999). But even that cause of action cannot enable U.S. courts to reach foreign domain name registrants who register domain names with a foreign registrar. The value of this in rem provision to trademark owners is seen in the concern expressed by the International Trademark Association that provisions in the draft Hague Convention on Jurisdiction and Recognition of Judgments, *see infra* Part III.B.7., might require the United States to repeal the provision. *See International Trademark Association, Comments on the Preliminary Draft Convention on Jurisdiction and the Recognition of Judgments* (Dec. 1, 2000) available at

litigating even easy cases under national laws in national courts imposes significant costs, creating incentives for trademark owners to pay the ransom cybersquatters demand rather than litigate. Inexpensive, non-national dispute settlement could resolve both of these concerns, eliminating the uncertainty of applying national laws extraterritorially and placing a cap on the price a squatter could extract from the mark owner. But whether a non-national dispute settlement system in fact achieves these results depends entirely on its structure, a subject to which we now turn.

### *B. The Evolution of Non-National Dispute Settlement for Cybersquatting*

Although the earliest conflicts between trademark owners and domain name registrants date back to the opening of the Internet to commerce in the early 1990s, proposals to develop non-national mechanisms to resolve these conflicts are of a far more recent vintage.<sup>41</sup>

#### *1. The gTLD-MoU's Administrative Challenge Panels (ACPs)*

In 1996, the Internet Assigned Numbers Authority (IANA) and the Internet Society<sup>42</sup> organized the Internet Ad Hoc Committee

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<http://www.uspto.gov/web/offices/dcom/olia/tmcybpiracy/haguecomments.pdf>.

41. Between 1995 and November 1999, Network Solutions, Inc. (NSI) sought to implement a series of nondiscretionary rules to regulate conflicts between trademark owners and domain name registrants. Briefly stated, that policy used temporal priority to establish rights to second level domain names that were identical to registered trademarks. If the trademark owner's registration predated the registrant's purchase of the domain name, and if the registrant could not establish its own superior trademark rights, then NSI put the contested domain name on hold. The parties were then forced to initiate judicial proceedings to determine ownership of the domain name, with NSI maintaining the status quo pending a court order concerning ownership. For a useful review, see Milton Mueller, *Technology and Institutional Innovations: Internet Domain Names*, 5 INT'L J. COMM. L. & POL. 1, 7-8 (2000) [hereinafter Mueller, *Technology and Institutional Innovations*], available at [http://www.ijclp.org/5\\_2000/pdf.ijclp\\_webdoc\\_1\\_5\\_2000.pdf](http://www.ijclp.org/5_2000/pdf.ijclp_webdoc_1_5_2000.pdf). The NSI policy was roundly condemned from all sides, and all but ignored in subsequent proposals for domain name dispute settlement.

42. The Internet Society is a nongovernmental international organization for global cooperation and coordination for the Internet and its internetworking technologies and applications. All About the Internet Society, at <http://www.isoc.org/isoc/> (last visited Oct. 8,

(IAHC) to revise the increasingly outdated structure of the Internet domain-name system.<sup>43</sup> In February 1997, IAHC published a document known as the Generic Top Level Domain Memorandum of Understanding (gTLD-MoU or the Memorandum).<sup>44</sup> The gTLD-MoU's principal objective was to establish a self-regulating, market-oriented mechanism for governing the domain name system. It advocated the creation of several new generic top level domains to be operated by a consortium of private, geographically-dispersed domain-name registrars operating under a common registration policy.<sup>45</sup>

A key component of that policy was an expedited, on-line dispute settlement system applicable to all registrars operating within the new gTLDs. As discussed in greater detail below, the center-piece of this system was the Administrative Domain Name Challenge Panels (ACPs) to be located within WIPO's Arbitration and Mediation Center. The ACPs were to receive complaints by certain intellectual property owners concerning second level domain names registered in these gTLDs.<sup>46</sup>

*a. The gTLD-MoU's Authority for Creating the ACPs*

The authority of IAHC to establish the ACPs was somewhat uncertain. On the one hand, the Memorandum contemplated that the International Telecommunications Union would act as a public depository for signatories to the gTLD-MoU, much in the way a

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2001). The Internet Assigned Numbers Authority (IANA) is the central coordinator for the assignment of unique parameter values for Internet protocols. See Robert Shaw, *Internet Domain Names: Whose Domain Is This?*, at <http://people.itu.int/~shaw/docs/dns.html> (last visited Oct. 3, 2001).

43. IAHC was comprised of an unusual consortium of international organizations, domestic governmental bodies, and private entities, including the Internet Architecture Board, the IANA, the Internet Society, the International Telecommunications Union, the International Trademark Association, the National Science Foundation, and WIPO. IAHC was dissolved on May 1, 1997. See <http://www.iahc.org> (last visited Oct. 3, 2001).

44. Internet Ad Hoc Committee, Internet Assigned Numbers Authority, Establishment of a Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System (gTLD-MoU) (Feb. 28, 1997) [hereinafter gTLD-MoU], available at <http://www.gtld-mou.org/gTLD-MoU.html>.

45. See *id.* § 2(d); *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1666-67 (1999).

46. gTLD-MoU, *supra* note 44, §§ 2(f), 8.

treaty would be administered.<sup>47</sup> Yet the drafters of the Memorandum expressly disclaimed its status as a source of public international law, an entirely sensible position given the non-governmental character of some of its proposed signatories.<sup>48</sup>

In the absence of any clear legal antecedents, the true source of legitimacy for this novel dispute settlement system was to be found, if at all, in the sovereignty of netizens in matters of the Internet.<sup>49</sup> More practically, if a broad consensus on the content of the dispute settlement policy could be achieved, the policy could then be enforced through a web of nominally consensual contractual relationships between domain name registrants and registrars.<sup>50</sup>

Yet the gTLD-MoU did not attract a broad spectrum of adherents. National governments declined to support the plan, and some critics claimed it was unduly beholden to trademark interests.<sup>51</sup>

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47. *Id.* p.mbl. The International Telecommunications Union is a specialized agency of the United Nations. *See also* Mueller, *Technology and Institutional Innovations*, *supra* note 41, at 17 (noting that the drafters of gTLD-MoU “organized an official signing ceremony in Geneva in an attempt to assume all of the trappings of an international treaty agreement”).

48. [Revised] Substantive Guidelines Concerning Administrative Domain Name Challenge Panels, at 3 (May 23, 1997), at <http://www.gtld-mou.org/docs/racps.htm> [hereinafter Revised Substantive Guidelines] (“the establishment of this procedure is not in any way the creation of an international law”). *See also* Vienna Convention on the Law of Treaties, art. 2(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 341 [hereinafter Vienna Convention] (defining a “treaty” as an international agreement concluded between States), *available at* <http://www.sils.org/Docs-Text-VCT.htm>.

49. *See infra* Part III.B.1. (discussing sources of legitimacy for non-national Internet regulation); *see also* Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name Case Study*, 74 *IND. L.J.* 587, 603 (1999) (arguing that informal and participatory consensus model used to adopt the Internet’s technical standards is ill-suited to public policy questions such as the structure and ownership of the domain name system).

50. Domain name registrars who joined a Council of Registrars (CORE) contemplated that the Memorandum would bind them to implement ACP decisions. Individual registrants, in turn, would submit themselves to the jurisdiction of the ACPs when applying to register a domain name with any such registrar. Memorandum of Understanding for the Internet Council of Registrars arts. 7(b), 7(c) (May 1, 1997), *available at* <http://www.gtld-mou.org/docs/core-mou.htm>.

51. Jonathan Zittrain, *ICANN: Between the Public and the Private*, 14 *BERKELEY TECH. L.J.* 1071, 1081 (1999). *See also* A. Michael Froomkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process*, at 10 (Aug. 26, 1999) [hereinafter Froomkin, *Semi-Private Rulemaking*] (“Critics of the gTLD-MoU charged that its author and proponents were over-solicitous of trademark interests”), *available at* <http://www.law.miami.edu/~froomkin/articles/tprc99.pdf> (draft on file with authors); Mueller, *Technology and Institutional Innovations*, *supra* note 47, at 16 (gTLD-MoU contained “concessions to trademark owners” which gave them “extraordinary power over domain name registrations”).

Others challenged the new system's accountability, asserting that the proposal "would tighten control of the Internet by IANA and the engineering community, thereby leaving a group of academics in charge of an increasingly commercial Internet."<sup>52</sup> As a result, the gTLD-MoU failed to achieve a critical mass of support and was soon short-circuited by the United States government's plan to privatize key aspects of the domain name system.<sup>53</sup>

*b. The Hybrid Nature of ACP Dispute Settlement*

Notwithstanding the failure of the gTLD-MoU to achieve widespread acceptance, the ACP proposal is worthy of analysis, both because of the difficulty of situating it within any preexisting model of dispute settlement and as an antecedent to similar conceptual ambiguities found in the later-adopted UDRP. In particular, the ACP proposal would have created a new dispute settlement creature that blended public and private elements and that was not wholly ministerial, judicial, or arbitral in nature.

Throughout the public comment and revision period, the ACP guidelines sought to downplay the power and authority of dispute settlement panels. The guidelines stated that ACPs would perform solely "an administrative function" in deciding disputes between intellectual property right owners and domain name registrants.<sup>54</sup> They rejected the contention that the ACPs constituted "an international court" or even "a legal authority," and renounced any

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52. *Developments in the Law*, *supra* note 45, at 1666. See also Heather N. Mewes, *Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System*, 13 BERKELEY TECH. L.J. 235, 242 (1998) (characterizing gTLD-MoU's as a "self-appointed, unaccountable, and illegitimate decision-making body" based in part on its failure to include national governments in the decision-making process and the participation of United Nations specialized agencies).

53. *Developments in the Law*, *supra* note 45, at 1666. The United States government exercised de facto veto power over the domain name system as a result of its control over the domain name root server. See Milton Mueller, *ICANN and internet governance: sorting through the debris of 'self-regulation,'* 1 INFO 497, 498 (Dec. 1999) [hereinafter Mueller, *ICANN and internet governance*].

54. Third Revised Draft, Substantive Guidelines Concerning Administrative Domain Name Challenge Panels (Jan. 16, 1998) at 2 [hereinafter Third Revised Draft], available at <http://www.gtld-mou.org/docs/tracps.htm>.

“jurisdiction over persons, or over the interpretation and enforcement of national or regional intellectual property laws.”<sup>55</sup>

In a limited way, this nondiscretionary “administrative” vision (approximating ministerial decision making) was accurate.<sup>56</sup> The guidelines for the first iteration of the proposal set forth “objective standards and criteria” to be applied by the ACPs. Those criteria preceded by the word “shall” were deemed to be conclusive, such that “if met, they automatically result in fulfillment of the standard.”<sup>57</sup> For example, under the first iteration of the policy, if a complaining party could show thirty-five or more trademark registrations for the same goods or services in at least four geographical locations, the panel would be required to conclude that its mark was “internationally known” and thus eligible for protection under the policy.<sup>58</sup>

Yet numerous other provisions of the proposal belie the claim that the ACPs were merely performing a ministerial function. For example, in its final request for comments, the gTLD-MoU’s Policy Oversight Committee asserted that the ACPs would “solv[e] difficult international jurisdictional and choice of law issues,” would “efficiently deal with the problem of domain name trafficking,” and would “uniquely, take into account the interests of legitimate domain name users as well as trademark owners.”<sup>59</sup> No administrative body with purely ministerial powers could solve such

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55. Revised Substantive Guidelines, *supra* note 48, at 3(c). The gTLD-MoU sought to justify this narrow interpretation of the ACP powers by emphasizing that panels would in no way “inhibit, affect or prevent the power of the appropriate national or regional courts to hear cases interpreting and enforcing intellectual property rights that fall within their jurisdiction.” gTLD-MoU, *supra* note 44, § 8(c); *see also* Third Revised Draft, *supra* note 54, at 2 (parties to ACP proceedings not precluded from filing complaints before national courts or initiating other forms of dispute settlement).

56. For a definition of “ministerial” in this context, see *infra* notes 244-46 and accompanying text.

57. Revised Substantive Guidelines, *supra* note 48, § IV ¶ 2.

58. *Id.* §§ IV, IV(A). The decision as to whether a registration relates to the same goods or services is not necessarily a nondiscretionary one, however. For example, United States trademark registrations may, because of their limitation to the goods upon which the mark has been used, contain quite different descriptions of goods and services than those found elsewhere. Thus, would registration in the same international class be sufficient to constitute the same goods or services, or would the standard require a complete identity of description?

59. gTLD-MoU Policy Oversight Committee, *Request for Comments*, at 2 (Jan. 16, 1988), available at <http://www.gtld-mou.org/docs/notice-98-01.html>.

intractable problems or engage in such delicate balancing of competing policies.

How, then, would the ACPs achieve these ambitious goals? As even a cursory review of the ACP guidelines makes clear, the ACPs were also granted broad powers that were decidedly judicial in nature.<sup>60</sup> The panels were to apply numerous sets of “criteria” and “factors” to decide questions such as the nature and scope of the claimant’s intellectual property rights, the countervailing rights of the respondent domain-name owner, and the interests of third parties, including governmental or regional authorities.<sup>61</sup> Above all, panels were to balance all the relevant circumstances and the competing rights of all parties involved.<sup>62</sup>

The broad and discretionary scope of remedies available to panels was equally suggestive of a judicial procedure. Panels could provisionally suspend or permanently exclude any second level domain name from use by the registrant or anyone other than the complainant. In exceptional cases, ACPs could even proactively exclude a second level domain name from use throughout the gTLD system by anyone other than the intellectual property owner. Finally, subject to the agreement of both parties, panels could modify the domain name, for example by reassigning it to a different gTLD, or by indexing or web site linking.<sup>63</sup> ACP decisions, including an apportionment or award of costs, were to be published on WIPO’s web site. Affected parties dissatisfied with a decision could appeal it to a three-member ACP Appeal Panel, which would have possessed discretionary jurisdiction to decide whether the panel made “an obvious and material mistake of fact or was manifestly unreasonable.”<sup>64</sup>

The ACPs judicial functions on matters of substance, however, were situated within a broader framework of international

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60. For a more detailed discussion of the scope of ACPs’ substance and powers, see G. Peter Albert, Jr., *Eminent Domain Names: The Struggle to Gain Control of the Internet Domain Name System*, 16 J. MARSHALL J. COMPUTER & INFO. L. 781, 795-814 (1998).

61. See Third Revised Draft, *supra* note 54, § V; IAHC, *Final Report of the International Ad Hoc Committee: Recommendations for Administration and Management of gTLDs*, § 7.1.2 (Feb. 4, 1997), available at <http://www.gtld-mou.org/draft-iahc-recommend-00.html>.

62. Revised Substantive Guidelines, *supra* note 48, §§ IV, IV(A).

63. Third Revised Draft, *supra* note 54, § III(A).

64. *Id.* § VII. The Appeal Panel’s discretionary authority emanated from its power to “summarily dismiss the appeal if it is apparent that the determination made no such mistake or was not manifestly unreasonable.” *Id.*

arbitration. The gTLD-MoU proposal required WIPO's Arbitration and Mediation Center to draft a comprehensive set of procedural rules for ACPs. The rules, which on the whole paralleled those of established centers of international commercial arbitration, including those of the WIPO Center,<sup>65</sup> addressed such traditional arbitral concerns as the selection, composition, and qualifications of the panelists, and the conduct of the proceedings. They also conferred upon the WIPO Center certain oversight functions, including the consolidation of claims, the appointment of the panel from its roster of decision makers, and review of party challenges to individual arbitrators.<sup>66</sup>

*c. Narrowing the Scope of Eligible Disputes*

Perhaps as a result of the ACPs' novel features, the stakeholders to be affected by ACP rulings sought to narrow the scope of registrant conduct eligible for mandatory panel review. Thus, the revised versions of the proposal introduced a screening device<sup>67</sup> that permitted panels to hear a complaint against a domain name owner only if that person had "manifestly acted in bad faith" or if there

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65. See WIPO Arbitration Rules (effective Oct. 1, 1994) (on file with authors).

66. See Tricia A. Hoefling, *The (Draft) WIPO Arbitration Rules for Administrative Challenge Panel Procedures Concerning Internet Domain Names*, 8 AM. REV. INT'L ARB. 173 (1997). The WIPO ACP Arbitration Rules themselves are reproduced in Stuart Levi et al., *The Domain Name System & Trademarks*, 520 PLI/Pat 9, 93 (1998).

Other traditional features of international arbitration were wholly absent from the ACP proposal. These included the voluntary decision by both parties to submit to arbitration in the first instance; the choice of substantive and procedural rules and participation in appointing the panel; and the nonfinality of any award for purposes of subsequent review by national courts. The existence of an appeal panel also departed from the traditional arbitral model. See Hoefling, *supra* note 66, at 178 n.15, 184-85; Revised Substantive Guidelines, *supra* note 48, § V(A).

67. This narrowing of the scope of the proposal was offset, to some extent, by changing the entities eligible to file ACP complaints. The initial proposal allowed complainants to file a claim with the ACP only if its trademark was "internationally known." Revised Substantive Guidelines, *supra* note 48, § II (characterizing international knowledge of trademark as the "entry standard" for ACP proceedings). This hurdle was abandoned in subsequent proposals to allow all trademark owners to submit complaints to the ACPs. It would be consistent with international (and most national) trademark law to accord owners of well-known marks greater protection than owners of marks generally. See Graeme B. Dinwoodie, *Federalized Functionalism: The Future of Design Protection in the European Union*, 24 AM. INTELL. PROP. L. ASS'N Q.J. 611, 655 n.123 (1996) (discussing the linkage in intellectual property law between thresholds for protection and the scope of protection).

was a “[m]anifest [i]mbalance [b]etween the [r]ights and [i]nterests of the [p]arties.”<sup>68</sup> The policy listed domain name “trafficking” as the only concrete example of conduct falling within these jurisdictional limits, although it gave that term a rather broad and open-ended interpretation.<sup>69</sup> For other types of cases, such as those involving “conflicting but evenly balanced intellectual property rights,” the policy required the panel to find that the case was not appropriate for the ACP and permitted it to recommend other forms of dispute resolution.<sup>70</sup>

## 2. *The WIPO Domain Name Consultative Process*

Each of these three attributes of the failed ACP proposal—the questioning of its authority and legitimacy, the hybrid nature of its dispute settlement architecture, and a narrowing of the subject matter of disputes eligible for review—was to be repeated as the focus of policymaking shifted in 1998 to the United States government and then back to WIPO. Initially, it was the U.S. Department of Commerce that intervened in the debate over the structure of the domain name system. In its February 1998 Green Paper and its June 1998 White Paper, the Department proposed a plan to transfer control of the domain name system to a private, nonprofit corporation.<sup>71</sup>

In addition to addressing larger questions of Internet governance, the White Paper also considered how trademark-domain name

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68. Third Revised Draft, *supra* note 54, § V(B). This screening requirement, however, did not apply to the separate proposal to allow trademark owners proactively to exclude on an *ex parte* basis domain name ownership by anyone other than themselves.

69. *Id.* The policy stated:

The ACP may make a determination in favor of a Party when it finds that the other Party has engaged in trafficking (cybersquatting, cyberjacking or warehousing), through the deliberate registration of an SLD [second level domain name] without relevant rights, on account of the SLD being identical or confusingly similar to the alphanumeric string that is the subject of the Claimant’s intellectual property right, in order to hoard or to resell the domain name, or for other cognate purposes.

*Id.*

70. *Id.*

71. Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826 (Feb. 20, 1998); Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) [hereinafter White Paper].

controversies should be resolved. Responding to public comments suggesting the need for an on-line dispute resolution mechanism to provide inexpensive and efficient alternatives to litigation, the White Paper proposed a process of international consultations conducted under the auspices of WIPO. These discussions were to culminate in a proposal to the new corporation concerning three issues: (1) a uniform dispute settlement system, (2) protection of famous trademarks, and (3) the effect of creating new gTLDs on intellectual property rights.<sup>72</sup> The White Paper acknowledged that these issues were highly controversial. For this reason, it urged that the jurisdiction of any new dispute settlement body be limited to instances of “cybersquatting and cyberpiracy,” leaving to national courts cases in which “legitimate competing rights” are concerned.<sup>73</sup>

*a. Authority for WIPO Consultations and Proposals*

Before turning to the substance of the proposals WIPO generated in response to the White Paper, it is necessary to address the source of WIPO’s authority (upon the request of the United States government) to engage in these consultations and to publish its

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72. The White Paper’s core recommendation provided:

The U.S. Government will seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademark holders with legitimate competing rights), (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects . . . of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs.

White Paper, *supra* note 71, at 31,747.

73. *Id.*

proposals. As we indicate below, there is a significant debate over that issue.

From one perspective, WIPO's consultative process was a natural and unobjectionable outgrowth of its functions as a specialized agency of the United Nations charged with "promot[ing] the protection of intellectual property throughout the world."<sup>74</sup> As part of this treaty-based mandate, WIPO administers the major intellectual property conventions, provides legal and technical assistance to national governments, organizes international conferences, creates expert commissions and standing committees, prepares studies on intellectual property issues, and holds conferences at which new international intellectual property agreements are negotiated. According to the WIPO secretariat, the two hallmarks that characterize all of these activities are "communication and international cooperation."<sup>75</sup>

True to this tradition, WIPO initiated a multi-staged and broad-based consultative process to consider the issues raised in the White Paper. In July 1998, it issued an initial Request for Comments to "obtain[] consensus on the issues to be addressed," followed by a period during which it solicited comments and held consultations with interested parties.<sup>76</sup> WIPO also convened a geographically and ideologically balanced panel of experts to advise it on drafting recommendations. It published an interim report in late December 1998,<sup>77</sup> invited a further round of comments and consultations, and then drafted a detailed and comprehensive final report on April 30, 1999, nine months after initiating the process.<sup>78</sup>

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74. Convention Establishing the World Intellectual Property Organization, July 14, 1967 (as amended on Sept. 28, 1979), art. 3(i) [hereinafter WIPO Convention], available at <http://www.wipo.int/members/convention/Con1.htm>. As of January 1, 2000, 171 member-countries belonged to WIPO.

75. WIPO, *General Information*, at <http://www.wipo.int/about-wipo/cn/gib.htm> (last modified June 2000).

76. WIPO, *RFC-3, Interim Report of the WIPO Internet Domain Name Process* (Dec. 23, 1998), ¶ 25 [hereinafter *Interim Report*], available at <http://wipo2.wipo.int/process1/rfc3/index.html> (last visited Sept. 7, 2001).

77. *Interim Report*, *supra* note 76.

78. WIPO, *Final Report of the WIPO Internet Domain Name Process* (Apr. 30, 1999) [hereinafter *Final Report*], available at <http://wipo2.wipo.int/process1/report/finalreport.html>. See also Harald Tveit Alvestrand, *My comments to the WIPO process and its result*, at <http://www.alvestrand.no/ietf/wiponote.html> (last visited Oct. 3, 2001) (member of panel of experts referring to final stages of WIPO consultative process as a "fast and furious

Throughout this period, WIPO solicited input from a wide spectrum of interested parties, including national governments, intergovernmental organizations, professional associations, and private corporations and individuals. It also used four distinct modalities to maximize that input: (1) a trilingual web site for publication of information, documents, and commentary; (2) an open, unmoderated listserv discussion forum; (3) the mailing of hard copies of the requests for comments to the governments and industrial property officers of each of its more than 170 member states and to each nongovernmental organization accredited as a WIPO observer; and (4) a series of open consultation meetings held in the major regions of the world.<sup>79</sup>

Notwithstanding these multifarious efforts to promote public awareness and input, the WIPO process merits careful scrutiny. First, WIPO was engaged in an act of collaboration between public and private entities quite unlike its historical role.<sup>80</sup> It acted upon a request from a single national government (the United States) to convene a study that would ultimately be submitted for consideration not by other national governments, or by a conference of governmental representatives negotiating a new treaty, but rather by a private corporation that was not even in existence at the time the WIPO study commenced. This private corporation had the power, through its control over the domain name system and its relationship with the United States government, to implement the WIPO proposals without further consultation with or approval by any of the many affected national governments.<sup>81</sup>

To be sure, WIPO's legislative body, the General Assembly, authorized the WIPO Secretariat to conduct the process and later approved the final report (five months after the Secretariat had submitted it to ICANN).<sup>82</sup> These endorsements, however, do not

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endgame").

79. *Interim Report*, *supra* note 76, ¶¶ 24-29; *Final Report*, *supra* note 78, ¶¶ 26-31 & Annexes II & III.

80. Professor Michael Froomkin has referred to this collaboration as an act of "semi-private rulemaking." Froomkin, *Semi-Private Rulemaking*, *supra* note 51, at 2.

81. WIPO does on occasion advise and provide technical assistance to single governments on the development of intellectual property laws. However, the laws that result from this advice are typically national in nature, and directly affect only the country that is seeking advice and guidance.

82. WIPO, *General Report adopted by the Assemblies of the Member States, Item 14 of the*

alter the fact that the consultative process sharply diverged from traditional forms of WIPO contributions to rulemaking, such as the drafting of model national laws or expert reports to support multilateral treaty negotiations.<sup>83</sup> In the latter instances, WIPO's proposals—no matter how expertly researched or enriched by input from affected constituencies—are filtered through one or often several layers of additional review as individual national governments decide whether (and with what modifications) to enact the model law or ratify the treaty. In contrast, these traditional democratic checks on WIPO's powers were wholly absent from the domain name process.

If WIPO's consultations were truly broad-based and transparent, much of the force of this legitimacy critique might be blunted. Filtering proposals through national governmental processes serves as a democratic check on lawmaking because those processes provide a vehicle for airing a range of views held by interested actors. But if Internet participants can contribute directly to the process of creating the norms that govern their on-line conduct, why settle for an indirect, second-best alternative?

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*Consolidated Agenda: Intellectual Property and the Electronic Commerce* ¶ 156 (Sept. 15, 1998) (approving of Secretariat's undertaking of consultative process), available at [http://www.wipo.org/eng/document/govbody/wo\\_gb\\_ab/a33\\_8-14.htm#643\\_157650](http://www.wipo.org/eng/document/govbody/wo_gb_ab/a33_8-14.htm#643_157650); WIPO General Assembly, *Twenty-Fourth (14th Ordinary) Session, Report adopted by the General Assembly*, WIPO Doc. No. WO/GA/24/12 ¶ 13 (Sept. 29, 1999) (approving of results of consultative process and submission of final report to ICANN), available at [http://wipo.org/cng/document/govbody/wo\\_gb\\_ga/ga24\\_12.htm](http://wipo.org/cng/document/govbody/wo_gb_ga/ga24_12.htm).

83. WIPO is engaging in a variety of new soft-law initiatives that are more removed from these typical roles. See, e.g., WIPO, *Assemblies of the Member States of WIPO, Thirty-Fourth Series of Meetings* (Sept. 1999), *Joint Resolution Concerning Provisions on the Protection of Well-Known Marks*, WIPO Doc. No. A/34/13 ¶ 9, at 3 (Aug. 4, 1999) (“[T]his creates no legal obligation for any country, but following such a recommendation would produce practical benefits.”), available at [http://www.wipo.int/eng/document/govbody/wo\\_gb\\_ab/pdf/a34\\_13.pdf](http://www.wipo.int/eng/document/govbody/wo_gb_ab/pdf/a34_13.pdf); WIPO General Assembly, *General Assembly, Twenty-Third (10th Extraordinary) Session, Activities of the Standing Committee on the Law of Patents (SCP), the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and the Standing Committee on Information Technologies (SCIT)*, WIPO Doc. No. WO/GA/23/1 (Sept. 4, 1998) (noting the establishment of standing committees and discussing their activities), available at [http://www.wipo.org/eng/document/govbody/wo\\_gb\\_ga/ga23\\_1.htm](http://www.wipo.org/eng/document/govbody/wo_gb_ga/ga23_1.htm). Some of these are attracting scholarly criticism. See William R. Cornish, *Genevan Bootstraps*, 19 EUR. INTEL. PROP. REV. 336 (1997) (complaining that WIPO's publication of Notes on the Model Provisions on Unfair Competition was an attempt to promote a particular, expansive interpretation of international treaty obligations).

Theoretically, two rejoinders apply. First, direct participation via active Internet communities has been subjected to persuasive critiques by those who doubt its efficacy as a tool of representational lawmaking.<sup>84</sup> Second, states may have interests apart from the citizens who participate directly in Internet activities because states represent the interests of many who, although uninvolved in the construction of the Internet, are affected by it.

Yet even assuming these theoretical challenges can be overcome, practical difficulties of ensuring an open and representative law-making process remain. As U.S. law professor and WIPO expert panelist Michael Froomkin has argued in articles and position papers published during and after the WIPO consultations,<sup>85</sup> formal transparency in theory cannot ensure broad-based participation in fact. From Froomkin's perspective as a critical insider, the consultative process was "not well understood by the public or even key participants"<sup>86</sup> and suffered from a number of flaws, including an unduly rushed timetable for review and comments, domination of meetings by commercial and intellectual property interests, and the addition of new information by WIPO staff after the close of the public comment period and with insufficient input from the panel of experts.<sup>87</sup>

These critical observations by a key participant do not negate WIPO's significant accomplishments, but they clearly affect the "perceptions of fair and encompassing process" upon which the political legitimacy of this novel lawmaking exercise depended.<sup>88</sup> They also made WIPO more vulnerable to the charges of its critics that it was acting as an advocate for one view of intellectual

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84. E.g., Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000) (critiquing claim that a self-governing cyberspace would more fully realize liberal democratic ideals).

85. A. Michael Froomkin, *Of Governments and Governance*, 14 BERKLEY TECH. L.J. 617 (1999) [hereinafter Froomkin, *Governance*]; Froomkin, *Semi-Private Rulemaking*, *supra* note 51; A. Michael Froomkin, *A Commentary on WIPO's The Management of Internet Names and Addresses: Intellectual Property Issues* (May 19, 1999) [hereinafter Froomkin, *WIPO Commentary*], available at <http://www.law.miami.edu/~amf/commentary.htm>.

86. Froomkin, *Semi-Private Rulemaking*, *supra* note 51, at 2.

87. Froomkin, *WIPO Commentary*, *supra* note 85, ¶¶ N-17.

88. Froomkin, *Semi-Private Rulemaking*, *supra* note 51, at 4. Among WIPO's accomplishments, in Froomkin's view, was its willingness to make substantial albeit insufficient changes to the interim report, and its clear definition of cybersquatting (which was superior to definitions that preceded it). *Id.* at 17, 20.

property protection rather than as a neutral exponent of a more balanced policy.<sup>89</sup>

WIPO's past participation in the failed gTLD-MoU regime, which some observers viewed as unduly pro-trademark, also fueled this perception of bias.<sup>90</sup> Recall that the gTLD-MoU proposal for ACPs would have set up WIPO's Mediation and Arbitration Center as the sole arbitral body to hear intellectual property complaints against domain name owners.<sup>91</sup> The Center opened in 1994 but had been only sporadically used by private parties to resolve intellectual property controversies.<sup>92</sup> The failure of the gTLD-MoU meant that the WIPO Center would continue to function on the margins of international arbitration. With intellectual property dispute settlement again on the table during the consultative process, WIPO stood to benefit both financially and in terms of prestige from recommending a dispute settlement system in which its Center would likely play an active and prominent role.

*b. The Scope and Hybrid Nature of Dispute Settlement Under WIPO's Proposals*<sup>93</sup>

In considering the shape of a domain name dispute settlement system, WIPO revived two core features of the ACP proposal: (1)

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89. See *id.* at 10 (noting public perception that WIPO was beholden to trademark interests); Mueller, *Technology and Institutional Innovation*, *supra* note 41, at 21-22 (characterizing WIPO's "constituency" as "the major multinational intellectual property holders").

90. See Froomkin, *Semi-Private Rulemaking*, *supra* note 51, at 10 ("[m]any of those who opposed the gTLD-MoU decided WIPO was in cahoots with those who sought to expand the rights of existing trademark holders to additional world-wide rights online."); see also *supra* notes 51-53 and accompanying text (discussing public perceptions and criticisms of gTLD-MoU).

91. See *supra* Part I.B.1.

92. See Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 *Stan. L. Rev.* 917, 965-66 (1997); see also RONALD BERNSTEIN ET AL., *HANDBOOK OF ARBITRATION PRACTICE* § 10-49 at 547 (3d ed. 1998) (questioning whether it was "necessary or useful to create the WIPO Center" if it merely siphoned cases away from other arbitral institutions).

93. The discussion that follows provides an overview of the WIPO proposals from the perspective of the themes raised in this Article. Readers interested in a more extended discussion of the WIPO proposals should consult the interim and final reports and Professor Froomkin's detailed critiques of them.

modifying domain-name registration contracts to require all registrants to submit to a uniform dispute settlement system, and (2) endowing that system with an amalgam of ministerial, judicial, and arbitral attributes.<sup>94</sup> However, the WIPO proposal also differed with respect to the subject matter of the controversies falling within the new system and the discretionary authority given to panelists to decide cases. As to these two issues, WIPO significantly narrowed its preliminary recommendations to accommodate concerns raised by nontrademark interests.

*(1) WIPO's Interim Report*

Like the ACPs before it, the proposed dispute settlement system that emerged from the WIPO consultative process was a conscious hybrid. The interim report characterized the proposal as designed to harness the advantages of arbitration while modifying and simplifying those advantages to account for the nondiscretionary administrative functions to be performed by the panels.<sup>95</sup> In fact, however, with the exception of (1) restricting the available remedies to complaining parties to the cancellation or transfer of contested domain names,<sup>96</sup> and (2) routinizing and expediting review of “typical cases of clear abuse,”<sup>97</sup> the interim report would have conferred powers on panelists that were far more judicial than ministerial in nature.

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94. In theory, WIPO's proposal for a mandatory uniform dispute settlement system was more far-reaching than the ACP proposal, the acceptance of which was contingent on a registrar who voluntarily joined the Council of Registrars within the gTLD-MoU. In practice, however, the gTLD-MoU's drafts anticipated that all registrars would eventually accept the ACP dispute settlement policy. See Mueller, *Technology and Institutional Innovations*, *supra* note 41, at 16.

95. *Interim Report*, *supra* note 76, ¶¶ 139-40. These arbitral “advantages” included the creation of a procedure in which the parties would participate in choosing a neutral decision maker to hear their dispute in a neutral venue subject to procedural rules that reflected various legal traditions, and that would lead to a binding, enforceable decision on the merits. See *id.* ¶ 140.

96. *Id.* ¶ 156.

97. *Id.* ¶ 170; see also *id.* ¶¶ 148(iii), 170 (“Cases involving instances of alleged *abusive registration of domain names* would not be likely to involve burdensome and complex factual and evidentiary investigations” and thus “should be resolved within a matter of days or weeks.”) (emphasis added).

For example, notwithstanding the White Paper's recommendation that dispute settlement should apply solely to cases of "abusive registrations,"<sup>98</sup> WIPO advocated instead that panels should be empowered to hear "*any disputes* concerning the alleged violation of intellectual property rights through a domain name registration."<sup>99</sup> As for the legal rules applicable to this broad category of controversies, panels were given the discretion to choose from among "the laws that, in the light of all the circumstances of the case, are applicable," and "a set of [seven] guiding principles."<sup>100</sup> According to WIPO, these principles "represented a distillation of the dominant approaches that have been adopted by national courts," but which, in fact, could not be found in any single national jurisdiction.<sup>101</sup> A chief feature of these principles was the discretion they conferred on panels to balance the rights and interests of

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98. The interim report did, however, attempt to define acts by a domain name registrant that would qualify as abusive. It stated that the complaining intellectual property owner would need to demonstrate

that the registration or use of the domain name by the domain name holder is without relevant rights or interests and unfairly: (i) capitalizes on the goodwill associated with the complainant's legitimate rights, whether by way of trademarks, personality rights, geographical indications or otherwise, or (ii) frustrates the complainant's desire to reflect its rights in a domain name.

Id. ¶ 244. The Report then listed five "circumstances" for panels to consider in determining whether abuse existed. For a detailed criticism of this approach as overbroad and insufficiently protective of free expression values, see A. Michael Froomkin, *A Critique of WIPO's RFC 3 ¶¶ 162-65* (Mar. 14, 1999) [hereinafter Froomkin, *RFC 3 Critique*], available at <http://www.law.miami.edu/~amf> (on file with the William and Mary Law Review).

99. *Interim Report*, *supra* note 76, ¶ 150 (emphasis added).

100. *Id.* ¶ 198. These seven principles were: (1) "The rights and interests of the parties;" (2) "The use of the domain name;" (3) "The length of time of registration;" (4) "The nature of the top-level domain in which the domain name is registered;" (5) "Abusive Registration of the Domain Name;" (6) "Identical or confusingly similar;" (7) "First-come, first-served principle." *Id.* ¶ 199.

101. *Id.* ¶¶ 196, 197-98; see Froomkin, *RFC 3 Critique*, *supra* note 98, ¶¶ 22, 155, 155-59 (criticizing the interim report for adopting a "smorgasbord approach" to governing law and for setting out "guiding principles" not found in their entirety in national law). Many legal texts that seek to bring together disparate constituent approaches ultimately articulate a composite approach found in no single constituent law. Indeed, such a nonconflictual approach to multistate lawmaking may be precisely the type of approach needed in the non-national setting, although the application of a national rule rather than a composite non-national rule may be appropriate where national interests predominate. We discuss this issue further in Part III.B.6.

intellectual property owners against those of domain name registrants.<sup>102</sup>

That WIPO intended panels to engage in the court-like function of developing a non-national trademark-domain name jurisprudence is shown by the interim report's recommendation that panel decisions be published whenever possible.<sup>103</sup> Not only would the publication of panel decisions develop "a body of persuasive precedents" to "enhance the predictability of the dispute-resolution system and contribute to the development of a coherent framework for domain names," it would also entice complaining parties away from litigating their claims in national courts.<sup>104</sup> Under WIPO's proposal, domain-name registrants were required to submit to the administrative procedure; but both parties were free to initiate national court litigation before, during, or after the procedure had been commenced.<sup>105</sup> The new system would thus need to demonstrate its comparative advantages in time, cost, and predictability to attract cases away from national courts (and national laws). Developing an autonomous non-national domain name jurisprudence applicable without regard to national borders or conflicting national interests would engender confidence in the "credibility and consistency of decisions" and achieve precisely this result.<sup>106</sup>

### (2)WIPO's Final Report

Domain name registrars, individual registrants, organizations representing the Internet's technical community, and certain members of the panel of experts widely criticized WIPO's interim report as unduly favoring intellectual property owners and granting them rights in excess of those that existed in any single national

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102. *Interim Report*, *supra* note 76, ¶ 199(ii).

103. *Cf.* Dinwoodie, *A New Copyright Order*, *supra* note 8, at 524-25 (noting the relevance of publication of decisions to the development of norms by arbitral panels).

104. *Interim Report*, *supra* note 76, ¶¶ 186, 133.

105. *Id.* ¶ 140. *But see* Froomkin, *RFC 3 Critique*, *supra* note 98, ¶¶ 118-24 (noting that the system proposed by WIPO would severely disadvantage domain-name registrants who would often have no practicable forum in which to bring suit or no substantive cause of action upon which to base a challenge to a panel ruling ordering cancellation or transfer of a domain name).

106. *Interim Report*, *supra* note 76, ¶ 140.

jurisdiction.<sup>107</sup> In response to these criticisms, WIPO narrowed its proposal for a dispute settlement system in two critical ways. First, it limited the system to “deliberate, bad faith, abusive, domain name registrations or ‘cybersquatting’” and excised from the panels’ jurisdiction “disputes between parties with competing rights acting in good faith.”<sup>108</sup> Second, it restricted the class of eligible complaints to trademark owners and excluded other intellectual property rightholders from the system.<sup>109</sup>

WIPO’s rationale for narrowing the proposal in this fashion was expressly premised on the need for an incrementalist approach.<sup>110</sup> Consistent with that tradition, participants in the consultative process had expressed profound unease about granting expansive powers to a new and untested dispute settlement system that had “the capacity to affect valued rights.”<sup>111</sup> Given this climate of reticence, and given the nonharmonization<sup>112</sup> of national laws

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107. See, e.g., Froomkin, *RFC 3 Critique*, *supra* note 98; Mueller, *Technology and Institutional Innovations*, *supra* note 41, at 22 & n.22.

108. *Final Report*, *supra* note 78, ¶ 135(i). As we discuss below, the topic of competing trademark rights on the Internet has since been taken up by the WIPO Standing Committee on Trademarks. See *infra* Part III.B.7. (discussing the relations between non-national and international systems). But the distinction between abusive registrations and competing rights cases is less concrete than this institutional allocation might suggest. If “competing rights” are conceived more broadly than competing exclusive trademark rights (for example, if the phrase is thought to include the nonexclusive right to use a mark that is descriptive or to use a mark in a particular way such as parody or criticism), then a delineation of the contours of cybersquatting will inevitably implicate the question of what are “competing rights.” See Graeme B. Dinwoodie, *Private International Aspects of the Protection of Trademarks*, WIPO Doc. No. WIPO/PIL/01/4 ¶ 82 n.200, (Jan. 2001) [hereinafter Dinwoodie, *Private International Aspects*], available at [http://www.wipo.org/pil-forum/en/documents/pdf/pil\\_01\\_4.pdf](http://www.wipo.org/pil-forum/en/documents/pdf/pil_01_4.pdf). This dilemma is being considered by the Standing Committee at present in finalizing its proposals and also has infused panel determinations under the UDRP. See *infra* Part III.B.7.

109. *Final Report*, *supra* note 78, ¶ 135(ii).

110. *Id.* ¶ 168 (“We are persuaded by the wisdom of proceeding firmly but cautiously and of tackling, at the first stage, problems which all agree require a solution.”).

111. *Id.* ¶ 133.

112. Difficult private international issues will occur with frequency when national laws are not entirely harmonized, or choice-of-law principles do not invariably lead to the application of the law of a single jurisdiction. But these issues arise even in the wake of harmonization of laws, because harmonization remains largely premised upon notions of national sovereignty and upon the sanctity of national institutions in applying harmonized rules. This adherence to national lawmaking models can (sometimes appropriately) undermine the objectives of harmonization. See Graeme B. Dinwoodie, *The Integration of Domestic and International Intellectual Property Lawmaking*, 24 COLUM.-VLA J.L. & ARTS. 307 (2000) (discussing the

addressing trademark-domain name disputes,<sup>113</sup> WIPO saw virtue in focusing, at the outset, on behavior that “was universally condemned throughout the WIPO process as an indefensible activity that should be suppressed.”<sup>114</sup>

To this end, WIPO sought to draft a definition of disputes that would sweep within its purview only egregious violations of trademark owners’ rights. Eschewing the term “cybersquatting” as insufficiently precise, WIPO adopted the phrase “abusive registrations” and defined it as existing only when three defined conditions were met.<sup>115</sup>

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limits of harmonization of national laws); Dinwoodie, *Private International Aspects*, *supra* note 108, ¶¶ 86-90 (discussing choice of law problems in the context of public international trademark law).

113. Indeed, one could argue that the lack of equivalent rights under any national law should not, in this instance, have precluded the recognition of non-national rights for trademark owners. After all, national systems were only beginning to grapple with these issues, and the lack of developed national solutions should hardly be surprising. In fact, those national solutions that have since developed have also proven favorable to trademark owners. *See e.g.*, *Referee Enter., Inc. v. Planet Ref, Inc.*, No. 00-C-1391 (E.D. Wis. Jan. 24, 2001) (granting a preliminary injunction under the ACPA to the owner of Referee Magazine, previously denied relief under the UDRP, against defendant’s registration of domain names “including the term ‘referee’ in any form”), *available at* [http://www.loundy.com/CASES/Referee\\_Ent\\_v\\_Planet\\_Ref.html](http://www.loundy.com/CASES/Referee_Ent_v_Planet_Ref.html). The argument for incrementalism thus derives as much from the need to establish the legitimacy of the new non-national system as from any substantive objection to the rights that would have been conferred on trademark owners. Although much criticism was leveled at the interim report on the latter ground, our focus is on the systemic development of non-national models.

114. *Final Report*, *supra* note 78, Executive Summary ¶ V.

115. *Id.* ¶ 171. These conditions were:

- (1) ... (i) the domain name is identical or misleadingly similar to a trade or service mark in which the complainant has rights; and (ii) the holder of the domain name has no rights or legitimate interests in respect of the domain name; and (iii) the domain name has been registered and is used in bad faith.

*Id.*

The final report then set out four specific examples which panels could treat as “evidence of the registration and use of a domain name in bad faith”:

- (2) ... (a) an offer to sell, rent or otherwise transfer the domain name to the owner of the trade or service mark, or to a competitor of the owner of the trade or service mark, for valuable consideration; or
- (b) an attempt to attract, for financial gain, Internet users to the domain name holder’s website or other on-line location, by creating confusion with the trade or service mark of the complainant; or
- (c) the registration of the domain name in order to prevent the owner of the trade or service mark from reflecting the mark in a corresponding domain name, provided that a pattern of such conduct has been established on the part of the

Given this narrowing of the dispute settlement policy, WIPO was also able to eliminate some of the ambiguity concerning the rules that panels were to apply. In particular, WIPO jettisoned the reference to the seven autonomous guiding principles advocated in its interim report. In its place, WIPO adopted a choice-of-law provision which would permit—but by no means compel<sup>116</sup>—panelists to apply the laws of the national jurisdiction with the most substantial connections to the parties and their dispute.<sup>117</sup>

Finally, WIPO made a variety of other modifications to its preliminary proposals. It recommended the use of three-person rather than single-member panels.<sup>118</sup> These panels were to be appointed by accredited dispute resolution service providers with no input from the parties.<sup>119</sup> Cases were to be decided by panels within forty-five days of the filing of a complaint.<sup>120</sup> WIPO also rejected the need for a body to hear appeals from panel decisions,<sup>121</sup> and it drafted a detailed and comprehensive set of model procedural rules to be used by service providers.<sup>122</sup> In all other respects, however,

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domain name holder; or

(d) the registration of the domain name in order to disrupt the business of a competitor.

*Id.* With respect to nonabusive registrations, the Report was somewhat less exact. It did, however, state that good faith registrations, registrations for legitimate noncommercial or expressive purposes, and claims between competing rights owners should not be grounds for transferring or canceling a domain name. *Id.* ¶ 172.

116. *Id.* ¶ 177(ii) (recommending that “in applying the definition of abusive registration, the panel of decision-makers shall, to the extent necessary, apply the law or rules of law that it determines to be appropriate in view of all the circumstances of the case”). Given this tepid endorsement of a traditional, conflictual approach to choice of law, it seems incorrect to characterize WIPO’s actions as rejecting “any attempt to create a *lex mercatoria* or a free-standing trans-national law of domain names.” Froomkin, *WIPO Commentary*, *supra* note 85, ¶ 72.

117. *Final Report*, *supra* note 78, ¶ 176:

For example, if the parties to the procedure were resident in one country, the domain name was registered through a registrar in that country and the evidence of the bad faith registration and use of the domain name related to activity in the same country, it would be appropriate for the decision-maker to refer to the law of the country concerned in applying the definition [of abusive registration].

*Id.*

118. *Id.* ¶ 207.

119. *Id.* ¶ 209.

120. *Id.* ¶ 203.

121. *Id.* ¶ 222.

122. *Id.* Annex V.

WIPO's final report preserved the hybrid nature of the new dispute settlement system.<sup>123</sup>

*c. Assessment of the WIPO Process*

Although WIPO's narrowing of the scope of dispute settlement in the final report resolved some of the controversies between intellectual property owners and other Internet stakeholders, it did not lay to rest the doubts expressed by some observers concerning the organization's capacity to engage in a balanced consultative process. By reviving the core features of the gTLD-MoU Administrative Challenge Panels, WIPO resuscitated a proposal of dubious political pedigree. Moreover, because of the expedited nature of the subsequent ICANN review process, WIPO's own revisions of that proposal were quickly entrenched.

Nominally, WIPO's recommendations were only advisory and were intended to be submitted to ICANN for further review. In fact, however, the recommendations were given a presumption of validity by participants in the ICANN drafting process.<sup>124</sup> As we explain below, that presumption allowed the hybrid nature of the dispute settlement proposal to go unexamined, setting the stage for the conflict of institutional mission that was to plague the UDRP's decision makers.

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123. In both its preliminary and final reports, WIPO recommended that owners of well-known trademarks be allowed to block issuance of domain names containing those marks or their near equivalents. *Id.* ¶¶ 245-91. That proposal has not yet been acted upon by ICANN, although so-called "sunrise" mechanisms have been used in the recent development of new generic top level domains such .info and .biz. See *ICANN Approves Seven Top-Level Domains; Winners Continue to Negotiate the Fine Print*, 5 ELEC. COMM. & L. REP. 1139 (Nov. 22, 2000) [hereinafter *ICANN Approves Seven Top-Level Domains*] (discussing ICANN's approval of new gTLDs, including their dispute settlement and intellectual property protection provisions).

124. WG-A Final Report to the ICANN Board (Aug. 3, 1999) [hereinafter WG-A Final Report] (noting that, according to the provisional Names Council charged with reviewing dispute settlement policy for ICANN Board, "[t]he WIPO Final Report may be considered to represent a consensus of most interested stakeholders"), available at <http://www.dnso.org/dnso/notes/19990804.NCwga-to-ICANN.html> (on file with the William and Mary Law Review); see also Posting of Kathryn Kleiman, KathrynKL@aol.com, to comment-udrp@icann.org, *Concerns about ICANN Uniform Dispute Resolution Policy* (Aug. 24, 1999) (characterizing ICANN's treatment of WIPO report as "far too deferential"), available at <http://www.icann.org/comments-mail/comment-udrp/current/msg00012.html> (on file with the William and Mary Law Review).

### 3. ICANN's Review and Implementation of the UDRP

Within weeks after WIPO submitted its report on April 30, 1999, ICANN began an expedited process to study and implement WIPO's recommendations. Recognizing that ICANN's organizational structure is both Byzantine and likely to be unfamiliar to many readers, we briefly outline that structure below. We then highlight the critiques of ICANN made by various observers, focusing on the organization's authority to adopt a mandatory dispute settlement policy. Finally, we explore the ways in which ICANN narrowed WIPO's recommendations prior to adopting them as the UDRP while maintaining the hybrid character of the new dispute settlement system.

#### a. Expedited Implementation Timetable

On May 27, 1999, ICANN's Interim Board referred the dispute settlement proposals in WIPO's final report to the ICANN Domain Name Supporting Organization (DNSO), one of the three supporting organizations established under ICANN's bylaws to develop and recommend substantive policies to the Board.<sup>125</sup> The Interim Board asked the DNSO to submit its recommendations by July 31, 1999, and it invited interested persons to comment by August 20, 1999, prior to its next meeting in late August.<sup>126</sup> In mid-June, the DNSO's Names Council<sup>127</sup> formed a working group to study the WIPO recommendations. The working group submitted its report at the end of July, which the Names Council adopted with minor

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125. The DNSO is composed of a General Assembly and a Names Council. Seven Constituency Groups, representing a different domain-name stakeholder perspective, each elect three members of the Names Council, which considers substantive domain-name policies on a "community consensus" basis and forwards its recommendations to the ICANN Board. Domain Name Supporting Organization of ICANN, at <http://www.dnso.org/dnso/aboutdnso.html> (last visited Oct. 3, 2001) (on file with the William and Mary Law Review).

126. ICANN, *Minutes of Meeting*, Res. 99.45, 99.46 & 99.47 (May 27, 1999), available at <http://www.icann.org/minutes/minutes-27may99.htm> (on file with the William and Mary Law Review); see also ICANN, *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy* [hereinafter *Timeline*], available at <http://www.icann.org/udrp/udrp-schedule.htm> (last updated Oct. 17, 2000) (on file with the William and Mary Law Review).

127. See *supra* note 125 (explaining Names Council).

modifications and submitted to the Board as a consensus recommendation in early August.<sup>128</sup> Later that month, a group of accredited domain-name registrars also submitted to the Board a proposal for a voluntary dispute resolution policy.<sup>129</sup>

On August 24, 1999, ICANN staff submitted to the Board a report on the Names Council and registrar proposals and posted it on ICANN's web site.<sup>130</sup> Only two days later, the Board accepted the DNSO's recommendations and instructed the staff to convene a small drafting committee composed of representatives of different Internet stakeholder groups to prepare implementing documents using the registrar's model policy as a starting point.<sup>131</sup> On September 29, the staff posted a report on those documents and invited public comment during the next two weeks on a few remaining open issues.<sup>132</sup> Finally, on October 24, 1999, the ICANN Board approved the final version of the implementing documents—the "Uniform Domain Name Dispute Resolution Policy" and the "Rules for Uniform Domain Name Dispute Resolution Policy"—as revised in light of a second staff report.<sup>133</sup>

#### *b. ICANN's Authority for Creating the UDRP*

The current challenges to ICANN's authority over the domain-name system are considerable and beyond the scope of this Article.<sup>134</sup> Even accepting for purposes of argument the legitimacy of a private, nonprofit corporation engaging in domain-name policymaking, three more particularized attacks against ICANN are relevant to the UDRP approval process. These include challenges to the structure and composition of ICANN's Board of Directors, the

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128. *Timeline*, *supra* note 126.

129. *Id.*

130. ICANN, *ICANN Staff Report: Uniform Dispute Resolution Policy for gTLD Registrars*, (Aug. 24, 1999), available at <http://www.icann.org/santiago/udrp-staff-report.htm> (on file with the William and Mary Law Review). The report noted that eleven written comments on the proposals had been submitted by the August 22 deadline. *Id.*

131. *Timeline*, *supra* note 126.

132. *Id.*

133. *Id.*; see *supra* note 17.

134. For articles identifying these challenges, see Liu, *supra* note 49; Mueller, *ICANN and internet governance*, *supra* note 53, at 497; Zittrain, *supra* note 51.

unduly accelerated pace of the proceedings, and review procedures which limited participation by all affected constituencies.

First, the accountability of ICANN's interim Board is questionable. During the five months when the dispute settlement proposal was being considered, the Board consisted solely of nine members appointed by the IANA.<sup>135</sup> It was not yet composed in the manner set out in ICANN's articles and bylaws, which require nine directors appointed by the three Support Organizations and an additional nine directors elected from ICANN's "at large" membership.<sup>136</sup> According to some observers, ICANN's decision to press forward with highly contested domain-name policies such as the UDRP while its interim board lacked accountability or representational diversity fatally tainted its decisions.<sup>137</sup> Several critics have even gone so far as to urge that all of the Interim Board's decisions, including its approval of the UDRP, be subject to a reauthorization vote once the new Board has been elected.<sup>138</sup>

A second challenge to ICANN's authority concerned the extremely expedited nature of the UDRP approval process and the limited number of comments received.<sup>139</sup> Both the bodies within ICANN considering the dispute settlement proposals and the individuals drafting and reviewing those proposals repeatedly expressed dissatisfaction with the time allotted for reflection and comment by interested observers and the public.<sup>140</sup> This limited timeframe also

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135. See Mueller, *ICANN and internet governance*, *supra* note 53, at 507.

136. *Id.* at 508.

137. *Id.* at 509.

138. Internet Democracy Project, *Yokohama Statement on Civil Society and ICANN Elections*, ¶¶ 1, 4 (June 27, 2000) (draft), available at [http://www.icannwatch.org/archives/civil\\_society\\_and\\_icann\\_elections.htm](http://www.icannwatch.org/archives/civil_society_and_icann_elections.htm) (on file with the William and Mary Law Review).

139. In total, ICANN received just over 100 e-mail comments, not all of them substantive in nature. See <http://www.icann.org/comments-mail/comment-udrp/current/maillist.html> (last visited Oct. 3, 2001).

140. See, e.g., WG-A Final Report, *supra* note 124 (questioning whether recommendation to adopt UDRP represented a genuine consensus of the DNSO given the "shortness of time available to WG-A to solicit input from the DNSO constituencies"); Posting of A. Michael Froomkin, [froomkin@law.tm](mailto:froomkin@law.tm), to [comment-udrp@icann.org](mailto:comment-udrp@icann.org), *A Catalog of Critical Process Failures; Progress on Substance; More Work Needed* (Oct. 13, 1999) [hereinafter Froomkin, *Catalog*] (criticizing the fourteen-day comment period as "the only opportunity that most non-registrar stakeholders have ever had to comment on the major features of" the UDRP), at <http://www.icann.org/comments-mail/comment-udrp/current/msg00101.html> (on file with the William and Mary Law Review); Posting of David Post, [Postd@erols.com](mailto:Postd@erols.com), to [comment-udrp@icann.org](mailto:comment-udrp@icann.org), *Comment* (Oct. 10, 1999) (urging ICANN Board to give affected parties

gave a patina of legitimacy to the results of the WIPO consultative process, which appeared languorous and thoughtful by comparison.<sup>141</sup>

The third critique of ICANN's procedures concerned the lack of adequate participation by stakeholders who favored a narrow dispute settlement policy. For example, the Provisional Names Council of the DNSO and the working group charged with considering WIPO's recommendations did not contain the proper complement of members required by ICANN's rules.<sup>142</sup> The missing entity was the Non-Commercial Domain Name Holders Constituency, which represented the views of a diverse group of noncommercial organizations concerned with freedom of expression.<sup>143</sup> Some participants also claimed that the manner in which documents were drafted and the procedures used to review them privileged trademark owners' interests and failed to forge a consensus among all affected stakeholders.<sup>144</sup> As we explain below, however, much of this criticism was alleviated by the final stages of the UDRP review process in which ICANN narrowed WIPO's dispute settlement recommendations.

*c. Narrowing the Scope of Eligible Disputes While Maintaining a Hybrid Dispute Settlement Model*

Using the WIPO final report and a draft policy and rules authored by a consortium of registrars as a template, ICANN's Board instructed its staff to make three modifications to those documents. First, it identified three factual situations which suggested that a

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additional opportunities to comment on UDRP proposals prior to adopting them), at <http://www.icann.org/comments-mail/comment-udrp/current/msg00067.html>.

141. See *supra* notes 75-78 and accompanying text.

142. WG-A Final Report, *supra* note 124, at 2.

143. See *id.*; Kleiman, *supra* note 124; Posting of Association for Computing Machinery's Internet Governance Committee, to [comment-udrp@icann.org](mailto:comment-udrp@icann.org), ACM-IGC Petition for Reconsideration on Cybersquatting (Aug. 16, 1999), available at <http://www.icann.org/comments-mail/comment-udrp/current/msg>.

144. See Froomkin, *Catalog*, *supra* note 140; Mueller, *ICANN and internet governance*, *supra* note 53, at 519; Posting of Carl Oppedahl, [carl@oppedahl.com](mailto:carl@oppedahl.com), to [comment-udrp@icann.org](mailto:comment-udrp@icann.org) *Comments [R]egarding UD[R]P* (Oct. 13, 1999) ("The process was skewed from its beginning to favor the interests of the trademark lobby and gave no meaningful voice to the domain name owners of the Internet."), available at <http://www.icann.org/comments-mail/comment-udrp/current/msg00105.html> (on file with the William and Mary Law Review).

domain name registrant would not be regarded as having acted in bad faith;<sup>145</sup> second, it specified the need for parity of “appeal” rights for complainants and respondents;<sup>146</sup> and third, it requested a definition of and measures to minimize “reverse domain name hijacking.”<sup>147</sup> Each of these revisions bolstered the rights of domain-name owners and narrowed the range of conduct giving rise to relief under the Policy.

In a revised draft of the Policy and Rules, the ICANN staff implemented the Board’s three recommendations in the following ways. First, it drafted a new paragraph of the Policy embodying the three circumstances where a domain-name registrant would be treated as having legitimate interests in its domain name.<sup>148</sup> Second, in an attempt to ensure that both parties would have equal “appeal” rights, the staff modified the Policy to require complainants to submit to the jurisdiction of national courts in one of two locations.<sup>149</sup> Concomitantly, it revised the Policy to stay

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145. ICANN, *Resolutions Approved by the Board, Santiago Meeting*, Res. 99.83.4 (Aug. 26, 1999), available at <http://www.icann.org/santiago/santiago-resolutions.htm>.

146. *Id.* Res. 99.83.5.

147. The three “factors” to be considered in determining bad faith registration of a domain name were:

- (a) Whether the domain name holder is making a legitimate noncommercial or fair use of the mark, without intent to misleadingly divert consumers for commercial gain or to tarnish the mark
- (b) Whether the domain name holder (including individuals, businesses, and other organizations) is commonly known by the domain name, even if the holder has acquired no trademark or service mark rights; and
- (c) whether, in seeking payment for transfer of the domain name, the domain name holder has limited its request for payment to its out-of-pocket costs.

*Id.* Res. 99.83.3.

148. ICANN, *Uniform Domain Name Dispute Resolution Policy, Draft Policy Prepared by ICANN Staff and Counsel and Posted for Public Review and Comment*, ¶ 4(c) (Sept. 29, 1999) [hereinafter *Draft Policy*], available at <http://www.icann.org/udrp/udrp-policy-29sept99.htm> (on file with the William and Mary Law Review).

149. ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy, Draft Rules Prepared by ICANN Staff and Counsel and Posted for Public Review and Comment* (Sept. 29, 1999) (defining “mutual jurisdiction”), available at <http://www.icann.org/udrp/udrp-rules-29sept99.htm> (on file with the William and Mary Law Review). The two jurisdictions were either: (1) the nation in which the Registrar had its principal office, provided that the domain-name holder had submitted in its Registration Agreement to jurisdiction in that nation, or (2) in all other cases, “at the location of the domain name holder’s address as shown for the registration of the domain name in Registrar’s Whois database at the time of the complaint.” Over time, this jurisdictional alternative would favor jurisdiction at the location of the registrar, since registrants purchasing domain names through ICANN-accredited registrars

automatically for ten business days a panel's order to cancel or transfer a registration if the respondent filed a complaint in such a court.<sup>150</sup> Finally, the staff included a definition of "reverse domain name hijacking," and it sought to minimize its occurrence by ensuring more effective notice to respondents of a complaint filed against them, by clarifying that complaining trademark owners bear the burden of proof, and by authorizing panels to make a finding that a complaint was brought in bad faith.<sup>151</sup>

After a second round of public comments nominally limited to the few "implementation issues left open in the draft documents,"<sup>152</sup> the ICANN Staff published a Second Staff Report containing a more fully articulated defense of the draft policy and rules it had proposed.<sup>153</sup> This report, while acknowledging that both trademark owners and domain-name registrants had submitted meritorious proposals for modifying the proposed UDRP, concluded that the Policy was "balanced, workable, and fair" in its current form.<sup>154</sup> It stated that any future modifications should be referred to the DNSO for further review "with the benefit of experience with the real-world operation of the policy."<sup>155</sup>

The Second Staff Report also strongly reaffirmed ICANN's intent that UDRP dispute settlement be exceedingly narrow in scope and

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would all be required to submit to jurisdiction in that location. *See* ICANN, *Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy*, ¶ 4.9, (Oct. 24, 1999) [hereinafter *Second Staff Report*] (noting that jurisdiction where respondent was located would only apply to "some legacy registrants" who had not registered domain names through accredited registrars), available at <http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm> (on file with the William and Mary Law Review).

150. *Draft Policy*, *supra* note 148, ¶ 4(k).

151. ICANN, *Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy*, 4 (Sept. 29, 1999) [hereinafter *Staff Report*], available at <http://www.icann.org/udrp/staff-report-29sept99.htm> (on file with the William and Mary Law Review). For the first panel decision to make a finding of reverse domain name hijacking, see *K2r Produkte AG v. Jeremie Trigano*, WIPO Case No. D2000-0622 (Aug. 23, 2000), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0622.html>.

152. *Staff Report*, *supra* note 151, at 4. Although the ICANN Staff sought to limit public comments to issues concerning the length and content of pleadings and decisions and the mechanics for selecting dispute settlement providers and panelists, public comments were directed to all aspects of its proposal. *See Second Staff Report*, *supra* note 149, ¶ 3.1 (cataloging titles of e-mail comments). This was hardly surprising given the Staff's attempt to foreclose public comment on the modifications that it had proposed.

153. *See Second Staff Report*, *supra* note 149.

154. *Id.* ¶ 1.6.

155. *Id.*

limited to “cases involving ‘abusive registrations’ made with bad-faith intent to profit commercially from others’ trademarks (e.g., cybersquatting and cyberpiracy).”<sup>156</sup> The Report stressed that “the fact that the policy’s administrative dispute-resolution procedure does not extend to cases where a registered domain name is subject to a legitimate dispute (and may ultimately be found to violate the challenger’s trademark) is a feature of the policy, not a flaw.”<sup>157</sup>

In the text of the Policy itself, this desire to limit the UDRP’s scope found its expression in paragraph 4, which set forth the elements of a trademark owner’s cause of action. Paragraph 4(a) required all complainants to prove essentially the same three elements recommended in WIPO’s final report.<sup>158</sup> Paragraphs 4(b) and 4(c) then enumerated specific examples of, on the one hand, a respondent’s bad faith registration and use of a domain name,<sup>159</sup> and

156. *Id.* ¶ 4.1(c).

157. *Id.*

158. *See supra* text accompanying note 115 (setting elements of cause of action proposed by WIPO). Paragraph 4(a) of the Policy states:

You are required to submit to a mandatory administrative proceeding in the event that a third party (a “complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure, that

- (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- (ii) you have no rights or legitimate interests in respect of the domain name; and
- (iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

Policy, *supra* note 17, ¶ 4(a).

159. Paragraph 4(b) of the Policy provides:

For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
- (iii) you have registered the domain name primarily for the purpose of

on the other, the rights or legitimate interests that a respondent might have in that domain name.<sup>160</sup> This structure also reinforced a ministerial role for UDRP panels, first by limiting their authority to open-and-shut cases of domain name abuses, and second by indicating that more complex disputes involving discretionary judgments were suitable only for national court adjudication.

Yet in response to proposals by trademark owners that the Policy as drafted was too narrow (and to address opposing proposals by noncommercial interests that the Policy was too broad), the Second Staff Report blurred this narrow, ministerial vision of the UDRP with more expansive judicial functions. Pressed by both interest groups, the report stated that the specific examples provided in Paragraphs 4(b) and 4(c) were “not intended to be exhaustive” and that additional evidence and arguments could be considered by UDRP panels as a basis for ruling in favor of trademark owners or domain-name registrants.<sup>161</sup> Although the staff’s comment and its corresponding language in the UDRP may have been intended to

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disrupting the business of a competitor; or  
 (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

*Id.* ¶ 4(b).

160. Paragraph 4(c) of the Policy provides:

Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

- (i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

*Id.* ¶ 4(c).

161. *Second Staff Report*, *supra* note 149, § 4.5(b). The commentary in the staff report is reflected in the “in particular but without limitation” language in paragraphs 4(b) and 4(c) of the Policy. For a discussion of the effects of these two clauses on decision making by UDRP panels, *see infra* Part II.C.

mollify criticisms of its proposal from both sets of interest groups, its effect was to grant panels substantial adjudicatory authority to reconcile the competing interests at stake in trademark domain-name disputes.

Finally, the Second Staff Report reaffirmed the arbitral roots of UDRP dispute settlement by providing for post-dispute review in national courts of so-called “mutual jurisdiction.”<sup>162</sup> These courts would be located either where the registrar was located or at the location of the domain-name holder as shown in the registrar’s Whois data. When filing a UDRP complaint, a trademark owner would choose one of these two countries and submit itself to the jurisdiction of the courts in that country for purposes of reviewing a UDRP panel decision. A respondent who filed a complaint with a court in such a country within ten business days of the panel’s decision would receive an automatic stay of the panel’s order transferring or canceling the contested domain name.<sup>163</sup>

The report also specified the method for the parties to select dispute settlement providers and panels. The provider for each dispute would be selected by the complainant, who would also have the initial option to choose whether the case would be heard by a one-person or a three-member panel. In either case, the complainant would pay all of the panel’s fees.<sup>164</sup> Only if the respondent chose to have the case heard by a three-member panel in cases where the complainant had chosen a one-member panel would the parties split the cost of the proceedings. And only in three-member panel cases would the parties have input into the selection of the decision makers; in all other cases the dispute settlement provider would choose the sole panelist to hear the complaint.<sup>165</sup>

#### 4. *The UDRP in Practice*

Just over one month after the Second Staff Report was published, ICANN selected WIPO as the UDRP’s first dispute settlement

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162. *Second Staff Report*, *supra* note 149, at 10-11.

163. *Id.*

164. *See Policy*, *supra* note 17, ¶ g.

165. *See id.* ¶¶ 4(d), 4(f), 3(b)(iv), 5(b)(iv)-(v); *see also Second Staff Report*, *supra* note 149, § 4.15.

provider. It accredited two other providers, the National Arbitration Forum and eResolution, approximately one month later.<sup>166</sup> On December 9, 1999, a trademark owner filed the first UDRP complaint and the one-member panel chosen to hear the case issued its decision on January 14, 2000.<sup>167</sup>

In practice as well as in construction, the UDRP has proven to be a remarkable development in the history of international dispute settlement. Even had trademark owners filed only a handful of complaints with panels and even had those complaints concerned only core domain-name abuses, the system would be worthy of serious scrutiny. But precisely the opposite trend has occurred.

In the first twenty-one months of the UDRP's existence, panels operating under the auspices of ICANN-approved dispute settlement providers have been inundated with cases. As of September 2001, filed complaints numbered over 4300.<sup>168</sup> UDRP panels have issued over 3500 published decisions, with more than three-quarters of these decisions ordering domain names transferred to the complaining trademark owners.<sup>169</sup> Although domain name registrants have achieved a few sporadic (but important) victories during the last few months,<sup>170</sup> beginning in the earliest days of the UDRP panels interpreted the Policy and Rules

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166. ICANN approved a fourth dispute settlement provider, the CPR Institute for Dispute Resolution, on May 22, 2000. See *Timeline*, *supra* note 126, at 2.

167. See *id.*; *World Wrestling Fed'n Entm't, Inc. v. Michael Bosman*, WIPO Case No. D99-0001 (Jan. 14, 2000).

168. ICANN, *Statistical Summary of Proceedings Under UDRP* (Oct. 2, 2001), at <http://www.icann.org/udrp/proceedings-stat.htm>. The number of complaints filed under the United States' recently enacted ACPA is also quite high. See Darryl Van Duch, *Cybersquatter Litigation Boom: Statute prompts 700 federal suits over Web domain names*, NAT'L L.J. (Feb. 26, 2001).

169. See *Statistical Summary of Proceedings Under UDRP*, *supra* note 168. The percentages vary significantly for different dispute settlement providers, a fact that may have important implications for reform. See Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, at 6 (providing statistical summary through July 7, 2001), available at <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (last visited Sept. 8, 2001); Milton Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy* [hereinafter Mueller, *Rough Justice*] (providing statistical summary through Nov. 2000), available at <http://dcc.syr.edu/roughjustice.pdf> (last visited Jan. 9, 2001).

170. See, e.g., *Bruce Springsteen v. Jeff Burgar & Bruce Springsteen Club*, WIPO Case No. D2000-1532 (Jan. 25, 2001) (protection of personal names); *Wal-Mart Stores, Inc. v. walmartcanadasucks.com*, WIPO Case No. D2000-1104, at 9 (Nov. 23, 2000) (.sucks domain names); *Lockheed Martin Corp. v. Parisi*, WIPO Case No. D2000-1015, at 4 (Jan. 26, 2001) (same).

expansively in ways that generally favored intellectual property owners over domain name registrants.<sup>171</sup> These rulings occurred notwithstanding the clear intent of the UDRP drafters to limit the panels' authority to core cases of domain-name abuse, and at a time when both ICANN and WIPO were considering their own expansion of the UDRP to new gTLDs and existing country code domain names (ccTLDs) as well as to names and identifiers not covered by the present Policy.<sup>172</sup>

Therefore, just as the creation of the UDRP did not adhere to a process of deliberative construction followed by prior international lawmakers, so too many UDRP panels have jettisoned the incrementalist decision-making methodology that other international dispute settlement bodies have adopted.

## II. CHECKING FUNCTIONS IN THE UDRP

The previous section demonstrated the ways in which the UDRP is composed of elements found in judicial, arbitral, and ministerial decision-making systems. In this section, we analyze the consequences of this hybrid structure. We begin with a discussion of the values of hybridization, identifying the advantages that flow from amalgamating the features of different decision-making paradigms. But hybridization has risks as well as benefits. Those risks relate to the mechanisms used to control the power granted to individual decision makers.

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171. See Bruce M. McDonald, *Intellectual Property Rights and Electronic Commerce*, 1 INTERNET L. & BUS. 483, 492 (May 2000) ("Early decisions indicate that [the UDRP is] being interpreted expansively in favor of trademark owners."); Mueller, *Rough Justice*, *supra* note 169.

172. See *Final Report, Second WIPO Domain Name Process*, *supra* note 27, ¶ 20 (noting that twenty-two ccTLDs have adopted the UDRP); *id.* ¶ 33 (discussing use of UDRP by new gTLDs); World Intellectual Property Organization, Second Internet Domain Name Process, Request for Comments 1: Request for Comments on Terms of Reference, Procedures and Timetable for the Second WIPO Internet Domain Name Process (July 10, 2000) (requesting public comments for developing recommendations on certain intellectual property domain name issues not included within UDRP), available at <http://wipo2.wipo.int/process2/rfc/rfcl/index.html>; WIPO Conference on Intellectual Property Questions Relating to the ccTLDs (Feb 20, 2001) (noting WIPO conference discussing importance of applying dispute settlement rules to ccTLDs), available at <http://ecommerce.wipo.int/meetings/2001/cctlds/>.

Within any single judicial, arbitral, or ministerial decision-making system, a variety of checking mechanisms constrain the power of decision makers. As a working typology, we divide these mechanisms into three distinct categories, which we refer to as creational, external, and internal checking functions.<sup>173</sup> These checking mechanisms serve several important objectives. They bolster the legitimacy of decision-making outcomes and the accountability of decision makers,<sup>174</sup> they confine decision making within the bounds of a system's institutional capacity,<sup>175</sup> they correct

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173. Creational checking functions arise when a decision-making body is established. They are designed to impose checks ex ante by anticipating the different kinds of excesses that decision makers may engage in and by adopting procedures to prevent them. External checking functions, in contrast, operate ex post in response to perceived errors or excesses of authority by decision makers in a specific case. Either the participants in a dispute or interested third parties may seek to initiate these external checking functions, selecting one or more mechanisms from the range of control devices put into place when the decision-making body was first established. Internal checking functions are internally generated forces within each system that operate upon judicial, arbitral, or ministerial decision makers to correct errors or check abuses of authority.

Although this working typology is useful in highlighting the different ways in which decision makers can be controlled, the classifications are not always distinct. For a related discussion of internal and external controls in international and arbitral decision-making systems, see W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 1-7 (1992).

174. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600 (defining legitimacy as "a quality that leads people (or states) to accept authority—independent of coercion, self-interest, or rational persuasion—because of a general sense that the authority is justified" and citing numerous other definitions from domestic and international law, political theory, and philosophy); see also William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 817 & n.94 (1999) (noting that most national laws permit challenges to arbitral awards in which arbitrators "exceed[ed] their authority" or "overreach[ed] their mandates").

175. In the judicial context, examples include the ECHR deciding cases involving massive violations of human rights, see Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 12 NETH. H.R.Q. 153 (1994), or the ECJ or the WTO's Appellate Body making "political judgments" that they are ill-equipped to make, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 391 (1994); Ravi Kanth, *WTO General Council Chair Warns of Peril to Dispute Settlement System*, 17 INT'L TRADE REP. (BNA) 1157 (July 27, 2000). In the arbitration context, examples include arbitral panels deciding cases involving domestic public laws rather than private contractual agreements. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 488 cmt. a (1987) ("The law of most states regards certain kinds of issues as not subject to arbitration, typically agreements not of a commercial character or not between merchants, and public law issues ...."). In the ministerial context, the issue can arise when an agency

errors, and they ensure consistent outcomes in factually and legally comparable cases.<sup>176</sup>

When elements from different decision-making systems are combined, however, the checking mechanisms that operate in any one system cannot automatically be imported into the new hybrid system. In the case of the UDRP, checking devices found in one or another of the adjudicatory, arbitral, and ministerial models are insufficient in themselves to constrain UDRP panel decision making; oftentimes, they are simply inappropriate. Moreover, 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. We contend that the failure to grapple with the hybrid conceptual identity of the UDRP system and, more importantly, to develop autonomous checking functions that reflect the distinctive nature of the UDRP, is the most significant casualty of jettisoning a deliberative pace of lawmaking.

#### *A. The Values of Hybridization in Non-National Systems*

In describing the UDRP's decision-making structure as a non-national hybrid, we focus on the features typically found in distinct arbitral, ministerial and adjudicative models. As we explain in detail in Part III, we cautiously support the use of hybrid mechanisms that consciously draw upon the characteristics of these different antecedents to fashion a new institutional device suited for transborder problems.<sup>177</sup>

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exercises its authority over novel subject matters without first acquiring the necessary technical expertise to address them. See James Gleick, *Patently Absurd*, N.Y. TIMES, Mar. 12, 2000 (Magazine), at 47 (questioning U.S. Patent Office's competence to handle e-commerce and software patents).

176. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035 (1977) (discussing the merits of redundant litigation to correct errors); cf. Helfer, *Forum Shopping*, *supra* note 1, at 293 (noting that successive review of same petition by multiple human rights tribunals serves error correcting functions).

177. It is worth noting at the outset, however, that the hybrid nature of the UDRP is not confined to a blending of features from adjudicative, arbitral, and ministerial prototypes. The UDRP system is a hybrid also of national, international, and anational structures and influences. In Part III, we will return in more detail to the conjoining of these features. The UDRP might also be viewed as a hybridization of private and public regulation. See Henry H. Perritt, Jr., *Defining the Hybrid in Hybrid Regulation*, 2001 U. Chi. Legal. F. (forthcoming

As a preliminary matter, however, one might ask why such hybridization is useful in a non-national setting? To be sure, the conflict between the non-national nature of the domain-name system and the national nature of the trademark system alone explains the need to blend non-national and national influences. But why also pursue a hybrid of adjudicatory, arbitral, and ministerial models?

In part, the non-national nature of the domain-name system, like the contexts to which the UDRP might be extended, demands such hybridization in seeking an optimal form of dispute settlement. Non-national-like dispute settlement has occurred heretofore only in the arbitral context.<sup>178</sup> Arbitration might then appear a good starting point from which to develop a model for non-national dispute settlement. Indeed, the streamlined proceedings typically identified as an advantage of arbitration would also appear to further one of the objectives underlying all proposals to address the trademark-domain name conflict.

The arbitral model, however, would not be appropriate for non-national dispute settlement if adopted without modification. The success of arbitration—its speed, its decision making tailored more closely to parties' intent than to default principles of law, and its finality ensured by less intrusive external review by courts—is premised upon two important characteristics not present here. First, the parties in arbitration have consented to these reduced forms of external checks, and second, the decision of the arbitrator affects only the parties and has limited if any value in articulating broader norms or rules. Neither the parties (by virtue of their consent) nor society (because the arbitration affects only the disputants) can therefore object to the truncated external checking mechanisms that are found in the arbitral model.

By contrast, parties to non-national UDRP proceedings are strangers and have not, other than formally, consented to the arbitral procedures thereunder, and the process by which the UDRP was created cannot serve as a genuine proxy for their consent. And if UDRP decision making is to effect the creation of norms, as we (and the proponents of the UDRP) intend and as the publication of

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2001) (on file with authors).

178. *See supra* notes 6 and 14.

decisions makes inevitable, then some of the control features found in a traditional adjudicatory model must be incorporated.

This does not mean that we should simply adopt an adjudicatory template, however. Courts remain predominantly national in nature, and court proceedings remain slow and expensive. So the wholesale adoption of the adjudicatory model is not attractive as a solution to a non-national problem. Instead, only selective incorporation of some of the checking features of that model is advisable.

Adoption of adjudicatory features, of course, will slow down the decision-making process, and thus, one might wish to reinject speed. Here, the ministerial model has a role to play. Ministerial decision making has the advantage of speed but it is restricted to cases where the application of the relevant rules is routinized. Much of the non-national decision making that occurs in the UDRP is not so routine. Consequently, although we might wish to incorporate aspects of the ministerial model, we cannot rely wholly on it as an antecedent because the functions it delegates to decision makers assume a far less discretionary form of decision making than we contemplate here. It would appear then that the non-national model could benefit from some—but not all—aspects of this pre-existing model.

### *B. Checking Functions in International Arbitration and in the UDRP*

As explained in Part I, much of the UDRP was built in part upon an arbitral model of decision making. The resolution of disputes between private parties pursuant to what are nominally contractual obligations; the use of lawyers, academics, and retired judges as decision makers; the creation of multiple, independent dispute settlement centers; and the role of the parties in choosing the panel all reflect arbitral antecedents. With respect to the mechanisms used to control excesses of authority and correct errors, however, there are critical distinctions between the checking functions of international arbitration and those found in the UDRP. We address those differences below.

### *1. Checking Functions in International Arbitration*

In international arbitration, the most important constraints on decision makers are ex ante creational checks rather than ex post external or internal checks.<sup>179</sup> Consider first creational checking mechanisms, which arise from negotiations between the contracting parties superimposed upon a backdrop of arbitration-related national laws and treaties. Under the paramount arbitral principle of party autonomy, the parties have virtually unfettered discretion to choose the structure and rules under which their disputes will be decided.<sup>180</sup> Three of their ex ante choices, however, are the most significant for purposes of checking the power of arbitral panels: (1) deciding between ad hoc and institutional arbitration, (2) agreeing upon the place where the arbitration will be conducted, and (3) selecting the composition of the panel.

The virtue of institutional arbitration is that it allows the contracting parties to select a suite of predrafted, time-tested procedural rules superintended by an established center of international arbitration.<sup>181</sup> Included among these rules are a host of mechanisms for supervising the arbitral process, ranging from assisting in the selection of the panel, to entertaining challenges to the impartiality or qualifications of individual panelists, to reviewing the content of draft awards.<sup>182</sup> However, because each institution exercises these supervisory functions in different ways, the parties' choice of a particular institution determines the scope of the checking functions applicable to the arbitrators.

The composition of the panel of arbitrators is also a significant creational control mechanism. In international commercial arbitration, use of a three-member panel is the accepted norm, and often a default rule if the parties fail to specify a different selection

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179. For working descriptions of these types of checking mechanisms, see *supra* note 173.

180. REDFERN & HUNTER, *supra* note 1, at 278 (party autonomy is the "guiding principle in determining the procedure to be followed"). See also Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 14 (1986) (noting that "virtually all of the advantages to be gained from institutional arbitration can be gained by making appropriate contractual provisions at the time of making the arbitration agreement").

181. In ad hoc arbitration, by contrast, the parties create individualized substantive and procedural rules for arbitrating their dispute.

182. Smit, *supra* note 6, at 634-43; Smit, *supra* note 180, at 14.

method.<sup>183</sup> Use of a tripartite panel typically allows each party to choose one arbitrator (so-called “party arbitrators”), providing confidence that at least one member of the panel will share that party’s views of the case and, more broadly, the same language, legal culture and philosophical approach.<sup>184</sup> Three-member panels also promote confidence in the arbitral process and thus generate fewer challenges to the panel’s final decision.<sup>185</sup>

Choosing the location of the arbitration also implicates creational checking functions. International arbitration is not wholly detached from the physical place in which the arbitration occurs. Location determines the national law governing disputes over the conduct of proceedings and the enforcement of awards, thereby allowing nations to monitor and control arbitrations conducted within their borders.<sup>186</sup> However, because different national laws exhibit different degrees of solicitude toward arbitration, the choice of a particular venue necessarily implicates the scope of the checking functions that national courts will exercise over arbitral proceedings.<sup>187</sup> For example, parties choosing a host state whose national arbitration law is modeled on the UNCITRAL Model Law or the New York Convention have implicitly agreed *ex ante* to limit the scope of judicial review to issues of basic procedural fairness and violations of the forum’s public policies, rather than to correcting errors of law.<sup>188</sup>

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183. REDFERN & HUNTER, *supra* note 1, at 193, 378; *see* UNCITRAL Model Law on International Commercial Arbitration, art. 11(3) (1985) [hereinafter UNCITRAL Model Law] (specifying tripartite arbitration as default rule for panel composition), *available at* <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>.

184. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 506 & nn. 85-86 (1997).

185. REDFERN & HUNTER, *supra* note 1, at 193-94 (indicating three-member panels are most effective for international commercial arbitration because parties are more likely to have confidence in their decisions); Rau, *supra* note 184, at 527 (noting the “widely-shared conviction that the ability to participate in the selection of arbitrators is critical to fairness in dispute resolution”).

186. *See generally* William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT’L & COMP. L.Q. 21 (1983). Disputes over issues such as the validity and scope of an agreement to arbitrate, the need for provisional relief, or the use of judicial measures in aid of arbitration are often resolved by national courts. *See* Smit, *supra* note 6, at 631-39.

187. *See* Park, *supra* note 174, at 809-10, 815.

188. *See* UNCITRAL Model Law, *supra* note 183, art. 34 (setting forth limited grounds upon which international arbitral awards may be set aside); Convention on the Recognition

Turning from creational to external checking functions, the parties' opportunity to control arbitral decision makers becomes significantly more attenuated. Indeed, an essential feature of the system of private ordering that arbitration makes possible is the deference national legislatures, national courts, and even arbitration centers show to the arbitral process and to the finality of decisions and awards.<sup>189</sup> As a general rule, successful challenges become increasingly more difficult as the arbitration proceeds.<sup>190</sup>

Knowing the broad deference given to the international arbitral process in general, and panel decisions in particular, the parties are free to bargain for more extensive challenge and review procedures. Most do not make such choices, however, because of the additional uncertainty, delays, and costs such procedures would add. Nevertheless, it is the knowledge that the parties *could* have

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and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. Ratified by more than 120 nations, the New York Convention mandates enforcement of foreign arbitral awards subject to a limited set of defenses that include invalid arbitration agreements, lack of due process, excess of authority, irregular composition of the tribunal, or a violation of the public policy of the enforcing state. *See id.* art. V. Review of an arbitrator's legal errors is not permitted. Most but not all national arbitration laws track these limited review standards. *See* Park, *supra* note 174, at 815-17.

189. Indeed, so pervasive is the deference granted to arbitral decisions that one commentator has stated that "an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law." Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 712 (1999).

190. Prior to the constitution of the arbitral panel, challenges to the agreement to arbitrate or to the impartiality of particular arbitrators are subject to established review procedures and receive a fair measure of solicitude by the outsiders asked to consider them. Challenges later in the process are less well-received, and postaward challenges, although quite common, are treated with the least solicitude. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 67-69 (1994) (discussing procedures for parties to challenge arbitrators appointed to panel); Sir Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARBITRATION INT'L 121, 134-41 (1997) (discussing a variety of "interventions by national courts"); Rau, *supra* note 184, at 491 (discussing UNCITRAL Model Law which "create[s] a mechanism for pre-hearing judicial challenges to arbitrators based on required disclosures"). The New York Convention's exceptionally narrow grounds for contesting the enforcement of arbitral awards is perhaps the most obvious manifestation of this practice. Tellingly absent from the Convention is any provision allowing a losing party to challenge an award on the basis of legal errors committed by the arbitrator, even where those errors are quite flagrant. *See* BORN, *supra*, at 506 (noting that U.S. courts have repeatedly interpreted the New York Convention "as foreclosing virtually all judicial review of the merits of arbitral awards"); REISMAN, *supra* note 173, at 109-20 (analyzing the control scheme of the New York Convention).

bargained to include these elements in their dispute settlement arrangements *ex ante* that legitimizes the system of deference given to an arbitrator's conclusions *ex post*.

How do the constraints on challenging arbitral decisions affect the incentives of arbitrators to limit their own authority? Arbitral panels are traditionally concerned not with articulating governing legal norms but with resolving private disputes within the constraints imposed by the parties' contract. Fealty to the parties' intent, therefore, is the benchmark against which arbitral accountability is measured.<sup>191</sup> The degree to which this benchmark has been internalized is more difficult to assess. For, if external checking functions are deliberately structured to be narrow, arbitrators may experience only weak incentives to behave in ways that are faithful to the parties' intent.<sup>192</sup>

Even if formalized mechanisms of external control are scant in any individual case, however, certain features of the arbitral system tend over time to internalize core notions of accountability to parties. The simple fact that arbitration is consensual serves to internalize accountability norms. Arbitrators know that the parties enjoy significant latitude in deciding where and how to resolve their disputes.<sup>193</sup> Thus, even if the prospects of a particular panel award being overturned by a national court are slim, the cumulative effect of exceeding authority across a number of cases is likely to press arbitrators to internalize certain limiting principles. This effect is particularly pronounced where the arbitrators regularly resolve disputes in a specific industry or for a particular center, or hope to

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191. As Professor Rau has written:

[A]rbitration should be understood through the lenses of contract rather than of adjudication: With respect to the neutrality of the arbitrators, just as with respect to other questions—for example, the extent of their “jurisdiction” or the finality of their award—the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties.

Rau, *supra* note 184, at 487; *see also* REISMAN, *supra* note 173, at 5-6; Park, *supra* note 174, at 814-15.

192. REISMAN, *supra* note 173, at 6 (noting absence in international arbitration, as compared to domestic arbitration, of the “hierarchical control system equipped with an effective compulsory jurisdiction to review allegations of excessive jurisdiction and to decide impartially the alleged nullity of the award”).

193. *See* DEZALAY & GARTH, *supra* note 9, at 7.

entice parties to appoint them to the financially remunerative task of serving on future panels.<sup>194</sup>

Consider the effect of these internalized checking functions on the content of arbitral awards. Nearly all international arbitration systems require that arbitrators give reasons for their decisions.<sup>195</sup> These reasons are not reviewed, however, with anywhere near the scrutiny of domestic and international judicial appeals, and even the deliberate disregard of controlling legal precepts is often an insufficient basis upon which to vacate an award. To the extent that external control mechanisms do exist, they are directed primarily to curbing excesses of authority rather than to correcting legal errors. In any single dispute, therefore, an arbitrator's incentive to engage in rigorous legal analysis often will be outweighed by her incentive to reach a conclusion that is faithful to the arbitration agreement and is acceptable, or at least tolerable, to both contesting parties.<sup>196</sup>

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194. See G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 634 (1988). Shell states:

Arbitrators, unlike judges, often have an incentive to make disputants equally happy or unhappy because they are paid by the parties rather than by the state. Since risk averse parties are more likely to agree on an arbitrator who has a reputation for moderate decisions ... arbitrators who want to encourage repeat business will seek a reputation for moderation rather than extremism in their decision making.

*Id.* See also Rau, *supra* note 184, at 521 (discussing arbitrators' "self-interest in trying to secure and expand prospects of future arbitral appointments").

195. See, e.g., Arbitration Rules of the United Nations Commission on International Trade Law, UNCITRAL art. 32(2), G.A. Res. 31/98, Dec. 15, 1976 (noting that "the arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given"); Rules of Arbitration of the International Chamber of Commerce, 1 Jan. 1998, R.25(2) ("The Award shall state the reasons upon which it is based."), available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>; London Court of International Arbitration, Arbitration Rules, Recommended Clauses & Costs, art. 26.1 ("The Arbitral Tribunal shall make its award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based."), available at [www.lcia-arbitration.com/rulecost/english.htm](http://www.lcia-arbitration.com/rulecost/english.htm) (last visited Oct. 2, 2001).

196. See Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 716-21 (1999) (criticizing arbitral awards as insufficiently reasoned and often based on "contextual justice" rather than careful legal analysis); Rau, *supra* note 184, at 523, 534 (indicating arbitration, unlike adjudication, creates "a tendency to look for intermediate solutions ... responsive to the uniqueness of each dispute" that often takes the form of "compromise awards"); see also REISMAN, *supra* note 173, at 95 (identifying structural incentives for three-person arbitrations to produce compromise awards).

This approach to decision making is especially prevalent where awards must be issued

Nor are arbitrators likely to be especially concerned with the effects of their reasoning on third parties. First, arbitral decisions are free from the constraining effects of precedent, a necessity given that parties regularly require decisions to remain unpublished or crucial passages excised to preserve confidentiality. Where decisions are published, they often contain desultory reasoning or fail to maintain decisional harmony with prior published cases addressing analogous legal issues.<sup>197</sup> These decisional ambiguities and conflicts often remain unresolved due to the paucity of institutionalized appellate processes to clarify or reconcile them.<sup>198</sup> Indeed, without a system of internal and external checks to support the production of carefully reasoned awards, commentators have questioned whether the international arbitration system is capable of developing a distinct body of rules and norms.<sup>199</sup>

## *2. Misplaced and Inadequate Arbitral Checking Functions in the UDRP*

When viewed in the aggregate, the most important constraints on arbitral decision makers are ex ante creational checks rather than ex post external or internal checks. The parties' ultimate control over an arbitrator's power flows from their virtually unfettered right to choose the substantive and procedural rules according to which

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within a short period of time, whether because of contractual or institutionally imposed deadlines or workload constraints. Cf. Ted L. Stein, Remarks, *Decisions of the Iran-United States Claims Tribunal*, 78 AM. SOC'Y INT'L L. PROC. 221, 228-29 (1984) (stating that tribunal's heavy caseload tends to suppress extended legal reasoning).

197. See Maniruzzaman, *supra* note 196, at 721 ("In arbitral practice it seems to be a striking feature that in many cases arbitrators leave out the analysis or any discussion while applying any principle of law."); see also Rt. Hon. Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 INT'L ARB. 141, 154 (1988) ("An arbitrator is not called upon to make detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited.").

198. One exception to this is the ICSID annulment procedure. See REISMAN, *supra* note 173, at 46-106. Although the ICC does contain a court, it does not review arbitration decisions on matters of substance. See REDFERN & HUNTER, *supra* note 1, at 51.

199. See Maniruzzaman, *supra* note 196, at 717-32 (discussing impediments to formation of *lex mercatoria*); see also KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* xiii (1999) (suggesting reforms of international arbitration practice designed to make the *lex mercatoria* "a self-contained legal system" rather than "a method of decisionmaking"). For competing views, see *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (Thomas E. Carbonneau ed., 1998).

the arbitral panel will decide their dispute. For this reason, negotiating the terms of the agreement to arbitrate is perhaps the most effective means of preserving accountability, preventing errors and controlling excesses of arbitral power.<sup>200</sup>

*a. Creational Checking Functions*

Consider the implications of this balance of arbitral checking functions for the UDRP. By imposing uniform, mandatory dispute settlement rules upon all domain-name registrants, ICANN eliminated the ability of registrants to opt out of UDRP dispute settlement proceedings or to tailor the system to their needs.<sup>201</sup> When an individual registers a domain name with any registrar of names in the three unrestricted generic top level domains anywhere in the world, she confronts a non-negotiable contract of adhesion. She cannot specify the subject matter of the disputes upon which the panel is empowered to rule or the procedures that it will follow, and she has (consistent with the inapt analogy to arbitral models) only limited control (via her selection of registrar, and hence the courts of mutual jurisdiction from which to seek redress) over the mechanisms by which panel excesses or errors may be challenged or reviewed.<sup>202</sup>

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200. For this reason, *inter alia*, the scope of the Federal Arbitration Act, which sanctions arbitration of contractual disputes, is stated to be inapplicable to contracts of employment of any “class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2000). The Supreme Court, however, has emphasized the federal policy favoring arbitration when in interpreting the scope of the arbitration statute. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (upholding pre-dispute arbitration clauses in employment contracts); *see also* Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1163 & n.246 (2001) (citing *Circuit City* and referring to the Court’s “iron enforcement of the Federal Arbitration Act”).

201. Thus, while much of the criticism of the ICANN process has focused on questions of “voice,” the questions of “exit” are also important. *See* Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1998).

202. *See* Froomkin, *Wrong Turn in Cyberspace*, *supra* note 26, at 98-99. A domain name registrant’s control over the mechanisms of dispute settlement is limited from the perspective of the three creational checking functions identified above. First, she cannot specify in advance which of the ICANN-accredited dispute settlement providers will hear her case. UDRP Rules, *supra* note 17, Rule 3(a). This omission is significant given the diversity of approaches among providers to handling challenges to a panel member’s independence or impartiality, a subject we address below.

Second, although she can define the courts of mutual jurisdiction by her residence and

In effect, all of the key substantive and procedural terms of the UDRP “arbitration” agreement are prenegotiated by ICANN, which merely heightens the importance of the content of the UDRP’s two foundational documents and the legitimacy of the process by which they were drafted. If these foundational documents fairly balance the substantive interests of trademark owners and domain-name registrants and if they contain equivalent procedural rights for both parties, then using ICANN as a proxy for individualized negotiation of a dispute settlement agreement may well be an acceptable and efficient alternative.<sup>203</sup> If, by contrast, these foundational documents are substantively or procedurally skewed, or if the process by which

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place of registration, she is unable to negotiate the background rules of national law against which the panel’s performance will be measured. This is so because there is no clear “seat” of arbitration in cyberspace and determining that seat will be crucial to determining the law to be applied by the court of mutual jurisdiction.

Third, although a registrant may participate in the panel selection process by electing to have her dispute heard by a three-member panel, such participation comes at the expense of splitting the cost of the proceedings with the complainant unless the trademark owner has already chosen a three-member panel to hear its complaint. The complainant’s incentive to select a three-person panel is also limited by the increased costs associated with this method of proceeding under the UDRP. *See infra* note 236 (citing cost data).

203. In the case of tortious acts between strangers (such as cybersquatting or trademark infringement), it has been argued that the absence of a “preexisting voluntary relationship between the parties” precludes use of arbitration as a method of dispute settlement. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 237 (1979). In fact, arbitration is possible whenever the parties can be “contractually-linked through intermediaries.” Ware, *supra* note 189, at 752. *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (permitting arbitration of age discrimination claims because of arbitration clause in securities registration application form). In the context of cybersquatting, therefore, some form of proxy system is essential to replace direct negotiations over the terms of the agreement to arbitrate.

The “bargain” in the UDRP system is completed when trademark owners agree to certain ground rules as a condition of filing a UDRP complaint. *See, e.g.*, UDRP Rules, *supra* note 17, Rule 3(b)(xiii) & (xiv) (complainant must agree to submit to jurisdiction of a court in at least one specified “mutual jurisdiction” with respect to “challenges to a decision canceling or transferring the domain name” and must waive all claims against, inter alia, registrar and ICANN arising out of the registration of the domain name or any dispute relating to it). This bargain, however, appears largely to benefit a third party, ICANN, rather than provide benefits to the other party to the agreement, namely, the domain-name registrant. Indeed, submission of the trademark owner to one “mutual jurisdiction” for purposes only of adjudicating the appropriateness of an order canceling the domain-name registration is a rather small “contractual” return for the domain-name registrant. (It is not clear, for example, that the trademark owner is to be treated as having submitted to the jurisdiction of these courts for related purposes, such as to determine whether a cause of action may arise out of a finding of reverse domain-name hijacking.)

they were created is open to challenge on legitimacy and accountability grounds, then the arbitral “bargain” struck by ICANN is itself called into question and a decisive check on the authority of UDRP panels has been cast into doubt.<sup>204</sup>

*b. External Checking Functions*

These concerns over the UDRP’s creational checking functions are further exacerbated by the fact that external checks are even more attenuated in the UDRP context than they are for international arbitration, both with respect to institutional controls and controls by national courts. Consider first the external checks imposed by the four dispute settlement providers and ICANN itself. Under many systems of institutional arbitration (including the aborted WIPO ACP procedure), arbitral centers retain the authority to enforce each panelist’s obligation to be both independent and impartial, first by requiring panelists to disclose any circumstances giving rise to doubts over those two attributes, and second by entertaining challenges from the parties to a particular panelist.

The system of neutrality enforcement contemplated under the UDRP is substantially more attenuated. Although the UDRP Rules do impose a duty on all panelists to be impartial and independent, the means by which that duty is enforced differ according to dispute settlement provider and thus vary from case to case.<sup>205</sup> One provider gives no specific provision for party challenges;<sup>206</sup> another allows challenges only within a fixed period of time after the initial appointment of a panelist;<sup>207</sup> whereas a third (and perhaps a fourth)

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204. Of course, the existence of de novo review by national courts mitigates any structural imbalances in the non-national system. As we explain immediately below, however, the prospects for meaningful national court review of UDRP panel decisions are uncertain at best.

205. Cf. *supra* note 173 (discussing blending of creational and external checking functions).

206. See WIPO, *Supplemental Rules for Uniform Domain Name Dispute Resolution Policy*, Rule 8 Annex C (Dec. 1, 1999) (containing no provision for party challenges to panelist’s independent or impartiality, but stating that WIPO Arbitration Center itself checks “whether there are any facts or circumstances, past or present, or that could arise in the foreseeable future, that might call in to question that person’s independence in the eyes of one or both of the parties”), available at <http://arbiter.wipo.int/domains/rules/supplemental.html>.

207. See National Arbitration Forum, *Dispute Resolution for Domain Names*, Supp. Rule 10(d) (Feb. 1, 2001) [hereinafter *Dispute Resolution for Domain Names*], available at <http://www.arbforum.com/domains/domain-rules020101.asp>.

permits challenges at any time during the proceedings if doubts about a particular panelist arise.<sup>208</sup> In addition, the grounds upon which challenges will be recognized vary widely.<sup>209</sup> The fact that ICANN permits dispute settlement providers to adopt different standards of review of a panelist's independence and impartiality suggests that providers may compete with one another over the substantive and procedural bases for panelist challenges. Whether such competition is likely to lead to more or less stringent panelist review is uncertain, however, and turns in part on the decision-making incentives created by the UDRP's panel selection rules, an issue we address in the next subsection.<sup>210</sup>

The absence of meaningful external controls by national courts over UDRP proceedings is even more striking. As an initial matter, however, the claim that external checking functions are more limited for the UDRP than for international arbitration seems contrary to the plain terms of the Policy. After all, the drafters expressly designed the UDRP as a soft-law system that supplements but does not supplant national court adjudication of domain name disputes.<sup>211</sup> If *de novo* review by a national court is possible, then it would seem that the UDRP's external checking functions are far

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208. See eResolution, eResolution Supp. Rule, Supp. Rule 10(a), available at [http://www.eresolution.ca/services/dnd/p\\_r/supprules.htm](http://www.eresolution.ca/services/dnd/p_r/supprules.htm) (last visited Oct. 3, 2001). The CPR Institute for Dispute Resolution's rules concerning challenges state only that "[c]hallenges to the impartiality, integrity or independence of a Panelist shall be determined by an officer of CPR." CPR Inst. for Dispute Resolution, *CPR's Supplemental Rules and Fees Schedule*, Supp. Rule 9, available at [http://www.cpradr.org/ICANN\\_RulesAndFees.htm](http://www.cpradr.org/ICANN_RulesAndFees.htm) (last visited Oct. 3, 2001).

209. Compare *Dispute Resolution for Domain Names*, *supra* note 207, Supp. Rule 10(b) (setting forth specific grounds for disqualification, including direct financial interest and prior representation of party), with eResolution, *supra* note 208, Supp. Rule 10(a) (allowing panelist recusal "if there are circumstances which raise serious doubts about his or her impartiality or independence").

210. See *infra* Part II.B.2.c. ICANN's power to approve and monitor dispute settlement providers will likely serve as a check on any provider that habitually permits biased or partial panelists to decide UDRP cases. Cases of less than systemic bias may be difficult to monitor, however, particularly given that the parties will have limited information and incentives to bring such challenges to ICANN's attention.

211. See Policy, *supra* note 17, ¶ 4(k) (parties to UDRP dispute are not precluded "from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded"); see also *Referee Enterprises, Inc. v. Planet Ref, Inc.*, No. 00-C-1391 (E.D. Wis. Jan. 24, 2001) (federal court issued injunction in case directly at odds with prior UDRP decision), available at [http://www.Loundy.com/CASES/Referee\\_Ent\\_v\\_Planet\\_Ref.html](http://www.Loundy.com/CASES/Referee_Ent_v_Planet_Ref.html).

*stronger* than the extremely limited national court checking mechanisms at work in arbitration.<sup>212</sup> Several features of the UDRP significantly undermine this argument, however, particularly with respect to external checking functions affecting domain name registrants. These features suggest that the UDRP may be soft law in theory, but much harder law in practice.

Consider first the filing of a complaint by a respondent in a court of so-called “mutual jurisdiction” to challenge a UDRP panel decision ordering her domain name to be canceled or transferred (described somewhat loosely as an “appeal” in the preparatory documents).<sup>213</sup> The extremely short ten-day window within which respondents must file such a proceeding is likely to exert a significant deterrent effect on national court review. Initiating litigation is often a time-consuming and complex process, particularly for individuals and businesses with limited financial resources who may be forced to find an attorney to litigate in a foreign jurisdiction.<sup>214</sup> Of course, nothing precludes a respondent

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212. This was the rationale adopted in a recent district court decision that refused to apply the deferential review standards of the U.S. Federal Arbitration Act to UDRP panel decisions. *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752 (E.D. Va. 2001) (concluding that either trademark owner or domain name registrant may “seek a *de novo* review of a dispute that has been the subject of the [UDRP’s] administrative procedure”).

213. See *Second Staff Report*, *supra* note 149, § 4.7. Such a proceeding differs from the conventional understanding of an appeal. To be sure, the level of review undertaken by courts of mutual jurisdiction (*de novo* review) comports with the standard of scrutiny typically applied by appellate courts to questions of law with which they are presented. Other aspects of the process, however, set it apart from traditional appeals and affect its role as an effective checking mechanism. In particular, appellate courts typically are reluctant (or unable) to disturb factual findings of lower courts absent egregious error. *Cf.* FED. R. CIV. P. 50 (applying the “clearly erroneous” standard to review of factual findings of a judge sitting as a fact finder). This would suggest perhaps, once more, that proceedings in courts of mutual jurisdiction would serve as a greater external check than normally served by the appellate system. However, reliance on a developed factual record by the appellate court also serves to expedite (and render less costly) the conduct of an appeal. The high cost of proceeding before a national court, one of the reasons for the development of the UDRP, is cemented in place by the lack of a portable factual record. The *de novo* factual inquiry, therefore, may paradoxically exacerbate (or perpetuate) the cost concern of national court proceedings discussed above, creating a disincentive to “appeal” and hence further weaken the external check served by “appeals” to national courts.

214. Although the UDRP requires a stay of a panel order where an action is filed by the domain name registrant in a court of mutual jurisdiction, there is nothing that prevents a domain name owner from proceeding in another court (perhaps closer to home) that might be willing to assume jurisdiction over the dispute. See UDRP Rules, *supra* note 17, Rule 4(k). While this would not necessarily have the automatic stay effect of proceedings in a court of

from filing national court proceedings after the ten-day window has expired. The registrant's incentives to do so once a domain name has been canceled or transferred will be substantially diminished, however, particularly when the removal of the domain name disrupts her established or planned business operations. From a cost-benefit perspective, it may be preferable to transfer operations to a different domain name or even to abandon a start-up enterprise altogether. Empirical evidence on this point is anecdotal, but the most comprehensive database of national court challenges to UDRP rulings lists only twenty-five cases in federal district court and one foreign case out of the more than 3500 UDRP panel decisions to date.<sup>215</sup>

Second, it is unclear whether respondents who do muster the resources to appeal panel decisions in fact possess a cause of action against a trademark owner under national laws seeking retention of the domain name. Michael Froomkin in particular has raised this as a weakness of the UDRP system.<sup>216</sup> If this criticism is well-founded, even where a dispute between the parties would have been decided in the respondent's favor had it been litigated under a particular national trademark or cybersquatting law, domain name registrants may not be able to reverse a panel decision where a transfer is already a *fait accompli*.

Whether the criticism is well-founded, however, is not so clear (at least under U.S. law). A small number of cases have been filed by aggrieved domain name registrants raising a smorgasbord of causes of action.<sup>217</sup> And the Anti-Cybersquatting Consumer Protection Act

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mutual jurisdiction, it is unclear how a domain name registrar would deal with conflicting national court determinations and/or orders. *Cf. id.*, Rule 3(b) (noting that changes will be made to domain name registration if an order is received from a court of "competent jurisdiction"). It is for this reason, among many others, as we discuss in Part III, that a jurisprudence of national-non-national relations must be developed.

215. Patrick L. Jones, *UDRP Appeals in Court* [hereinafter *UDRP Appeals in Court*], at <http://www.udrplaw.net/UDRPappeals.htm> (last visited Oct. 3, 2001). *See also* Cerf, *supra* note 26, at C2 ("Even though the UDRP is non-binding ... it appears that [the challenge to panelists' decisions] has happened in only a few dozen out of over 2,000 decisions to date."). *But see infra* note 217 (referencing specific appeals).

216. Froomkin, *WIPO Commentary*, *supra* note 85, ¶¶ 124-27.

217. *See* *Virtuality L.L.C. v. Bata Ltd.*, No. H-00-3054 (D. Md. Apr. 2, 2001) (dismissing registrant's state law claims but retaining jurisdiction of federal claims), *available at* <http://www.mdd.uscourts.gov/Opinions/PDF/2001/April/bata.pdf>; *Famology.com, Inc. v. Perot Systems Corp.*, No. 00-2363 (E.D. Pa. June 19, 2001) (dismissing registrant's conversion claim

(ACPA),<sup>218</sup> enacted in the United States in late 1999, permits domain-name registrants whose domain name has been canceled or transferred pursuant to the UDRP (or a similar policy) to file a civil action in U.S. federal court against the prevailing party in order to establish that the registration and use of the domain name was lawful under the Lanham Act.<sup>219</sup> If the domain-name registrant is successful, the court may “grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.”<sup>220</sup> To our knowledge, no other national law provides such a cause of action.

Third, respondents who frame their claims not as an appeal of the merits of a UDRP ruling but rather as a challenge to excesses of panel power are equally unlikely to prevail. In traditional international arbitral proceedings, nation-states have enacted detailed statutory regimes to allow losing parties to challenge awards, albeit on very limited grounds. But it is doubtful that hybrid UDRP decisions qualify as arbitral awards under these statutes, particularly given the *de novo* national court review

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against trademark owner but refusing to dismiss tortious interference with contract and abuses of process claims), *available at* <http://www.udrplaw.net/UDRPappeals.htm>. For a different complaint filed in a U.S. district court seeking to reverse a panel ruling, see *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, No. 00-CV-141L (filed Aug. 17, 2000) (alleging causes of action for fraud and unfair competition, tortious interference with prospective economic advantage and a declaratory judgment of no trademark infringement), *available at* <http://www.domainbattles.com/lawsuit3.htm>.

218. Pub. L. No. 106-113, 113 Stat. 1536 (codified at 15 U.S.C. § 1125(d) (Supp. V 1999)).

219. 15 U.S.C. § 1114(2)(D)(v) (1994). The statute also provided a cause of action for owners of trademarks—both registered and unregistered—against cybersquatters. 15 U.S.C. § 1125(d). In contrast to section 1114(2)(D)(v), the provision, this part of the statute has been used heavily by trademark owners. *See, e.g., Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, 202 F.3d 489, 495 (2d Cir. 2000), *cert. denied*, 530 U.S. 1262 (2000).

220. 15 U.S.C. § 1114(2)(D)(v). Although at least one complaint has been filed in a U.S. district court seeking to challenge a panel ruling under this provision, there have been no reported decisions interpreting it. *Barcelona.com*, (<http://www.domainbattles.com/lawsuit3.htm>).

It is unclear whether section 1114(2)(D)(v) was thought necessary to remedy jurisdictional, substantive, or remedial failings. A declaratory judgment action for nonviolation of the Lanham Act surely existed—subject to the thresholds required for such actions generally—even without section 1114(2)(D)(v). But the relief provided in the statute suggests that this might be a useful means of checking UDRP excesses. This provision raises a variety of issues in addition to its intended application. For example, to work fully, the domain name registrant may have to join the domain-name registrar as a defendant in the action.

contemplated by the Policy.<sup>221</sup> Courts in the United States, at least, have indicated that they would not be bound by panel findings, which suggests a clear intent not to treat panel decisions as arbitral awards.<sup>222</sup> For this reason, it is doubtful that national courts possess any grant of power to review UDRP panel abuses as such.

As to this third weakness of national court proceedings as an external check on UDRP decision making, one might respond that the lack of a check on panel excesses is somewhat untroubling given courts' power of de novo review on the merits. Nevertheless, even if national proceedings on the merits develop in ways that obviate the problems discussed above,<sup>223</sup> limited judicial review of panel excesses would serve an independent checking role of significant value. Such "quasi-procedural" reviews<sup>224</sup> contribute to checking in ways that even the ostensibly stronger de novo merits assessment cannot achieve. The articulation of procedural and structural standards across the board (e.g., regarding the impartiality of arbitrators) may be of greater long-term consequence than an unbiased court simply reaching a different conclusion on the merits. The latter review ensures a proper result in a single case, but does nothing to develop appropriate systemic checks on excess at the level of UDRP panel decision making. Indeed, the legitimacy of the UDRP system depends on the exposure of such conduct as unacceptable, *even where* the outcome of the case on the merits

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221. Many national arbitration statutes are based on the UNCITRAL Model Law, *supra* note 183, whose applicability to UDRP proceedings is highly questionable. Most importantly, the model law permits the parties to have recourse to a national court to "set aside" an arbitral award only on exceedingly narrow grounds, such as incapacity of a party; invalidity of the arbitration agreement; lack of proper notice of the arbitral proceedings; failure to follow the agreed panel appointments process; awards dealing with disputes or matters beyond the scope of the submission to arbitration; disputes not capable of settlement by arbitration under national law; or awards in conflict with the public policy of the State. *See id.* art. 34. These narrow grounds are directly at odds with a system in which the parties may seek de novo review of the award by a national court.

222. *See Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752 (E.D. Va. 2001) (rejecting claim of trademark owner that UDRP decisions were arbitral awards entitled to the deferential review and enforcement standards of the Federal Arbitration Act, 9 U.S.C. § 10 (2000); *see also Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc.*, 54 U.S.P.Q.2d (BNA) 1766 (N.D. Ill. 2000); *BroadBridge Media, L.L.C. v. Hypercd.com*, 55 U.S.P.Q.2d (BNA) 1426 (S.D.N.Y. 2000).

223. *See supra* text accompanying notes 213-22.

224. *See supra* note 188 (discussing UNCITRAL model law).

would be unaffected.<sup>225</sup> De novo merits review by national courts will fail to highlight these excesses, whether courts reach the same or a different result, thus preventing the internalization of systemically appropriate standards by UDRP panelists.<sup>226</sup> This is especially so where, for reasons discussed above, other aspects of the system discourage domain-name respondents from seeking national court review in individual cases.<sup>227</sup>

Uncertainty over the location of national court review and the substantive law to be applied raises a fourth doubt regarding national courts' ability to provide adequate external checks on UDRP panel abuses. Initially, one would expect that, as a result of the mutual jurisdiction provision in the UDRP, courts in jurisdictions where registrars are based might develop an expertise and interest in reviewing UDRP panel decisions. For example, the Eastern District of Virginia (by virtue of being the home to NSI, the original exclusive registrar for domain names in the leading generic top level domains) has thus far dealt with a significant number of trademark-domain-name disputes.<sup>228</sup> But the mutual jurisdiction provision is unlikely over time to centralize such expertise. Even assuming that trademark owners will select the domicile of the

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225. Attention to these dual concerns of individual justice and systemic monitoring is achieved in national court systems by doctrines of "harmless error."

226. This assumes, of course, that national courts will even consider a prior UDRP panel decision as relevant to their own analysis of the dispute between the parties. *See Referee Enterprises, Inc. v. Planet Ref, Inc.*, No. 00-C-1391 (E.D. Wis. Jan. 24, 2001) (failing even to refer to prior UDRP decision between the same parties), *available at* [http://www.Loundy.com/CASES/Referee\\_Ent\\_v\\_Planet\\_Ref.html](http://www.Loundy.com/CASES/Referee_Ent_v_Planet_Ref.html).

227. In addition, depending upon the scope of issues for which merits review by courts of mutual jurisdiction is available, a procedural checking mechanism may be used by courts strategically to indicate to panels the parameters of acceptable decision making on substantive issues. National appellate courts frequently use similar national mechanisms of judicial review to provide lower courts with guidance on the margins of the substantive law even where appellate or review jurisdiction over the merits does not exist. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (using mandamus procedure to review class action certification where direct appeal unavailable). Indeed, the use (or abuse) of such appellate procedures for these purposes may force legislators to recognize the need for more expanded direct review. *See* FED. R. CIV. P. 23(f) (creating broader appeal possibilities in context of class certification addressed by mandamus in *Rhone-Poulenc*); *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the U.S. Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000) (discussing genesis of Rule 23(f)).

228. *E.g., Banco Inverlat, S.A. v. www.inverlat.com*, 112 F. Supp. 2d 521 (E.D. Va. 2000); *Caesars World Inc., v. Caesars-Palace.com*, 112 F. Supp. 2d 502 (E.D. Va. 2000).

registrar as the court of mutual jurisdiction rather than the domicile of the domain-name registrant, the geographic location of registrars is slowly diversifying under ICANN's competitive registration policy. As the backlog of disputes regarding NSI-registered domain names is cleared, a similar disaggregation of national judicial decision making can be expected. Moreover, respondents are not restricted to so-called "appeals" and may bring proceedings in any court of competent jurisdiction.<sup>229</sup>

At least in the short term, these diverse national courts are likely to differ widely over the extent of review they grant to UDRP rulings,<sup>230</sup> and over conflict-of-laws methodologies they apply to determine the applicable substantive rules. Taken together, the potential for multiple national review venues and the lack of discernible review standards thus may diminish further the capacity of national courts to serve as external checks. As a theoretical matter, multiple venues might generate competition among legal systems and thus stimulate active national court review.<sup>231</sup> This free market approach to the development of legal rights certainly undergirds the current domain-name registration system.<sup>232</sup> However, it may not cut as strongly in favor of efficient, appropriate lawmaking in the context of external checking mechanisms.<sup>233</sup> Dispersing the checking function through

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229. Policy, *supra* note 17, ¶ 3(b). Such courts may include, in some nations, not only national courts but local courts as well. See David McGuire, *California Passes Sweeping Anti-Cybersquatting Law*, NEWSBYTES, Aug. 23, 2000, 2000 WL 21181749 (discussing California's new state cause of action against cybersquatting in domain names that are identical or confusingly similar to the "real names of other people, living or dead").

230. See *Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc.*, 54 U.S.P.Q.2d (BNA) 1766 (N.D. Ill. 2000); *BroadBridge Media, L.L.C. v. Hypercd.com*, 55 U.S.P.Q.2d (BNA) 1426 (S.D.N.Y. 2000).

231. See *infra* notes 365-66 (discussing why a multiplicity of venues might serve a useful check on UDRP panels and enhance the legitimacy of the lawmaking and adjudicative process).

232. Cf. Burk, *supra* note 201 (discussing jurisdictional competition over legal norms regulating cyberspace); DAN L. BURK, *The Market for Digital Piracy*, in BORDERS IN CYBERSPACE 205 (Brian Kahin & Charles Nesson eds., 1997) (discussing danger of "race to the bottom" in jurisdictional competition over rules of copyright protection).

233. One of us has written elsewhere of the value of "weak" international lawmaking, facilitated by the wide dispersal of decision makers. See Dinwoodie, *A New Copyright Order*, *supra* note 8, at 570-71 (discussing value of international copyright lawmaking being conducted by varied national courts). However, there is an important difference between weakening national courts that create international law through adjudication (which lends

decentralized review may simply dilute that function, sending the wrong message to UDRP panelists.

Contrast this state of affairs with international arbitration, in which review of an award may occur in multiple jurisdictions, but the nature of that review—challenges under the national laws of the seat of arbitration, and challenges elsewhere under the strictures of the New York Convention—is fixed and known in advance to both the parties and the decision makers prior to the proceedings. Under this set of external constraints, the award review, however limited, either at the arbitral situs or during enforcement proceedings, is likely to—in most cases—identify fairly quickly those arbitrators who regularly exceed the powers arbitration agreements grant them or make other egregious errors. The knowledge of such review is also likely to exert its own constraining effect on arbitrators, deterring them from making challengeable errors in the first instance.

Finally, the attenuation of national courts' external checking function is manifested by the automatic nature of UDRP enforcement. Unlike international arbitrations subject to the New York Convention, there is no requirement that prevailing UDRP complainants institute separate national court proceedings to enforce their awards—a crucial check on arbitral power. Instead, enforcement of UDRP awards in favor of trademark owners are automatic *unless* the respondent takes steps to appeal. This shift of the burden of enforcement removes any opportunity for a “second look” at the arbitral award,<sup>234</sup> thereby destabilizing one of the features that makes the strong presumption favoring enforcement of arbitral awards acceptable in the first place.

### *c. Internal Checking Functions*

For the foregoing reasons, national courts are unlikely to exercise significant *de facto* external checks on abuses of authority by UDRP

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legitimacy to such lawmaking) and weakening national courts that serve as checks on the excesses of potentially too powerful non-national lawmakers (which reduces the legitimacy of the lawmaking endeavor).

234. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (emphasizing review of arbitral awards at the enforcement stage to ensure compliance with forum's public policy).

panels, notwithstanding the de jure power that they are given under the terms of the Policy. This leaves internal checking functions as the principal method by which arbitral-type excesses are to be checked. Yet UDRP panels have only weak incentives to limit their own authority.

As noted above, the panelists and institutions operating in international arbitration cases compete for business of both complaining and responding parties. They thus have an incentive to stay within the boundaries of the arbitral agreement and to issue awards that encourage repeat business from both parties.<sup>235</sup> In the UDRP, by contrast, competition incentives are skewed in favor of complainant intellectual property owners. It is complainants, not respondents, who choose the dispute settlement provider and who pay panel fees in all single-panelist cases. In principle, respondents may convert a single-member panel to a three-person panel after receiving the complaint. In practice, the large number of cases in which respondents fail to appear and the added cost of choosing a three-person panel for those who do<sup>236</sup> significantly diminish the impact of respondents' choice on the incentives of providers and decision makers.<sup>237</sup>

Confirming fears expressed by some participants during the ICANN review-and-comment process, evidence suggests that

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235. See Shell, *supra* note 194, at 634.

236. Fees for a single-member panel run between \$750 and \$1000 (U.S. dollars) for a single domain name. Fees for a three-member panel run between \$2200 and \$2500 (U.S. dollars) for a single domain name. For a comparison of fee schedules and other cost data among the first three UDRP dispute settlement providers, see Berkman Ctr. For Internet & Soc., Harv. Law Sch., *Choosing a Provider*, at <http://eon.law.harvard.edu/udrp/process.html> (last visited Oct. 3, 2001). Respondents who elect a three-member panel must split the cost of the panel's fees with the complainant.

237. Of the first 273 decisions issued by UDRP panels, only nineteen were decided by three-member panels. See M. Scott Donahey, *The ICANN Cybersquatting Decisions # 3: April 7, 2000 through May 5, 2000* [hereinafter *Cybersquatting Decisions 3*], available at <http://eon.law.harvard.edu/udrp/decisions/2000-3.html> (last visited Oct. 3, 2001); M. Scott Donahey, *The ICANN Cybersquatting Decisions # 2: March 2, 2000 through April 6, 2000* [hereinafter *Cybersquatting Decisions 2*], available at <http://eon.law.harvard.edu/udrp/decisions/2000-2.html> (last visited Oct. 3, 2001); M. Scott Donahey, *The ICANN Cybersquatting Decisions # 1: January 14, 2000 through March 9, 2000* [hereinafter *Cybersquatting Decisions 1*], available at <http://eon.law.harvard.edu/udrp/decisions/2000-1.html> (last visited Oct. 3, 2001). This pattern has largely continued through July 2001. See Geist, *supra* note 169, at 17 (reporting that of the first 3094 cases, 292 or 9.5% were decided by three-person panels).

dispute settlement providers are acting on the “irresistible incentive to . . . develop a reputation for deciding cases in favor of complainants.”<sup>238</sup> Providers now publish statistics on their win/loss records and other information about their decisions, information which serves as indirect advertising to trademark owners intent on choosing the most complainant-friendly provider.<sup>239</sup> There is also anecdotal evidence that providers have adopted more overt methods to attract complainants by boasting of the tough stance their panelists have taken in UDRP disputes.<sup>240</sup> These features have already created a public perception that some dispute settlement providers are more complainant friendly than others, a fact that the case statistics support (although the cause-and-effect dynamic is still unclear).<sup>241</sup> If this perception becomes entrenched, it will affect the selection process of an ever larger pool of complaining trademark owners, further skewing provider incentives and undermining ICANN’s vision of the UDRP as a substantively uniform system administered by disaggregated decision makers competing only over nonsubstantive matters.

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238. Comments of David Post to ICANN Staff & Council Regarding UDRP, Oct. 11, 1999, at 3, at <http://www.icannwatch.org/archives/essays/939754407.shtml>; see also John Berryhill, *The UDRP Provides Disputable Resolution Incentives*, at 2 (Apr. 4, 2000) (“[A]ny pro-registrant provision that managed to sneak its way into the UDRP can be effectively negated by the overall incentive structure built into the way that the UDRP is administered.”), at [http://www.icannwatch.org/archive/udrp\\_and\\_incentives.htm](http://www.icannwatch.org/archive/udrp_and_incentives.htm).

239. See CPR Inst. for Dispute Resolution, *Dispute Resolution for Internet Domain Names: Cases and Published Decisions*, at [http://www.cpradr.org/ICANN\\_Cases.htm](http://www.cpradr.org/ICANN_Cases.htm) (listing results of UDRP cases decided by CPR Institute) (last visited Oct. 3, 2001); eResolution, *Decisions: Domain Name Administrative Decisions*, at <http://www.eresolution.ca/services/dnd/decisions.htm> (listing results of UDRP cases decided by eResolution) (last modified Sept. 21, 2001); National Arbitration Forum, *Domain Name Dispute Resolution: Decisions*, at <http://www.arbforum.com/domains> (listing results of UDRP cases decided by National Arbitration Forum) (last visited Oct. 3, 2001); WIPO Arbitration and Mediation Ctr., *Case Results: gTLDs*, at <http://www.arbiter.wipo.int/domains/statistics/results.html> (last visited Oct. 3, 2001) (statistical breakdown of cases decided by WIPO Arbitration Center).

240. Berryhill, *supra* note 238, at 3 (citing examples of dispute resolution providers “boast[ing]” that they “go after cybersquatters” and have “evicted” them from domain names).

241. See Geist, *supra* note 169, at 6 (providing statistical evidence documenting differential win/loss records among dispute settlement providers); Mueller, *Rough Justice*, *supra* note 169 (same); see also Tamara Loomis, *Disputes Get Swift Resolution Under UDRP*, N.Y.L.J., July 27, 2000, at 5 (“Trademark lawyers seem overwhelmingly to prefer WIPO, whose panelists are comprised mainly of intellectual property lawyers and professors.”).

In addition, consider the identity of the individuals who serve as UDRP panelists. Most are practicing intellectual property attorneys, while a somewhat lower number are retired judges and legal academics.<sup>242</sup> It is at least an open question whether decision makers from the private sector can sufficiently distance themselves from the milieu in which they practice to self-limit their own powers and develop balanced norms for the trademark-domain name interface. This is particularly true if panelists are permitted to trade on their UDRP expertise by representing trademark owners in future domain-name disputes.<sup>243</sup>

Taken together, these skewed internal checking functions are likely to place significant pressure on UDRP decision makers to rule in favor of complaining trademark owners. If, however, the disputes subject to the UDRP were both unambiguous and narrow, then the Policy itself might exert an adequate constraining force to prevent panelists from acting on these pressures. As we explain below, however, the UDRP provides panelists with discretionary decision-making authority, making it unlikely that the text of the Policy will exert such a constraining effect.

### *C. Checking Functions in Ministerial Decision-Making Systems and in the UDRP*

The documents that comprise the UDRP's drafting history, including both the WIPO Report and the gTLD-MoU, stressed the ministerial or nondiscretionary administrative character of their

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242. Loomis, *supra* note 241, at 5. For WIPO's complete "list of neutrals" and their qualifications, see <http://arbitrator.wipo.int/domains/panel/panelists.html> (last modified Sept. 11, 2001).

243. See *Tata Sons evicts pornographic cyber squatter* (Aug. 28, 2000) (discussing recent UDRP victory and stating that WIPO panelist affiliated with private intellectual property law firm in India "has been advising [the company] in all Trade Mark related matters and the filing of complaints with WIPO Arbitration Center in domain name cases"), at [http://www.tata.com/tata\\_sons/releases/20000828.htm](http://www.tata.com/tata_sons/releases/20000828.htm) (last visited Oct. 2, 2001); see also Berryhill, *supra* note 238, at 1 (positing that counsel representing trademark owners will choose dispute settlement providers staffed by "practicing trademark attorneys," some of whom may be "pre-disposed" to find in their client's favor).

In international commercial arbitration, panelists in one dispute often act as counsel in future disputes not involving the same parties. See DEZALAY & GARTH, *supra* note 9, at 18-29. In that context, however, control over the selection of panelists and arbitration centers is more fairly divided. See *supra*, Part II.B.1.

respective proposed decision-making models. The ministerial attributes of the UDRP coalesce around several features: the Policy's focus on cybersquatting and other widely deplored domain name abuses, the short time periods for rendering decisions, the ability to prosecute or defend claims without the assistance of attorneys, and lastly, limiting the remedial powers of panels to transferring or canceling domain names. These nondiscretionary attributes make it important to compare the checking functions that operate in ministerial decision-making systems with those at work in the UDRP.

### *1. Checking Functions in Ministerial Decision-Making Systems*

We begin with a definitional clarification. By ministerial or nondiscretionary administrative decision making, we are referring to systems in which the authority granted to decision makers is tightly if not entirely constraining. Within such systems, a predetermined rule or set of rules compels a particular result in response to a given set of facts.<sup>244</sup> Such rule-based decision making is the antithesis of discretionary decision making, which occurs "whenever the effective limits on [a decision maker's] power leave him free to make a choice among possible courses of action or inaction."<sup>245</sup> We recognize, of course, that there is no bright line separating discretionary from nondiscretionary decision making, although there are strong and weak forms of discretion.<sup>246</sup> Nevertheless, we believe that the distinction is a useful one for our purposes, both because it was a concept the UDRP's progenitors adopted and because it highlights the ways in which the UDRP differs from systems (be they administrative or judicial) in which decision makers do enjoy significant discretion.

In the case of domestic ministerial or nondiscretionary administrative bodies, creational checking functional are often imposed by elected representatives or their delegates who are

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244. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24 (1977) ("Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.")

245. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969).

246. *See id.* at 52-96; DWORKIN, *supra* note 244, at 31-39.

accountable to the voting public, or at a least more directly accountable than the individuals who act as decision makers.<sup>247</sup> The authority of these decision makers, in turn, is constrained first by the statute delegating legislative authority to the administrative agency<sup>248</sup> and later by transparency and participation procedures that precede administrative rulemaking.<sup>249</sup>

With these creational checks established, affected parties can assert a variety of external checking mechanisms. External checks may be as simple as a exercising a right to appeal, either to an administrative appellate authority or to a national court, both of which are empowered to review claims of error using a standard of review that grants a predetermined degree of deference to the initial decision maker. In the case of national courts, the appealing party may seek to compel the administrative decision maker to perform a nondiscretionary act or to overturn a decision in which the agency abused its discretion.<sup>250</sup> However, where challenges are leveled at decision-making bodies against whom no appeal lies, checking functions may be legislative or constitutional in nature, such as when legislators revise a statute to limit or expand the authority of an administrative agency.

The internal constraint on abuses of ministerial decision-making power is the self-imposed value of rotely applying preset legal rules to a particular set of facts. By mechanically and neutrally implementing the nondiscretionary power granted to them, administrators insulate themselves from claims of error or abuse.<sup>251</sup>

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247. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 645-48 (1999) (reviewing literature on administrative accountability). Creational checking functions might also be imposed by “the people” in the exercise of popular sovereignty. See U.S. CONST. art. III.

248. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding that FDA lacked authority to regulate tobacco products).

249. See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 551-57 (2000).

250. See generally CHARLES H. KOCH, JR., 2 ADMINISTRATIVE LAW AND PRACTICE § 8.20, at 466 (2d ed. 1997) (noting historical and modern uses of writ of mandamus to compel government officials to perform non-discretionary obligations).

251. See Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science* in THE USES OF DISCRETION 11, 37 (Keith Hawkins ed., 1992) (discussing ways in which decision makers use nondiscretionary rules “as defences” and as “justification for decisions after the fact”); see also *id.* at 39 (“In administrative agencies ... bureaucratic rules guide officials in ... providing protection from criticism in difficult cases.”).

A simple decision awarding or declining to award a claimed benefit or privilege is often all that is required. Explanations need not be given at all, or if provided, need not be detailed or discursive.<sup>252</sup>

## *2. Misplaced and Inadequate Ministerial Checking Functions in the UDRP*

What checking mechanisms could operate to control the ministerial functions of UDRP panels? One mechanism would be to provide a system of internal appeals, an option WIPO recommended but ICANN rejected. De novo “appeals” to national courts theoretically could also provide some external checks, but the substantial obstacles to review discussed above may deter appeals by respondents in most cases. Yet some form of meaningful external review procedure is essential to maintain accountability and “to ensure that the rules produced in the administrative sphere fall within the original legislative mandate and do not violate the rights of individuals or other private interests.”<sup>253</sup>

One further context in which panels are authorized to act in ways that might appear ministerial in nature is where a respondent fails to answer the complaint. Commentators have noted the large number of UDRP decisions in which respondents fail to appear or to defend against trademark owners’ complaints.<sup>254</sup> These defaults do not disempower panels from processing such cases, many of which involve clear and uncontroversial abuses of domain names.<sup>255</sup>

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252. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 637 & n.8 (1995) (identifying situations in which “legal decisionmakers facing specific controversies simply announce results without giving reasons to support them”).

253. Lindseth, *supra* note 247, at 646.

254. Berkman Ctr. for Internet & Soc., Harv. Law Sch., *Analysis of Key UDRP Issues*, at A3 ¶ 2 [hereinafter *Key Issues*], at <http://eon.law.harvard.edu/udrp/analysis.html> (last visited Oct. 3, 2001) (“[I]n most cases the respondent defaults by failing to submit a timely response, leading to an even greater likelihood of a finding of bad faith, since the dispute is then resolved solely on the complaint.”).

255. To the contrary, panels are expressly authorized by the Policy and Rules to review the allegations of the complaint and to order a cancellation or transfer of the domain name if justified. UDRP Rules, *supra* note 17, Rule 14(a). The UDRP also gives panels broad discretion to determine the significance of a party’s default. *Id.* Rule 14(b) (“If a Party, in the absence of exceptional circumstances, does not comply with any provision of, or requirement under, these Rules or any request from the Panel, the Panel shall draw such inferences therefrom as it considers appropriate.”).

At the level of individual justice, we are largely untroubled by the grant of default judgments. It requires little cost or effort to participate in UDRP panel proceedings, and the range of circumstances in which panel determination of cases against defaulting parties will produce bad substantive law is probably narrow. In particular, while several panels have treated a respondent's default alone as a virtual admission of the complainant's claims,<sup>256</sup> this is unlikely to alter the development of UDRP jurisprudence if the legal conclusion is explicitly premised upon the uncritical acceptance of the alleged facts. Only where a contested legal issue would benefit from adversarial debate, and instead, is argued from one side alone, is skewed UDRP case law likely to result.

We do not mean to downplay such a possibility. However, our concern about the number of default cases rests principally on a more structural basis, and suggests that a continuing high rate of default may be problematic for the UDRP unless carefully monitored.<sup>257</sup> International and non-national dispute settlement bodies typically cannot rely on a large account of intrinsic credibility or legitimacy. They are built on less obviously democratic foundations, and their representational capacity is continually questioned.<sup>258</sup> Therefore, it is even more important for such bodies to operate in ways that enhance their legitimacy and do not deplete their capital of credibility.

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256. See *Noodle Time, Inc. v. Max Marketing*, No. AF-0100 (Mar. 9, 2000) (stating that failure to respond "should be considered as an admission that such claims are true"), available at <http://www.eresolution.ca/services/dnd/decisions/0100.htm>; *Alcoholics Anonymous World Services, Inc. v. Raymond*, WIPO Case No. D2000-0007 (Mar. 6, 2000) (citing *Mondich* and finding "Respondent's failure to respond to the Complaint allows the inference that the evidence would not have been favorable to Respondent"), available at <http://www.arbiter.wip.int/domains/decisions/html/2000/d2000-0007.html> (last visited May 4, 2001); *Mondich v. Brown*, WIPO Case No. D00-0004 (Feb. 16, 2000) ("It is a general principle of United States law that the failure of a party to submit evidence on facts in its control may permit the court to draw an adverse inference regarding those facts."), available at <http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0004.html>.

257. In the human rights context for example, supranational tribunals and review bodies require individual complainants to substantiate the factual assertions they make against defending governments in order to find a treaty violation. See Helfer & Slaughter, *supra* note 5, at 353-54.

258. See *infra* Section III.B.1.; see also Bodansky, *supra* note 31, at 599-600.

In the specific context of domain-name disputes, ensuring the credibility and persuasiveness of default decisions is particularly important given the doubts expressed about ICANN's authority. It also helps to alleviate concerns that the process by which the UDRP was adopted unduly favored intellectual property interests. International institutions, such as the European Court of Human Rights, the International Court of Justice, and the World Trade Organization make great efforts (through financial assistance or technical support) to reduce default jurisprudence.<sup>259</sup> The UDRP panels are more like such tribunals than national courts in terms of the need to preserve their legitimacy, and thus should consider adopting mechanisms developed by such tribunals in deciding default cases.

#### *D. Checking Functions in International Adjudication and in the UDRP*

As we explained in Part I, several attributes of the UDRP resemble the adjudicatory functions of domestic courts and international tribunals. These include the requirement that all panel decisions be reasoned and published in a widely accessible manner on provider web sites. Published, reasoned decisions contemplate an interpretive role for panels and the creation of a trademark-domain name jurisprudence—functions endorsed by the text of the Policy, by participants in the WIPO consultative process, and during ICANN's own deliberations.<sup>260</sup>

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259. See Peter H. F. Bekker, *International Legal Aid in Practice: The ICJ Trust Fund*, 87 AM. J. INT'L L. 659 (1993) (discussing mechanisms used by the U.N. to provide legal expertise and funds to states seeking to settle disputes through the International Court of Justice); Carl Otto Lenz & Gerhard Grill, *The Preliminary Ruling Procedure and the United Kingdom*, 19 FORDHAM INT'L L.J. 844, 858 (1996) (discussing legal aid provided to individuals litigating before European human rights tribunals); Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1230-32 (1999) (noting that developing countries have asked that additional resources be made available to assist in the prosecution of claims before WTO dispute settlement bodies).

260. See UDRP Rules, *supra* note 17, Rule 15(a) (authorizing panels to decide cases using "any rules and principles of law that [they] deem[] applicable"); *supra* Part I.B. (discussing UDRP's formation).

Yet, are UDRP panels competent to create such a jurisprudence within the constraints the Policy imposes on them? In international adjudication, numerous checking mechanisms limit the authority of international courts, tribunals, and review bodies (which we collectively refer to as tribunals) to interpret treaties and resolve disputes between contesting parties. The next sections identify those restrictions and then compare them to the checks that operate on UDRP panels.

### *1. Checking Functions in International Adjudication*

International tribunals are creatures of treaties. When negotiating, ratifying and enforcing treaties, national governments use a variety of tools to prevent and control excesses by the tribunals they create. Most obviously, governments build creational checking functions into a treaty's text to specify the form and functions of adjudication. These textual constraints include clauses addressing the composition of the tribunal, the discretion it enjoys to screen cases for review, its evidentiary and fact-finding powers, and whether its decisions are legally binding or not.<sup>261</sup> Checking features are also implicit in the Vienna Convention on the Law of Treaties, which contains a hierarchy of generally applicable treaty interpretation methods.<sup>262</sup> Structural checks of a political nature can be imposed by adding procedures for treaty parties to delay or overrule individual tribunal rulings,<sup>263</sup> or by specifying in advance the procedures for amending a treaty in response to a particular decision.<sup>264</sup>

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261. Helfer & Slaughter, *supra* note 5, at 300-07 (discussing state parties' control over structure of supranational tribunals).

262. Vienna Convention, *supra* note 48, arts. 31, 32 (specifying interpretive methodologies for all treaties).

263. The WTO achieved a similar result by requiring rulings of panels or the Appellate Body to be adopted by the DSB absent a consensus to do otherwise. *See infra* note 265 and accompanying text; *see also* Daniel Pruzin, *U.S. Blocks EU's Request for Panel at WTO on Havana Club Rum Dispute*, 17 Int'l Trade Rep. (BNA) 1209, 1209 (2000) (noting use of procedure permitting party to temporarily block formation of a WTO dispute settlement panel).

264. In the WTO, panel and Appellate Body rulings do not constitute definitive interpretations of the WTO agreements. *See* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999). For such authoritative constructions, states must look outside of the dispute settlement process to the

International adjudication is also home to a diverse series of external checking functions. While some treaties allow litigating parties to appeal an initial decision by a tribunal, many do not. In the latter instance, or when the decision is issued by the treaty's highest decision-making authority, affected parties (which often include nonlitigating treaty signatories) may exercise both formal and informal political checking mechanisms in response to perceived errors or excesses by decision makers.

Most formally, affected treaty parties may seek to amend their agreement to thwart the impact of a particular decision. But amendment procedures are cumbersome and time-consuming. A defending state may therefore choose a more narrowly tailored mechanism, such as initiating treaty procedures that allow it to block or delay a particular decision from taking effect.<sup>265</sup>

Where a tribunal's decision is both final and binding, more attenuated external checking functions come into play. The losing party may seek to delay implementation of a particular ruling or even flout it altogether, in each case justifying its conduct by reference to the decision makers' alleged errors or abuses of authority.<sup>266</sup> If decisions are nonbinding then losing parties may simply ignore them, but because even nonbinding decisions have a

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WTO Ministerial Conference and General Council, which may adopt such interpretations only if three-fourths of the WTO membership agrees. *See* WTO Agreement, *supra* note 2, art. IX(2).

265. This blocking mechanism is subject to differing constraints in different treaty regimes. In the old GATT trade regime, for example, the losing party could unilaterally block a panel decision from taking effect. Under the WTO dispute settlement system, by contrast, decisions become binding unless all states agree to block them by a consensus vote. *See* David Palmetier, *National Sovereignty and the World Trade Organization*, 2 J. WORLD INTELL. PROP. 77, 80-81 (1999); *see also* REISMAN, *supra* note 173, at 15 (discussing potential uses of UN Security Council to nullify decisions of the ICJ). For a recent example of delaying tactics with respect to global intellectual property norms, see Ravi Kanth, *WTO Arbitrator Gives Canada Until Oct. 7 to Comply With Drug Stockpiling Decision*, 17 Int'l Trade Rep. (BNA) 1313, 1314 (2000) (WTO arbitrator rejected Canada's request for fifteen-month period to implement TRIPs panel's pharmaceutical patent ruling and imposed six-month period instead); Award of the Arbitrator, United States—Section 110(5) of the Copyright Act, WTO Doc. No. WT/DS160/12 (Jan. 15, 2001) (rejecting U.S. claims for a fifteen-month delay), *available at* [http://www.wto.org/english/tratop\\_e/dispu\\_e/160\\_12\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/160_12_e.pdf).

266. The United States' criticisms of the ICJ in response to the Court's acceptance of jurisdiction in the *Paramilitary Activities in Nicaragua Case* is perhaps the most famous example. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 326-29 (3d ed. 1999). For a discussion of realistic rates of compliance and delaying tactics in European human rights cases, see Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39 (2000).

strong “compliance pull,” a losing party may still publicly express its disagreement with the reasoning or conclusions of the tribunal.<sup>267</sup> Whether made in response to binding or nonbinding decisions, such public criticisms send a message to decision makers that they have acted in ways perceived as improper by important players in the decision-making process. It is a message that international tribunals have heeded in the past,<sup>268</sup> thereby internalizing the very values that external checking functions serve.

What other internal checking mechanisms constrain judicial decision making? An extensive literature seeks to explain the art of common and civil law judging in general and of reasoned decision making in particular.<sup>269</sup> Much of this literature identifies ways in which judges have internalized norms that constrain their actions.<sup>270</sup> Indeed, the notion that decisions should be reasoned in itself exerts a constraining force on judicial decision making. Reason giving roots out latent errors, promotes intellectual rigor, and constrains the scope of discretion in a specific case within a preexisting framework

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267. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (“Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”). For an analysis of the compliance pull exerted by nonbinding decisions of the U.N. Human Rights Committee, see Helfer & Slaughter, *supra* note 5, at 344-45.

268. See Helfer & Slaughter, *supra* note 5, at 315-17 (discussing methodologies used by ECJ and ECHR in response to charges of judicial activism by national governments); see also Helfer, *Adjudicating Copyright Claims*, *supra* note 20, at 408-09 (discussing how ECHR advanced its authority incrementally to overcome resistance from state parties).

269. Distinctions are often drawn between common law and civil law judging. Conventional understanding of civil systems emphasizes, for example, the more mechanical nature of judging. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985); KONRAD ZWEIGERT & HEIN KÖTZ, *1 AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., Oxford Univ. Press 3d rev. ed. 1998). Both systems, however, value reason giving, even if the reasons stated may rest in the case of common law systems on inductive consistency with prior decisions, and in civil law systems on deductive application of first principles. See Thomas Mackay Cooper, *The Common and the Civil Law – A Scot’s View*, 63 HARV. L. REV. 468, 471 (1950). For insightful discussions of the methods and functions of reasoning in civil law systems, see Mitchel de S.-O.-l’E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1342-43 (1995); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 92 (1994).

270. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); see also Lee Anne Fennell, *Between Monster and Machine: Rethinking the Judicial Function*, 51 S.C. L. REV. 183, 184 (1999) (analyzing and reviewing literature on “jurisprudential threats that judges themselves perceive as circumscribing their work”).

of generalized principles.<sup>271</sup> More broadly, the giving of reasons “bolsters a court’s legitimacy by justifying its conclusions in terms of a particular polity’s legal traditions and underlying social, economic, and political values.”<sup>272</sup>

The existence of international judicial scrutiny is a comparatively novel development and thus internal constraints are still evolving. The core tension arises from balancing a tribunal’s power of independent review against the need for deference to politically accountable domestic governmental bodies. On the one hand, international jurists have claimed an exclusive interpretative competence that arises concomitantly with adjudicating disputes between contesting parties. To be sure, it is necessary and appropriate for jurists engaging in this function to analyze the rights and obligations a treaty imposes.<sup>273</sup> The results of such an independent analysis are, however, far from preordained. International tribunals employ a multiplicity of interpretative tools to expand existing rights, fill gaps left open by treaty drafters, and claim implied powers nowhere enumerated in a treaty’s text.<sup>274</sup>

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271. See Bingham, *supra* note 197, at 141-43 (identifying benefits produced by the obligation to produce reasoned judgments, including imposing constraints on judicial discretion); Rau, *supra* note 184, at 530 (“[R]easoned opinions can be seen as one means of imposing transparency on the decision-making process and in particular, of imposing a certain self-discipline on the decisionmakers themselves.”); Schauer, *supra* note 252, at 641 (describing reasoned decision making as “includ[ing a] decision within a principle of greater generality than the decision itself”).

272. Helfer & Slaughter, *supra* note 5, at 322. The operation of internal judicial constraints is particularly acute where judges are engaged in decision making at what is perceived to be the margins of their legitimacy or institutional capacity.

273. The candor with which different international tribunals have claimed this interpretative function varies. The ECHR, for example, has explained that it possesses a “European supervision” over national governments that “empower[s it] to give the final ruling” on questions of treaty interpretation. *Barfod v. Denmark*, 149 Eur. Ct. H.R. (ser. A) at 12 (1989); *see also* *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 36 (1979). The ECJ has claimed the same preeminent interpretive power. Lindseth, *supra* note 247, at 663-64 (citing case law and commentary indicating that the ECJ has “established itself as the ultimate judge of the extent of Community competences”). By contrast, other dispute settlement bodies have proceeded more cautiously. *E.g.*, *Waste Mgmt., Inc. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/98/2 ¶¶ 8-9 (2000) (panel noted its power to interpret NAFTA investor dispute settlement provisions under the Vienna Convention on the Law of Treaties but did not elaborate on that power).

274. The ECJ’s early and aggressive use of a teleological method of interpretation to expand its own competencies and those of European Community institutions is by far the most famous example of this trend. *See, e.g.*, Lindseth, *supra* note 247, at 638, 663-64 (discussing ECJ’s method of treaty and legislative interpretation); J.H.H. Weiler, *The*

To counterbalance these broad interpretive powers, however, international tribunals have adopted critical internal checking mechanisms. These include procedural screening devices to avoid deciding certain cases on their merits, incrementalist decision-making strategies, and identification of subjects ill-suited for international adjudication.<sup>275</sup> When using these devices to self-impose constraints on their authority, international jurists often acknowledge the virtues of deferring to domestic actors, of respecting the intentions of a treaty's drafters, and of considering the broader political climate in which their decisions will be received.<sup>276</sup>

In the abstract, these two approaches—interpretative supremacy and internal restraint—at best are in tension and, at worst flatly contradictory. However, the obligation to give reasons for decisions, together with the candor with which most jurists approach interpretive problems, has generated an extensive body of doctrinal rules to reconcile the competing pressures. And these rules exert yet another constraining force: jurists treat their own precedents as persuasive authority although no treaty requires them to do so.<sup>277</sup> In this way, putative excesses of interpretive authority quickly become entrenched in a tribunal's case law, highlighting for affected parties

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*Transformation of Europe*, 100 YALE L.J. 2403, 2416 (1991) (noting same). For a discussion of a similar expansion of judicial power by the ICJ, see REISMAN, *supra* note 173, at 19-45.

275. National courts also possess an arsenal of escape mechanisms (e.g., in the United States, the political question doctrine) that permit them to avoid politically contentious issues and thus not risk their legitimacy. *Cf.* *Bush v. Gore*, 531 U.S. 98 (2000) (Breyer, J., dissenting). However, the calculation whether to invest or preserve some of a court's finite supply of legitimacy in entering a divisive topic may differ in the case of international tribunals where legitimacy may be more tenuous (and more readily depleted) than in the national context.

276. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 211-13 (1996) (identifying importance of these issues for WTO dispute settlement bodies); Helfer, *Adjudicating Copyright Claims*, *supra* note 20, at 399-401 (discussing ECHR's methodologies of deference to national actors); *see also Waste Mgmt., Inc.*, ICSID (W. Bank) Case No. ARB(AF)/98/2 ¶¶ 8-9 (Keith Hight, dissenting) (stressing need for "as complete an understanding as possible . . . of the legal issues involved" in NAFTA Chapter 11 dispute because the "precedential significance of this Award for future proceedings under [NAFTA] cannot be underestimated").

277. *See* REISMAN, *supra* note 173, at 31; Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 3-4 (1999); Helfer & Slaughter, *supra* note 5, at 319. This phenomenon of treating past decisions as persuasive authority extends to the judgments of sibling tribunals as well. *See* Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 699-700 (1999).

an opportunity to exercise one or more external checking functions to remedy them.

*2. Misplaced and Inadequate Adjudicatory Checking Functions in the UDRP*

Accepting that the UDRP's drafters sought to empower panels to create some sort of trademark-domain name jurisprudence does nothing to answer the question of what substantive norms such a jurisprudence should strive to develop. Much of the UDRP's genesis reflects a desire to limit the scope of dispute settlement to cybersquatting and similar behavior condemned by all Internet stakeholders.<sup>278</sup> However, the questions remain: how to ensure this vision is translated into practice, and how to provide mechanisms for rectifying any deviations from that vision should they occur? As we explain below, the checking mechanisms ICANN adopted were inadequate to address the risks and problems engendered by granting panels adjudicative decision-making powers.

*a. Creational Checking Functions*

One obvious way to confine panels' adjudicatory power is to include clear rules and limiting principles in the UDRP's founding documents.<sup>279</sup> Yet, the final version of the UDRP reflects only an equivocal endorsement of this basic creational checking mechanism. Some provisions of the Policy do indeed manifest the drafters' desire to the limit the scope of dispute settlement and the interpretive authority of panels. However, others suggest a starkly different vision of the UDRP, one that contemplates expansive, discretionary adjudication by panels deciding cases at the trademark-domain name frontier.

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278. This aspiration found its most compelling expression in ICANN's *Second Staff Report*, which rejected attempts by both trademark and domain name owners to alter the UDRP to reflect their respective interests. See *Second Staff Report*, *supra* note 149, at 8-9.

279. See Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, in *THE USES OF DISCRETION*, *supra* note 251, at 87 ("Perhaps the most obvious way of limiting a decision-maker's discretion is to provide him with rules written at some level of detail that attempt to tell him what decision to reach where a particular set of facts exists.").

The most acute expression of this tension appears in the first three subsections of paragraph 4 of the Policy, which set forth the elements that a complainant must prove to justify a transfer or cancellation of a domain name. Paragraphs 4(b) and 4(c) list the circumstances demonstrating, on the one hand, a respondent's "registration and use" of a domain name in bad faith, and on the other, her "rights or legitimate interests" in the domain name sufficient to defeat a complaint. If the UDRP were designed as a system of constrained judicial decision making, these enumerated circumstances would be dispositive of all claims and all defenses. Under such a system panels would admittedly still have interpretative discretion to decide in each dispute whether the facts presented fell within the parameters of the enumerated rules and to resolve ambiguities contained within the rules themselves.<sup>280</sup> However, the exclusive nature of the categories would exert considerable constraining force, preventing panels from expanding the Policy very far beyond the heartland of cases circumscribed by the text.

The UDRP's drafters, however, did not limit panelists' discretion to these enumerated grounds. Instead, they labeled these exemplars as "circumstances" which existed only "in particular but without limitation" to other situations of bad faith, on the one hand, or rights and legitimate expectations, on the other.<sup>281</sup> Such an obvious and open-ended invitation to lawmaking sends a clear message to panels that they can exercise independent authority in determining which sorts of unenumerated circumstances justify a ruling in favor of complainants or respondents.<sup>282</sup> Without constraints on these open-

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280. One obvious example would be the number of and types of domain-name registrations necessary to constitute a "pattern" of registering designed domain names to prevent trademark owners from reflecting their marks in such domain names. See Policy, *supra* note 17, ¶ 4(b)(ii).

281. *Key Issues*, *supra* note 254, ¶ 3 ("Since the UDRP specifies that bad faith is not limited to the specific circumstances enumerated in 4(b), panels have taken the liberty of finding bad faith beyond the 4(b) factors."). For a recent and controversial example, see *Reg Vardy Plc v. Wilkinson*, WIPO Case No. D2001-0593 (July 3, 2001) (respondent, who was not a competitor of the mark owner, registered domain name in bad faith notwithstanding fact that Policy ¶ 4(b)(iii) premises finding of bad faith upon registration primarily for the purpose of disrupting the business of a competitor; panel relied on "all the circumstances" and registrant's "objective of causing harm and nuisance to the Complainant"), available at <http://www.time4talk.co.uk/finalwipo/Decision.htm>.

282. Even with this indefinite grant of decision-making authority, however, ICANN could

ended clauses, panels are left with little to guide the exercise of their discretionary lawmaking powers. Not surprisingly, this omission has produced a schism between panels that strictly construe the UDRP and those that interpret the Policy more expansively to curb a broader range of conduct by domain-name registrants.<sup>283</sup>

*b. External Checking Functions*

An alternative checking model would have granted panels interpretive powers in the text of the UDRP, but constrained those powers and corrected any errors they engendered through external checking functions. As drafted, the UDRP contains two external checking mechanisms, one political and the other legal. Neither, however, are adequate to curb abuses of adjudicatory power by panelists.

Political checking mechanisms exist by virtue of ICANN's authority to revise the Policy and Rules. ICANN's established procedures make it possible to amend the UDRP on a regular basis in response to input from affected parties. Indeed, the authors of the *Second Staff Report* expressly recommended that the DNSO revisit dispute settlement issues after the UDRP began operations to consider the recommendations of trademark and domain-name owners. Such a robust political revision process could diminish the significance of panel errors and excesses of authority by quickly correcting them to conform to the consensus view of interested stakeholders.

There are numerous impediments to the effectiveness of the political checks we have just sketched, however. First, if the process by which ICANN's initial iteration of the UDRP was subject to legitimacy challenges, similar charges (however justified) are likely to plague any revision of that process. Moreover, if intellectual property interests have captured ICANN's rulemaking process, as some commentators have contended, then the results of any revision process may be regarded as equally tainted. In addition, the pitch of the legitimacy and capture debate is likely to be set even higher than

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have used other textual methods to at least partially effectuate its goal of limiting the UDRP's scope. We discuss one such method in Part III.B.6.a. *infra*.

283. See *Cybersquatting Decisions* 3, *supra* note 237, at 2.

in the dispute over the creation of the UDRP, given that the review will occur in the same timeframe as consideration whether to extend the UDRP to far more controversial intellectual property issues.<sup>284</sup>

Second, the extremely rapid growth of UDRP case law is likely to make ad hoc review of the UDRP process a poor proxy for review in individual cases, or more formalized periodic review procedures. In the first twenty-one months of operation alone, UDRP panels issued over 3500 decisions, raising myriad complex issues for reviewers to consider. In addition, the sheer number of decisions issued suggests that episodic appraisals may be inadequate to prevent erroneous interpretations of the Policy from becoming entrenched.

Third, attention to UDRP review and reforms is likely to be obscured, at least in the short term, by the other domain name regulatory issues on ICANN's agenda. For example, the question of UDRP reform has received far less scrutiny than the creation of new gTLDs, an essential component of ICANN's mandate from the United States government.<sup>285</sup> This suggests that political checking mechanisms are likely to be both slower and more cumbersome than the *Second Staff Report* had contemplated.

Fourth, the attention and resources that affected constituencies can devote to monitoring the UDRP and urging reforms of the system are likely to be limited. This is so not only because of the competition between UDRP reform issues and other regulatory issues on ICANN's agenda but also because of the multiple fora in which lawmaking is likely to occur. In July 2000, WIPO commenced its second domain-name consultative process to consider the more contentious intellectual property issues excluded from its first consultative process.<sup>286</sup> This second WIPO process produced

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284. WIPO, *Interim Report of the Second WIPO Internet Domain Name Process*, (Apr. 12, 2001) [hereinafter *Interim Report II*] (identifying conflicts between domain name registrations and myriad intellectual property issues, including personal names, trade names, geographical indications and indications of source, nonproprietary names for pharmaceuticals, and names of international intergovernmental organizations), available at <http://wipo2.wipo.int/process2/rfc/rfc3/>.

285. See ICANN, *New TLD Program*, at <http://www.icann.org/tlds> (last modified Sept. 9, 2001) (identifying seven new gTLDs approved by ICANN); *ICANN Approves Seven Top-Level Domains*, *supra* note 123 (reviewing proposals for new gTLDs, including extensions of UDRP and enhanced protections for intellectual property owners).

286. WIPO, *WIPO2 RFC-1: Request for Comments On Terms of Reference, Procedures and Timetable for the Second WIPO Internet Domain Name Process* (July 10, 2000) (noting that

recommendations to ICANN for additional mechanisms (some of which are similar to the UDRP) to protect certain other names and identifiers, such as international nonproprietary names of pharmaceutical substances and the names of international intergovernmental organizations.<sup>287</sup>

Fifth and finally, the active use of the UDRP and its expansive interpretation by some panels are likely to create an “endowment effect” that will make it difficult for ICANN’s political bodies to resist a ratcheting-up of intellectual property protection or to investigate panel errors and abuses.<sup>288</sup> Several forces are likely to obscure the need for a review of the UDRP that tests trends in panel case law for their fidelity to the present Policy. These include a push by trademark owners to extend the UDRP to new gTLDs, a drive by famous trademark owners to incorporate enhanced dispute

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member states had asked WIPO to study and issue recommendations concerning domain name registrants’ “bad faith, abusive, misleading or unfair use of: Personal names; International Nonproprietary Names (INNs) for Pharmaceutical Substances; Names of international intergovernmental organizations; Geographical indications, geographical terms, or indications of source; and Tradenames”), *available at* <http://wipo2.wipo.int/process2/rfc/rfc1/index.html>; Caroline Drees, *U.N. Agency Broadens Fight Against Cybersquatters*, Reuters (July 10, 2000) (quoting WIPO Assistant Director General as characterizing second WIPO consultative process as addressing “very complicated” legal issues which are less harmonized than national trademark laws), *available at* <http://www.acm.org/technews/articles/2000-2/0T12w.html>.

287. See *Final Report, Second WIPO Internet Domain Name Process*, *supra* note 27, ¶¶ 117, 163. It bears noting, however, that the interim and final reports of the Second WIPO Domain Name Process candidly acknowledge the much more significant risks associated with lawmaking at the perimeter of the international intellectual property system:

The efficiency with which policy can be implemented through the deployment of the technical infrastructure, however, also inspires caution. New law has, in the past, been created in democracies by representative legislatures. It is one thing to give expression to existing law in an effective manner through the deployment of a powerful technical infrastructure. It is quite another thing to use the technical infrastructure not merely for the implementation, but also for the formulation, of new laws.

*Interim Report II*, *supra* note 284, ¶ 26; see also *Final Report, Second WIPO Internet Domain Name Process*, *supra* note 27, ¶¶ 65-67 (expressing similar sentiments and recalling distinctions in political theory between creating law and applying law). The recommendations (both of action and inaction) contained in the final report of the Second WIPO Internet Domain Name Process were heavily influenced by whether the protections sought by different parties reflected a consensus embodied in existing international intellectual property law. See, e.g., *id.* ¶¶ 92, 155, 201, 245.

288. See Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

settlement protections for their marks, and pressure by non-trademark interests currently excluded from the UDRP to incorporate their intellectual property rights into the Policy. In the debates these issues generate, the existing UDRP will serve as a minimum baseline against which all revisions proposals will be measured.<sup>289</sup> The debate over forward-looking developments is likely to obscure the more retrospective question of panels overstepping their adjudicatory authority.<sup>290</sup> Additionally, if ICANN expands the UDRP without undertaking a meaningful and balanced review, its actions may validate those panels that have adopted an expansionist methodology.

Whatever the results of ICANN's political review of the UDRP, such a process is likely to provide little comfort to the parties in individual cases who believe that a panel has acted erroneously or exceeded its mandate. What legal recourse do such aggrieved parties have under the present Policy? As noted above, the drafters did not include any system of internal appeals, either to ICANN, to the registrars, or to the dispute settlement providers. As a result, even where two opposing lines of decisions become entrenched in the case law, there is no established mechanism in place to review them. Appeals to national courts, although possible, suffer from all of the difficulties we identified above in our discussion of external arbitral checking functions.

In addition, the fact that UDRP panels apply a non-national body of rules that may diverge from national trademark and cybersquatting statutes suggests that those courts issuing rulings in cases previously considered by UDRP panels will apply their own

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289. See, e.g., *Electronic Commerce Work Programme*, *supra* note 15, ¶ 44 (stating that the UDRP has "arguably become a de facto international standard"); WIPO, *Wipo To Probe New Issues Relating To Domain Name Abuse*, Press Release PR/2000/235 (July 10, 2000) (stating that the UDRP "is now widely regarded as an efficient, quick and cost-effective way to resolve domain name disputes"), available at <http://www.wipo.int/eng/pressrel/2000/p235.htm>.

290. Alternatively, ICANN's review process may focus only on the current system's most egregious problems, such as the skewed incentives created by permitting complainants to choose the dispute settlement provider. See Mueller, *Rough Justice*, *supra* note 169. By way of full disclosure, we note that one of us has recently been appointed as the independent academic expert on the Task Force named to review the UDRP. ICANN Watch, *Names Council Selects UDRP Task Force Members* (Aug. 27, 2001), at <http://www.icannwatch.org/article.php?sid=317> (listing Graeme Dinwoodie as part of task force as "independent academic expert").

national laws rather than “correct” the panel’s interpretation of the Policy or its application to a particular set of facts.<sup>291</sup> Moreover, because panels also have discretion to decide cases using whatever legal rules they deem applicable,<sup>292</sup> they are free to ignore any indirect corrective force these national court decisions exert and to continue deciding cases using their preferred construction of the Policy. That many UDRP decisions will involve parties and registrars from different countries is likely to enhance this effect.

Panel decisions that diverge widely from the text of the UDRP, from each other, or from national laws, risk undermining the UDRP’s legitimacy.<sup>293</sup> Conflicting panel decisions, particularly interprovider conflicts, are likely to exacerbate disparities in the panel selection process, making the complainant’s right to choose the provider an even more significant feature than it is at present. By contrast, any significant divergence between the UDRP and national trademark laws will increase the incentives for losing parties to appeal a panel’s ruling. If lengthy and expensive national court appeals become habitual, they will undermine the UDRP’s goal of providing a fast, inexpensive, and streamlined way to resolve cybersquatting cases without adding much to the checking functions the system sorely needs.

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291. Indeed, in one recent case, a U.S. district court adopted a ruling directly at odds with a prior UDRP panel decision between the same parties without even citing that decision, let alone discussing why or how the panel had erred. *Cf. Referee Enters., Inc. v. Planet Ref, Inc.*, No. 00-C-1391 (E.D. Wis. Jan. 24, 2001), available at [http://www.loundy.com/CASES/Referee\\_Ent\\_v\\_Planet\\_Ref.html](http://www.loundy.com/CASES/Referee_Ent_v_Planet_Ref.html), with *Referee Enters., Inc. v. Planet Ref, Inc.*, No. FA0004000094707 (Nat’l Arb. Forum June 26, 2000), available at <http://www.arbforum.com/domains/decisions/94707.htm>. In another case, a U.S. district court issued a preliminary injunction that effectively affirmed a prior UDRP panel decision, again without citing to the prior dispute. *Cf. Registrat.com, LLC v. Fisher Controls Int’l, Inc.*, No. H-01-1423 (S.D. Tex. June 28, 2001), available at <http://www.sOrk.com/docs/fisher1.pdf>, with *Fisher Controls Int’l, Inc. v. Registrat.com LLC*, No. FA0102000096749 (Nat’l Arb. Forum Apr. 20, 2001), available at <http://www.arbforum.com/domains/decisions/96749.htm>.

292. UDRP Rules, *supra* note 17, Rule 15(a).

293. One of the most frequent concerns raised by UDRP observers is whether panels are adopting coherent and consistent interpretations of the Policy. *See Cybersquatting Decisions 3*, *supra* note 237 (providing a statistical analysis of decisions between commencement of UDRP and May 5, 2000, showing that only 25.5% of cases cited prior panel decisions and stating that “[t]his does not bode well for the rule of law, encourages users to forum shop for panelists, and provides little guidance to prospective users as to how a particular issue is likely to be decided”); John Partridge, *Loblaw loses another Net name battle*, TORONTO GLOBE & MAIL, June 21, 2000, at B7 (noting “a disturbing lack of consistency in decisions under the new dispute resolution system”).

*c. Internal Checking Functions*

ICANN's conflicting signals to UDRP panels concerning their adjudicatory powers also affects their adoption of internal checking mechanisms. On a basic level, the requirement that all decisions be published and reasoned exerts a constraining effect on gross errors and excesses of authority. Panelists know that the decisions they author will be available to all potentially affected parties, including not only the litigants, but future litigants, other panelists, and ICANN. They thus have a significant interest in ensuring that their rulings meet at least minimal levels of competence and persuasiveness, particularly if they hope to receive future UDRP assignments.<sup>294</sup>

Beyond this bare minimum level of competence, however, there are few structural incentives for panels to produce carefully reasoned decisions.<sup>295</sup> Well-reasoned decisions require at least a modicum of deliberation, a quality that the time and cost-sensitive UDRP does not favor. Consider the following: Panels normally must issue a decision within less than forty-five days after a complaint is filed. Panelists are private adjudicators with other responsibilities outside of the UDRP competing for their time. Also, the modest compensation panelists receive for their services pales in comparison to the fees they can receive as practicing attorneys or deciding other

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294. Cf. Louise Ferguson, *Geographic Domains on Shaky Ground*, THE STANDARD, Aug. 11, 2000 (reporting statement of WIPO Assistant Director General that "the performance of the arbitrators is constantly under review"), available at <http://www.thestandard.com/article/0,1902,17627,00.html>.

295. A number of commentators (and a few panel decisions) have criticized the quality of the legal reasoning of panel decisions. See, e.g., Loomis, *supra* note 241, at 5; Emerson H. Tiller, *ICANN's Uniform Domain Name Dispute Resolution Policy: An Overview and Critique*, 1 INTERNET L. & BUS. 589 (June 2000). See also *Winterson v. Hogarth*, WIPO Case No. D2000-0235, ¶ 6.12 (May 22, 2000) (noting that panel decision in *Cedar Trade Assocs. v. Ricks* "unfortunately gives no guidance as to why common law rights ... qualified as a trade mark"), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0235.html>; *J.P. Morgan v. Resource Mktg.*, WIPO Case No. D2000-0035 (Mar. 23, 2000) (refusing to follow four prior panel decisions which had accepted rebuttals from complainants "[b]ecause the distinguished panelists in these cases did not discuss this issue [and this panel does] not have the benefit of their reasoning"), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0035.html>.

arbitral matters.<sup>296</sup> Each of these pressures are likely to limit the attention that panelists can devote to drafting reasoned opinions.

Deliberation, particularly deliberation seeking to reconcile a dispute settlement system's competing systemic values, is facilitated by the use of multiple decision makers.<sup>297</sup> Thus, holding other variables constant, three-member panels should produce better reasoned UDRP decisions than one-member panels. Three-member panels enjoy increased opportunities for exchanging views, catching errors, identifying relevant issues not raised by the parties, and fleshing out ambiguities or competing approaches. It is not surprising, therefore, that a sizable number of three-member panel rulings contain dissenting or concurring opinions,<sup>298</sup> a fact that suggests single-member panels may be obfuscating or eliding controversial issues embedded in their decisions. Yet, as we identified earlier, the increased cost of three-member panels and the disincentives for both complainants and respondents to choose them are likely to severely limit the number of three-member panel decisions.

The lack of any appeal process within the UDRP makes the need for a deliberative approach to decision making particularly acute. Although some observers have criticized ICANN's failure to include such an appellate mechanism to resolve interpretive differences among panel rulings,<sup>299</sup> dispute settlement systems can create

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296. See Berryhill, *supra* note 238, at 3 (“A \$200 an hour attorney has very few hours to waste in reading the complaint and the response, making a decision, and reducing that decision to writing.”); Steven Bonisteel, *Tour Boat Firms Collide in ICANN Domain Dispute*, NEWSBYTES (Ontario), May 26, 2000, 2000 WL21177837 (“[T]he lower fees [for UDRP panels] may be discouraging some arbitrators from giving their full attention to the matter and providing a full slate of reasons.”).

297. Cf. Helfer & Slaughter, *supra* note 5, at 325 (explaining the persuasiveness of ECJ decisions to national European courts by noting “the intrinsic value of widespread and diverse input in a deliberative process: Two minds are better than one, and fifteen minds, particularly minds from different perspectives and cultures, are better than two”).

298. Of the forty-five three-member panel opinions between January 14 and July 3, 2000, nine (20%) contained individual concurring or dissenting opinions. *Cybersquatting Decisions 1 through 3*, *supra* note 237; See M. Scott Donahey, *The ICANN Cybersquatting Decisions # 5: June 14, 2000 through July 3, 2000* [hereinafter *Cybersquatting Decisions 5*], available at <http://eon.law.harvard.edu/udrp/decisions/2000-5.html> (last visited Oct. 3, 2001); M. Scott Donahey, *The ICANN Cybersquatting Decisions # 4: May 5, 2000 through June 13, 2000* [hereinafter *Cybersquatting Decisions 4*], available at <http://eon.law.harvard.edu/udrp/decisions/2000-4.html> (last visited Oct. 3, 2001).

299. Cabel, *supra* note 34, at 6.

coherent jurisprudence without an appeals body or a doctrine of binding precedent. The adjudication of public international law disputes has always operated without the aid of a supreme judicial control body, and the recent proliferation of courts and tribunals has not thrust international law into chaos.<sup>300</sup>

Several conditions are necessary, however, for the UDRP to function effectively as a disaggregated and nonhierarchical dispute settlement system. First, like the jurists who serve on international tribunals and domestic courts, UDRP panelists must internalize a set of guiding objectives and principles to assist them in resolving difficult cases. How, for example, should they interpret the lawmaking powers granted to them by ICANN in paragraph 4 of the Policy? Should the UDRP panelists construe these powers as a narrow grant of authority consistent with the drafters' goal of limiting the UDRP to open-and-shut cases, or should they use their discretionary authority to adopt teleological interpretive methods and fill gaps left open by the drafters?

Answers to these questions require a theory of the relationship between adjudicators and the lawmakers who created the dispute settlement system. Gap-filling may be appropriate for systems in which the drafters have expressly authorized such a function, or where political lawmaking bodies are at an impasse.<sup>301</sup> Gap-filling is far more problematic, however, when it encroaches upon areas intentionally excluded from a dispute settlement system or where the political rulemaking process is robust and promises to fill gaps on its own. An expansive construction of adjudicatory powers also is highly questionable during the early days of a new dispute settlement regime in which jurists' authority to hear even

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300. Charney, *supra* note 1, at 104-05 (noting that "the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system"); *id.* at 108 (arguing that persuasive authority of ICJ's decisions for other international tribunals is bolstered by "the fullness and deliberative character" of its decision-making style); see also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 353 (1999) (indicating "a rule of *stare decisis* is not necessary to the development of a body of jurisprudence by a court or dispute resolution tribunal").

301. Helfer & Slaughter, *supra* note 5, at 382-83 (discussing gap-filling by ECHR); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998) (discussing gap-filling in courts applying the United Nations Convention on Contracts for the International Sale of Goods and similar treaties).

uncontroversial disputes is fragile and subject to intense scrutiny by affected parties.<sup>302</sup>

Measured against this internal checking-function metric, the UDRP's performance is questionable. Several panels have extended the UDRP to cases involving legitimate disputes over domain name ownership or to bad faith registration without corresponding bad faith use, categories of cases that the drafters expressly excluded from the Policy.<sup>303</sup> More striking still is a line of cases permitting surname and geographic name owners to bring successful complaints against domain name registrants (either by ignoring the elements required to prove a claim or by very expansive interpretation of the notion of common law trademark rights).<sup>304</sup> Not only did these

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302. See Dinwoodie, *New Copyright Order*, *supra* note 8, at 503-18 (discussing the dangers of activist WTO panel interpretations in TRIPs cases); Helfer, *Adjudicating Copyright Claims*, *supra* note 20, at 423-31 (discussing dangers of gap-filling by TRIPs panels).

303. Cf. *J. Crew Int'l, Inc. v. crew.com*, WIPO Case No. D2000-0054, ¶ 3 (Apr. 20, 2000) (UDRP prohibits "speculative registration of names that happen to be the trademarks of others without a demonstrable plan for bona fide use"), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0054.html>, with *World Wrestling Fed'n Entm't, Inc. v. Bosman*, WIPO Case No. D99-0001, ¶ 3 (Jan. 14, 2000) ("It is clear from the legislative history that ICANN intended that the complainant must establish not only bad faith registration, but also bad faith use."), available at <http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html>; see also *Telstra Corp. v. Nuclear Marshmallows*, WIPO Case No. D2000-0003, ¶ 7.11 (Feb. 18, 2000) (endorsing concept of "passive holding" as sufficient to satisfy UDRP's requirement of bad faith use), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0003.html>.

304. See, e.g., *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, WIPO Case No. D2000-0505 (Aug. 4, 2000) (geographic name), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0505.html>; *Roberts v. Boyd*, WIPO Case No. D2000-0210 (May 29, 2000) (personal name), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0210.html>; *Winterson v. Hogarth*, WIPO Case No. D2000-0235 (May 22, 2000) (personal name), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0235.html>. But see *Kur-und Verkehrsverein St. Moritz v. StMoritz.com*, WIPO Case No. D2000-0617 (Aug. 17, 2000) (refusing to transfer trademarked geographic name of Swiss city to official organization representing that city where respondent provided information services about such city), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0617.html>; *Sumner v. Urvan*, WIPO Case No. D2000-0596 (July 24, 2000) (refusing to transfer domain name containing stage name of famous musician because musician's actual name was different and also generic), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0596.html>; *Springsteen v. Burgar*, WIPO Case No. D2000-1532 (Jan. 25, 2001) (refusing to transfer domain name), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d1532-0003.html>.

It is possible, though difficult, to obtain trademark rights in personal names. See 15 U.S.C. § 105(2)(e)(4) (1994) (providing for denial of trademark registration on ground that a claimed

rulings ignore the drafters' desire to limit the UDRP to trademark controversies, they also were issued at a time when WIPO was studying whether to recommend an expansion of the Policy to encompass these precise intellectual property rights.<sup>305</sup>

A second component of an effective nonhierarchical dispute settlement system is that its disaggregated decision makers must engage in an extensive and informed dialogue with each other regarding the norms they seek to articulate. Such a dialogue requires each decision maker to carefully search past relevant decisions, to review those decisions, and to harmonize, reconcile, and distinguish any divergent interpretations of the unitary text that all decision makers are construing. In this way, it will be possible to minimize many, although clearly not all, of the potential conflicts that a nonhierarchical system of adjudication can engender.<sup>306</sup>

Whether UDRP panels will engage in the kind of sustained dialogue necessary to avoid jurisprudential incoherence is uncertain. Panels are not bound by prior UDRP decisions and need not refer to them at all in their rulings. They may, of course, treat prior decisions as persuasive under their Rule 15(a) authority to consult whatever

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mark is primarily merely a surname). UDRP panels have transferred domain names containing celebrity names on the grounds that such names constitute common law trademark rights. *See, e.g., Winterson*, WIPO Case No. D2000-0235; *cf. Interim Report II*, *supra* note 284, ¶ 175 (stating that UDRP jurisprudence “indicates that it can and should be applied to protect personal names against bad faith domain name registrations, provided that the criteria of the Policy are carefully and properly applied and that in cases where personal names “have not been registered as a trademark or service mark, a particular focus must be devoted to ascertaining that the name in question, under relevant law, has acquired the requisite common law trademark rights”); U.S. Patent & Trademark Office, *Abusive Domain Name Registration Involving Personal Names*, at <http://www.uspto.gov/web/offices/dcom/olia/domainnamerep.html>, (last modified Jan. 18, 2001) (concluding that the ACPA should not be extended to protect personal names).

305. *Final Report*, *supra* note 78, ¶¶ 167-68 (declining to extend dispute settlement to “trade names, geographic indications or personality rights”); *see also Second Staff Report*, *supra* note 149, ¶ 4.1(c) (“Except in cases involving ‘abusive registrations’ made with bad-faith intent to profit commercially from others’ trademarks ... the adopted policy leaves the resolution of disputes to the courts.”) (emphasis added).

306. *See* Charney, *supra* note 1, at 114 (advocating increases dialogue between ICJ and other international tribunals); Helfer, *Forum Shopping*, *supra* note 1, at 326-31, 335-40, 349-53 (documenting cases of horizontal dialogue among UN and regional human rights tribunals and advocating more sustained dialogue to promote jurisprudential coherence); Helfer & Slaughter, *supra* note 5, at 323-26 (noting dialogue among supranational tribunals as one factor that covaries with their effectiveness).

rules of law they deem applicable to a particular dispute.<sup>307</sup> They are not required to do so, however, and a recent statistical survey reveals that prior panel rulings are cited in only slightly more than one-quarter of all cases.<sup>308</sup> There may be cogent reasons for this trend: Given the discretion panels enjoy to choose the controlling law, it is far from clear what persuasive force, if any, a UDRP ruling nominally decided under the law of one nation has for UDRP issues arising under another nation's laws.<sup>309</sup>

The UDRP's hybrid decision-making structure poses a more fundamental challenge to developing a consistent domain name jurisprudence. The arbitral model upon which much of the UDRP was founded places limited weight on past awards as sources of authority. It also focuses more on resolving disputes between the

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307. See 3636275 *Canada v. eResolution.com*, WIPO Case No. D2000-0110, § 7 (Apr. 10, 2000) ("Although entitled to consider principles of law deemed applicable, the Panel finds it unnecessary to do so in any depth. The jurisprudence which is being rapidly developed by a wide variety of Panelists world-wide under the ICANN Policy provides a fruitful source of precedent."), available at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0110.html>.

308. For the period of January 14 to July 3, 2000, 160 out of 568 decisions, or 28%, cited to prior panel decisions. *Cybersquatting Decisions* 1 through 3, *supra* note 237; *Cybersquatting Decisions* 4 and 5, *supra* note 298. This trend has risen slightly over time. *Cybersquatting Decisions* 5, *supra* note 298 (noting that 33% of 156 decided cases cited prior panel decisions in the period of June 14 to July 3, 2000); see also *Sundor Brands v. Trenchcoat Prods., Inc.*, WIPO Case No. D2000-0633, ¶ 6 (Aug. 21, 2000) (refusing to distinguish prior panel decisions on the ground that "the instant Panel is not aware of the evidence presented in the cases cited by Respondent and that such decisions are not binding in this matter") (emphasis added), available at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0633.html>; *Pivotal Corp. v. Discovery Street Trading Co.*, WIPO Case No. D2000-0648, ¶ 3 (Aug. 14, 2000) ("The Panel is perfectly aware that it is not bound by any other decisions."), available at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0648.html>.

Moreover, these figures mask the fact that panels have yet to develop a methodology for assessing prior case law. Many of the panels that do cite to prior UDRP cases do so in a cursory fashion without discussing the prior decision's reasoning or identifying whether a split of authority exists on the particular point at issue. See, e.g., *Sundor Brands*, WIPO Case No. D2000-0633. Only a few have engaged in more extended analysis such as distinguishing past precedents or reconciling conflicting strands of case law. See, e.g., *J.P. Morgan v. Resource Mktg.*, WIPO Case No. D2000-0035, ¶ 3 (Mar. 23, 2000) (noting inconsistent panel approaches as to whether UDRP allows submission of rebuttals by complainants and choosing approach that was more persuasively reasoned), available at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0035.html>; *Pivotal Corp.*, WIPO Case No. D2000-0648, ¶ 7 (discussing several decisions analyzing what constitutes a bona fide offering of services by the respondent).

309. See *Key Issues*, *supra* note 254, at 9 (noting divergent approaches to "the perils of applying domestic [UDRP] decisions to international disputes").

parties than on articulating governing legal norms or creating a jurisprudence to guide future conduct by nonparties. Given these antecedents, it is not surprising that stark divergences have developed between panels analyzing the same legal issues.<sup>310</sup> With limited internal incentives for panelists to reconcile divergences, no appeals process, and attenuated political checks, it is questionable whether the UDRP as presently constituted can achieve jurisprudential coherence.

### III. EXTENDING THE NON-NATIONAL MODEL OF LAWMAKING AND DISPUTE SETTLEMENT

As we explained at the beginning of this Article, international and domestic policymakers are heralding the UDRP as a new model for resolving legal disputes that transcend national borders. Their proposals to extend the UDRP, however, fail to address two key questions. First, are the conditions necessary for the UDRP's replication absent in other settings; and second, assuming that replication is feasible, should the UDRP be propagated whether in its current form or only with certain modifications of its structure?

In this Section, we seek answers to both of these questions. In brief, we believe that the UDRP's non-national model can indeed be applied elsewhere, even absent centralized technological monopolies such as ICANN. Of course, merely because replication is possible does not mean it is desirable. We conclude that the question of whether policymakers should encourage the proliferation of non-national approaches to lawmaking and dispute settlement cannot be answered in the abstract.<sup>311</sup> It depends instead on the methods used

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310. See Neil J. Cohen, *Forum: ICANN at the Crossroads*, 1 INTERNET L. & BUS. 581, 581 (2000) (stating that "the decisions diverge widely on the most important UDRP issues" and that the outcome in any particular dispute "is a crapshoot"); The TLD Lobby, *Is Your Domain Name in Jeopardy?*, at <http://www.tldlobby.com> (last visited Oct. 3, 2001) (stating that UDRP decisions have been "wildly inconsistent").

311. Although some (but by no means all) of the deficiencies of the UDRP are consequences of breaking new ground free of existing national political structures and traditional forms of international cooperation among governments, a return to either a purely national model or a purely treaty-based one would jettison the advantages that non-national lawmaking offers. We therefore reject the cosmetic "solutions" of instituting a series of checking mechanisms based upon those found in a single national model or a single treaty regime, or based upon a single decision-making model (whether adjudicatory, ministerial, or arbitral).

to legitimize non-national structures, which in turn hinges on such foundational issues as (1) the pace of non-national lawmaking and dispute settlement relative to their alternatives; (2) the design of checking mechanisms different from those currently found in the UDRP; (3) the degree to which non-national structures accommodate competing national values and interests; (4) the relationships between non-national structures and complementary or competing national and international ones; and (5) the substantive law that the system encompasses. We address these variables in our discussion below, identifying the options available to public and private policymakers seeking to emulate the UDRP's advantages without retaining its problematic features.

*A. Replicating the UDRP: Are Technological Monopolies Essential?*

As an initial matter, one might question whether calls to replicate the UDRP are misguided not on legitimacy grounds, but because of technological deficiencies. According to this argument of technological essentialism, centralized technological monopolies were not merely a sufficient condition for creating the non-national UDRP; rather, they were a necessary condition. For technological essentialists, the successful operation of the UDRP rests on two features embedded within the architecture of the domain-name system itself. First, technology gave ICANN exclusive control of the most commercially valuable domain-name space and permitted it to condition access to that space on a registrant's "consent" to a host of substantive rules. Second, technology provided the means to enforce dispute settlement decisions simply and automatically, without the delays or due process constraints that enforcement of judgments normally entails. In the absence of these two features, it might be argued, non-national structures will be inherently unstable and may even be rendered nugatory by competing national and international alternatives.

To be sure, technological essentialism helps to explain why the first extension of the non-national model is occurring entirely within the domain-name system. It is no accident that ICANN made non-national dispute settlement a required component of the seven new

gTLDs under its exclusive control.<sup>312</sup> Applying the UDRP, either in its current form or in an enhanced format, to a broader set of domain-name disputes requires relatively minor modifications to the root server and to the web of contractual relationships that ICANN and its accredited registrars superintend.

Technological essentialism may similarly explain why the Second WIPO Domain Name Process will likely produce the next wave of UDRP extensions. The legal and political issues the second WIPO process raises are complex, often exceedingly so. If, however, governments and affected stakeholders can reach a consensus on how to reconcile these issues, implementing that bargain will be straightforward.<sup>313</sup> Stated another way, the critical, practical questions facing WIPO are questions of legitimacy, not questions of technology.

Technological essentialism fails to account for other aspects of the non-national story, however. First, consider the fact that ICANN's control of domain-name space is far from complete. ICANN has imperfect control over the practices and policies of ccTLDs, and its recent interactions with ccTLD registries suggest a relationship of hostility rather than one of mutual cooperation.<sup>314</sup> In addition, ICANN is attempting to fend off competition from New.net, a California firm that registers second level domain names in "alternative" gTLDs outside the existing root server and thus beyond ICANN's reach.<sup>315</sup> Nevertheless, both New.net and an increasing number of ccTLD registries have voluntarily adopted the UDRP to

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312. See *ICANN Approves Seven Top-Level Domains*, *supra* note 123.

313. See *Interim Report II*, *supra* note 284, ¶ 24 (stating that implementing the recommendations of the second WIPO process through ICANN "has the obvious advantages of automaticity in effect and total coverage. Since the technical infrastructure is deployed in favor of the [chosen] policy, the policy can effectively be implemented throughout the whole of that technical infrastructure, namely the DNS [domain name system]").

314. ICANN, *Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee* (Feb. 23, 2000), at <http://www.icann.org/committees/gac/gac-ccTldprinciples-23feb00.htm>; Andrew Orłowski, *Country code chiefs, registrars mull ICANN breakaway*, THE REGISTER (Nov. 25, 2000), available at <http://www.theregister.co.uk/content/6/14999.html>.

315. James Ledbetter, *Competing Domain-Name Registries Creating Tower of Cyber-Babel*, THE STANDARD (July 5, 2001), available at <http://www.thestandard.com/article/0,1902,27694,00.html>.

review cybersquatting complaints by trademark owners against registrants in these domain-name registries.<sup>316</sup>

These events undermine the claims of technological essentialism in two ways. First, they suggest that the UDRP can succeed even in areas of the domain-name system not under ICANN's monopoly control (at least for purposes of imposing a mandatory dispute settlement system upon registrants). Second, and perhaps more importantly, the events reveal that where a non-national dispute settlement system has advantages over traditional adjudication or arbitration, those advantages may in themselves persuade other public or private regulatory bodies to adopt the system, even in the absence of a mandatory or centralized control structure.<sup>317</sup>

This latter point explains why the UDRP's non-national model can indeed flourish outside of the domain-name context. Consider for example the notice and take-down obligations of private Internet Service Providers (ISPs). The European Community's recent Information Society Directive instructs member states to encourage the development of a notice and take-down system by means of "voluntary agreement between all parties concerned."<sup>318</sup> Recent practice under the U.S. Digital Millennium Copyright Act (DMCA) suggests one way such a system might operate. Under the DCMA,

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316. See New.net, *Model Domain Name Dispute Resolution Policy*, at [http://www.new.net/policies\\_dispute.tp](http://www.new.net/policies_dispute.tp) (last visited Oct. 3, 2001) (comparing text of New.net dispute settlement policy to UDRP); *Final Report, Second WIPO Internet Domain Name Process*, *supra* note 27, ¶ 20 (noting that twenty-two ccTLDs have adopted the UDRP). Similarly, keyword providers have adopted dispute settlement mechanisms not unlike the UDRP to resolve disputes between keyword holders and trademark owners, notwithstanding that keyword providers are not obligated to apply the UDRP or any equivalent system. See *id.* ¶ 43.

317. Cf. Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 858 (1996) (discussing historical processes by which alternative dispute resolution systems became institutionalized among American businesses).

It is equally plausible, however, that an existing dispute settlement system will be emulated not because of its advantages, but because network effects have made it a de facto model that cannot be ignored. See generally Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998). For present purposes, we are agnostic about the causes of proliferation. Our point is simply that non-national dispute settlement systems can and do proliferate absent technological imperatives. We address normative issues in the next subsection.

318. Information Society Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, *in the Internal Market*, arts. 12-14, and recitals 40-46, O.J. L 178, 1, 6, 12-13.

ISPs in the United States function as the de facto adjudicators of infringement disputes between copyright owners and users who post copyrighted content to web sites. The disputes they oversee are designed to precede litigation and do not preclude the contesting parties from adjudicating their claims in court. The first few years of practice under the statute, however, reveal that the overwhelming majority of disputes are resolved with no judicial intervention.<sup>319</sup>

Admittedly, ISPs are nominally applying United States copyright law to these disputes, not non-national or international law. However, the rules applicable to notice and take down disputes may well evolve away from purely national roots toward contract-enshrined norms and practices not tied to any particular prescriptive authority.<sup>320</sup> This is especially likely if non-U.S. ISPs proliferate or U.S. ISPs acquire customers from other countries. Moreover, although technology permits ISPs to remove infringing copyrighted content from their web sites, the sheer number of ISPs means that it is a far more decentralized technology than that which controls domain names. In short, there are both analogies to and divergences from the UDRP that suggest the non-national model can flourish outside of the domain-name system.

Where governments conclude that their national interests are served by non-national dispute settlement models, those models are likely to proliferate.<sup>321</sup> Proliferation might also occur where the

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319. See Steven J. Metalitz, *Implementation of the DMCA: The Practical*, Ninth Annual Conference on International Intellectual Property Law and Policy, at 7 (Apr. 20, 2001) (on file with the William and Mary Law Review) (noting ISP action on thousands of notice and takedown notifications and near total absence of disputes in court and concluding that “the notice and taking down procedure codified [in the DMCA] has rapidly become the primary means by which copyright owners and service providers cooperate to deal with instances of online infringement”).

320. Under one approach to such a system, an ISP’s subscribers would submit to dispute settlement of infringement claims by third-party copyright owners with respect to postings of copyrighted materials on the ISP’s computer servers. The question of whether the ISP must remove such allegedly infringing materials would be consigned, in the first instance (or perhaps exclusively), to non-national dispute settlement providers authorized by the ISP subscriber agreement to hear such claims based on some designated body of rules, be they national or international copyright laws or some hybrid of the two. Further review by national courts is possible but not essential to such a system.

321. A recent example is the draft Agreement on the Free Trade Area of the Americas, FTAA.TNC/w/133/Rev.1 (July 3, 2001), available at [http://www.ftaa-alca.org/alca\\_e.asp](http://www.ftaa-alca.org/alca_e.asp). The draft treaty obligates the states that ratify it to participate in ICANN’s Governmental Advisory Committee and to require “domestic Network Information Centers (NICs) [to]

relevant private actors' interests are served by non-national models. Indeed, the mix of public and private involvement may vary widely. The substantive content of the UDRP emerged from a body of uncertain public-private status. In the case of the DMCA, the notice and take-down procedure is embodied in legislation, but the system's content has evolved from private ISP practice. In Europe, the EC Directive encouraged the negotiation of private agreements but did not establish a mechanism for their development. Thus, public regulation of private parties may be required to jump start the non-national system, as was needed also with credit-card charge-back disputes in the United States.<sup>322</sup> If properly designed, however, the system's advantages may well convince even unregulated private parties to emulate it, as occurred with the voluntary adoption of charge backs in Europe and with ccTLDs and New.net's emulations of the UDRP.<sup>323</sup>

In sum, we agree with the claim of technological essentialists that centralized technological controls of the sort ICANN enjoys will greatly facilitate the propagation of non-national dispute settlement systems. Nevertheless, such controls are not necessary conditions for extending the non-national model, either where that model has demonstrable advantages over alternatives or where government or private interests are served by adopting a non-national approach. The nature and extent of technological implementation (and, indeed, public law involvement and oversight) will vary from one context to another.

### *B. Designing Checking Functions for Non-National Systems*

Assuming, therefore, that the UDRP can be replicated in other contexts, we turn to the normative issues raised by non-national structures and the variables that should guide government officials and private parties considering whether, and in what form, to adopt

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participate in the . . . UDRP to address the problem of cyber-piracy of trademarks." *Id.* at 8.14.

322. *See* Perritt, *supra* note 7, at 945-50 (explaining why credit-card-charge-back dispute settlement systems benefit consumers, merchants, and financial intermediaries and predicting the spread of such systems internationally).

323. *Id.* at 949 ("The relatively wide availability of charge-backs in Europe despite the absence of any government compulsion to offer them, is strong testimony to their attractiveness as an alternative dispute resolution mechanism.").

them. These variables are developed from our analysis of the UDRP as the structure at the leading edge of this paradigmatic shift, but we intend that they extend more broadly. Only if greater attention is paid to a new complement of checking functions will it be possible for non-national lawmaking and dispute settlement structures legitimately to replicate the UDRP.

Our analysis has a theoretical focus that we hope will serve as a template for further and diverse scholarly inquiry. For example, the variables we identify with regard to checking functions could help guide empirical studies of the UDRP. At present, UDRP opponents and proponents cite individual panel decisions to support claims that the system is broken or functioning as its drafters intended. More than anecdotal evidence is available, however. Because nearly all UDRP decisions and other dispute settlement data are published, commentators can identify with some precision broader trends upon which to ground their assessments of the system and prescriptions for reform.<sup>324</sup>

Future empirical studies could focus on procedural or substantive issues. The extent of default jurisprudence would be a useful subject for examination. Critics often cite the high success rate of trademark owners as almost irrefutable evidence of the UDRP's imbalance, but the success rate of trademark owners can be measured in many ways. For example, the rate might differ if default cases were excluded from the calculation. So too, as appeals to national courts become more prevalent, information about the percentage of panel decisions appealed, and affirmance or reversal rates, could be used to assess the efficacy of national courts as checking mechanisms for non-national decision makers.<sup>325</sup> Substantively, studies might, for example, gauge whether panels are expanding the UDRP by identifying the percentage of cases that premise a finding of bad faith on conduct that the UDRP's drafters chose not to include within paragraph 4(a) of the Policy. The degree to which national interests are penetrating into the system could be tested by analyzing panels'

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324. Milton Mueller's statistical assessment of performance trends across all four UDRP dispute settlement providers is an early and influential example. See Mueller, *Rough Justice*, *supra* note 169. Michael Geist's recent study of disparities among the different dispute settlement providers also offers helpful empirical data. See Geist, *supra* note 169.

325. We note, however, that current information about appeals from UDRP panel rulings is anecdotal and incomplete. See *UDRP Appeals in Court*, *supra* note 215.

choice of law methodologies and deference to national trademark rights.

For present purposes, however, we focus on conceptual and foundational concerns. Legitimacy and accountability, institutional capacity, and the need for error correction mechanisms—these concerns endure and guide our analysis.

### *1. The Importance of Legitimacy*

As described above, the UDRP contains weaknesses that undermine its claims of legitimacy. Legitimacy, of course, is a value worthy of pursuit in and of itself.<sup>326</sup> In a context such as the UDRP, however, where regulatory and adjudicatory authority largely operate outside existing national political arrangements and derives power in part from the custom and consensus of affected constituencies,<sup>327</sup> legitimacy is essential to achieve even pragmatic, self-interested goals such as viability and efficacy. Absent legitimacy, non-national alternatives likely will arise because of the ease with which competing structures and institutions can emerge without the decelerating constraint of international or national political debate and procedure. The fate of the Internet Ad-Hoc Committee's Memorandum of Understanding and the rise of New.net speak to such facility.<sup>328</sup>

Legitimacy also nurtures and invigorates other forces that may help to sustain the non-national system and abate its inherent vulnerability. Non-national law is largely soft law, at least in theory.<sup>329</sup> But the law produced by a non-national system may be hardened through, and incorporated into, traditional lawmaking and adjudicatory processes. For example, it might be incorporated into instruments such as treaties. The recently released proposal for a Free Trade Area of the Americas Agreement raises the UDRP's status by making it the required means for resolving certain cybersquatting disputes.<sup>330</sup> Similarly, national courts soon will be

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326. *See supra* Part I.A.

327. *See Liu, supra* note 49, at 618-25 (discussing cyberspace source of authority).

328. *See supra* text accompanying notes 42-53 and 315-16 (discussing IAHC and New.net as possible rival to ICANN).

329. *See supra* Part II.B.2. (discussing whether UDRP is hard law in practice).

330. *See supra* note 321.

forced to consider (in many procedural contexts) what degree of deference to give UDRP rules and UDRP panel decisions.<sup>331</sup> Judicial deference, where appropriate, would both boost the UDRP as the de facto system and harden its soft-law character. A slightly different form of hardening might be achieved by most country code domains adopting the UDRP, thereby consolidating the UDRP's position.<sup>332</sup> Yet all these developments are unlikely to occur unless the system is perceived as legitimate.

*2. Deliberative Construction in a Non-National Era: The Case for Speed*

In fashioning control mechanisms for non-national systems, one basic strategic choice must be confronted—deciding upon the pace of legal change. As noted at the beginning of our inquiry, two distinctive features of the UDRP's hybrid model were the absence of deliberative construction in developing the rules of the dispute settlement system, and a departure from incrementalism in adjudicating disputes.<sup>333</sup> These aspects of the UDRP may of themselves weaken the legitimacy of the system. However, they also present a basic preliminary dichotomous choice, between slower and faster models of lawmaking and decision making, that affects how best to legitimize a hybrid system without jettisoning its advantages.<sup>334</sup>

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331. *Cf.* *Heathmount A.E. Corp. v. Technodome.Com.*, No. CA-00-00714-A, at 18 (E.D. Va. Dec. 29, 2000) (refusing to treat the UDRP as adequate alternative forum when reviewing forum non conveniens motion and stating that the UDRP “is not an adequate substitute for this court’s consideration of the issues presented here”), *available at* <http://dnlr.com/reporter/technodome>.

332. The FTAA requires national governments to mandate that private parties not part of the non-national system join that system. This bolsters the UDRP in two similar but slightly different ways. First, because treaties must be approved by elected representatives and the ICANN delegation from the Department of Commerce was never so approved, the former has greater democratic legitimacy. Second, the status of the UDRP is enhanced by its widespread adoption by a larger number of registries.

333. *See supra* text accompanying notes 4-15.

334. *See supra* Part II.A. Although we stress that change may occur at different rates of acceleration for legislative and dispute settlement institutions within the same non-national system, we recognize that “dispute settlement is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance.” Trachtman, *supra* note 300, at 336.

If a dizzying pace of progress is thought to be essential to secure the benefits of non-national dispute settlement, that pace could be maintained provided that decisions are subject to greater and later external checks. Alternatively, the process could be consciously made more deliberative, bringing it more within broadly accepted parameters of slower-moving lawmaking models. That is, softer law (as might be achieved, for example, through minimizing the de facto binding force of panel decisions)<sup>335</sup> can be made more quickly without jeopardizing desired systemic values; harder law must be developed more incrementally. While the former is a riskier strategy, it has greater potential gains.

Consider the early flood of cases under the UDRP as an example. Undoubtedly, this surge is in part the result of many disputes having accumulated prior to the implementation of the Policy, as well as a rush of early, easy cases that have come to establish the basic parameters of appropriate conduct on-line.<sup>336</sup> Both of these types of cases should subside over time, at least within existing gTLDs,<sup>337</sup> but we doubt that the number of cases brought before the UDRP will slow significantly. Unlike most other international structures, the UDRP is a vehicle for adjudication of certain routine commercial disputes. These disputes are brought by self-interested individuals in lieu of private, multijurisdictional litigation, using procedures that are inexpensive and user-friendly. Moreover, they are brought without the checking intervention of state actors.<sup>338</sup> These are precisely the characteristics that make the UDRP model attractive for replication.<sup>339</sup> To remove them in the name of ensuring the fuller

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335. See *supra* Part II.B.2.b. (discussing practical binding effect of decisions).

336. The Policy does not have any statute of limitations. Thus, disputes that significantly predate the launching of the UDRP in December 1999 may be freely decided by panels.

337. A second wave of accumulated, easy cases may arise once new gTLDs are opened for registration. The nature and number of these cases will depend on variables such as whether trademark owners are given priority in registering their trademarks in the new domain-name space and whether the gTLDs are open to all comers or restricted to certain classes of registrants. See *supra* Part II.A.

338. See Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 358-60 (1997) (noting that limiting WTO jurisdiction to disputes among states creates restraints on government decision makers' likely prosecution of intellectual property claims).

339. Strong pressures to allow private parties access to the dispute resolution process exist even in systems nominally restricted to nation states. See Daniel Pruzin, *WTO Members Make Unfriendly Noises on Friends of the Court Dispute Briefs*, 17 Int'l Trade Rep. (BNA) 1283,

ventilation of competing perspectives that a slower pace makes possible might make the model significantly less useful.

Moreover, because of the pace of change in the digital environment, panels will inevitably be faced with sets of facts involving cutting edge issues upon which non-national lawmakers inevitably will not have focused their attention. There is immense value in panels being able to address these issues in the interstices between periods of non-national rulemaking to create a fund of experiential knowledge upon which lawmakers may later draw. Indeed, although UDRP panels' legitimacy may be endangered by a hastening to address issues beyond the core of agreed cases, their attractiveness may be equally undermined by their refusal to decide cases in which gap-filling is required.<sup>340</sup>

Yet the legitimacy of panels jettisoning a cautious, incremental approach depends, in large part, on the pace and nature of the lawmaking process that undergirds and interacts with panel decision making. Change may occur at different rates of acceleration for legislative and adjudicative institutions within the same non-national system, but the speed of each is dynamically interactive; the pace of one affects the pace of the other.

If non-national legislative reviews of dispute settlement outcomes are both frequent and representative, then the dangers of panel excesses and experimentation are, at least in the aggregate,<sup>341</sup> markedly diminished. If, by contrast, the legislative process is obstructed, not only are the dangers of rapid panel expansions magnified temporally, but their legitimacy is far more uncertain. True, international tribunals continue to function during periods of political impasse, but during such times they are also subject to pressures not found during phases of more lubricated political

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1284 (2000) (noting increasing acceptance of and reliance upon submissions by non-governmental organizations and interest groups by WTO Appellate Body and Panels). *But see* Philip Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT'L ECON. L. 295, 303 (1996) (criticizing proposals to grant private parties standing to bring claims before the WTO).

340. *Cf.* Paul Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPs Dispute Settlements*, 29 INT'L LAW. 99, 112 (1995) (arguing that WTO panels should engage in filling gaps in TRIPs Agreement).

341. These dangers do exist in individual disputes, but it is here that national institutions, and in particular national courts, may serve an important constraining function. *See infra* Part III.B.6.a.

evolution.<sup>342</sup> Some tribunals have successfully managed these pressures, swiftly extending their powers to achieve larger objectives when forward political motion had slowed to a crawl, and retrenching when legislative processes regenerated.<sup>343</sup> However, keeping a steady hand on the throttle of the accelerator requires a degree of institutional control and coherence that may be impossible when a non-national dispute settlement system's hybridization includes a disaggregated decision-making structure.

For these reasons, the preliminary choice between faster and slower models of evolution pervades each of the checking functions below through which we seek to legitimize hybrid non-national models typified by the UDRP. That is, the devices we discuss below nominally relate to a variety of discrete procedural issues, but almost all implicate an effort to modulate the pace of non-national lawmaking and non-national dispute settlement, thereby accommodating the legitimacy objective we identified earlier.

### *3. Institutional Reform: Refurbishing Non-national Lawmaking*

Reform of ICANN's lawmaking structures would assist in refurbishing the legitimacy of that institution and, as a consequence, of the panels that interpret and apply the "law" that ICANN produces. Moreover, if the organization's lawmaking processes were revised to enhance its democratic credentials, the different organs of ICANN could additionally serve more significant checking functions than they do at present.

We believe that some formal, organized rulemaking body, whether public or private, is essential to impose checking functions on panels, particularly if non-national legal norms will continue to serve at

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342. Both the ECJ and the WTO have been presented with a docket of competence-expanding cases during periods when international lawmaking by national governments was obstructed. See Lindseth, *supra* note 247, at 663-64 (discussing ECJ); Kanth, *supra* note 175, at 1157 (discussing WTO). It was also during such a period of expansion that the ECJ came under pressure from national courts in Europe to impose human rights limitations on Community powers. See Helfer & Slaughter, *supra* note 5, at 310-11 (discussing ECJ's acquiescence to pressures by German Constitutional Court to develop a human rights jurisprudence).

343. See Helfer & Slaughter, *supra* note 5, at 315-16 (documenting how the ECJ initially extended its powers to achieve the goals of integration during periods of political stagnation and then became more cautious as the EC's political processes became more active).

least in part as rules of decision for on-line domain name disputes. Existing treaty-based institutions are insufficient vehicles for the forms of lawmaking and dispute settlement demanded by a global and digital world.<sup>344</sup> To be sure, such institutions tie the resultant rules more directly to the people that are governed through the national governments by whom such rules are negotiated. Treaty lawmaking, however, is too slow, and does not reflect the increasingly important interests that exist apart from (although partly overlapping with) the interests represented in national political units.<sup>345</sup>

Clearly, we do not envisage (and the peoples of the world are not ready for) the creation of a world parliament to establish a direct link between the non-nationally governed and their non-national governors.<sup>346</sup> Such a body is neither practical nor normatively compelling when (globalization notwithstanding) social identities and priorities remain linked in many important ways to nationality.<sup>347</sup> But this does not mean that looser political structures of a non-national nature cannot be designed to complement national mechanisms. Nor does it imply that such structures cannot be nurtured to grow in line both with evolving social norms of community and with practical considerations. This growth, and the metrics for measuring its determinants, will appropriately be judged by the primary actors at the present stage of global political organization, namely the disaggregated national governments who are themselves subjected to pressures from individuals and private parties operating within and across nation-states.<sup>348</sup>

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344. Treaty institutions, however, may set parameters on the extent of power exercised by non-national structures. Additionally, treaty norms may also serve as the substantive legal rules to be applied by non-national dispute settlement decision makers. *See infra* Part III.B.7.

345. *See* Dinwoodie, *A New Copyright Order*, *supra* note 8, at 483-84 (need for dynamism); *id.* at 550-52 (complexity of interests).

346. *But see* Richard Falk & Andrew Strauss, *On The Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000) (advocating the extension of democratic procedures and institutions from the setting of the nation-state to the global context).

347. *Cf.* Roger Cohen, *EU Unity After Danish Vote: 'Wide' Rather Than 'Deep'?*, INT'L HERALD TRIB., Oct. 2, 2000, at 13 (discussing resurgence of national identities within Europe in wake of Denmark's rejection of common EU currency).

348. *See* Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 240-42 (2000).

Notwithstanding ICANN's status as the UDRP's progenitor, it may not be well-placed to evolve in this fashion. The trenchant democracy deficit and legitimacy critiques leveled against ICANN mean that entrusting the organization in its present form to oversee and implement creational and external checking mechanisms may only exacerbate the skewed elements of the present system. Much ink has been spilled by scholars and public interest groups advocating specific proposals for how to reform ICANN, including changes to its voting and operational systems.<sup>349</sup> For present purposes, we will not rehearse the different proposals.<sup>350</sup> We simply indicate our general support for reforms not only because they will bolster the legitimacy of ICANN's control of the domain-name system, but also because they enable us to enlist ICANN (or whatever national rulemaking succeeds it)<sup>351</sup> in the performance of a variety of crucial checking functions over panel decision making.<sup>352</sup>

#### *4. Horizontal Non-National Relations: Competitive Federalism*

The relationship between competing non-national fora may also affect the content and pace of panel decision making and the internalized values of decision makers. Diffusion of power may act as a check on abuses of power. At present, ICANN is committed to making available to complainants a wide range of dispute settlement institutions. Accordingly, domain-name registrants are required to submit to the jurisdiction of any and all dispute settlement providers. However, the procedures in place also give the complainant unfettered choice among those providers, and thus the

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349. See, e.g., Center for Democracy and Technology, *Domain Name Management Policy* (2000), at <http://www.cdt.org/dns/icann/study/> (last visited August 31, 2001); At-Large Membership Study Committee, *Discussion Paper #1* (July 12, 2001), available at <http://www.atlargestudy.org/DiscussionDraftRev.5.4.htm>; see also Mueller, *Technology and Institutional Innovation*, *supra* note 41; Zittrain, *supra* note 51.

350. At minimum, these include reaffirming decisions taken at a time of democratic impoverishment. See *supra* text accompanying notes 137-38 (discussing proposal).

351. Zittrain, *supra* note 51, at 1088-90 (discussing possible alternatives and successors to ICANN).

352. These might include more intrusive legislative oversight of panel developments through conducting annual (or more frequent) reviews of UDRP outcomes, investigating allegations of actual or apparent biases relating to arbitral appointment procedures, and considering proposals for structural reforms (such as a UDRP Appellate Body).

competition that is engendered is simply a race to favor the mark owner.<sup>353</sup>

Restoring competition and balance is essential. Other commentators have proposed immediate reforms.<sup>354</sup> Additional proposals might be considered if the number of dispute settlement providers increased markedly. Requiring domain-name registrants to designate a limited number of providers to whom they agree to submit disputes might establish countervailing pressures and thus more closely mimic the competition seen in international commercial arbitration. There, the incentive to be seen as a fair dispute settlement institution (or panelist) is generated by advance, predispute designation of the dispute settlement institution. While this veil of ignorance cannot be replicated in the UDRP context, a similar equilibrium might be produced by establishing two equal forces that push against each other. This is one example of how a hybrid non-national structure might have to achieve the same result as existing paradigms using slightly different devices.

##### *5. Vertical Non-National Relations: A UDRP Appellate Body?*

Significant checking functions could also be entrusted to some form of non-national appellate body, either within ICANN itself or comprised of jurists from the different dispute settlement providers. Although the virtues of such a body are obvious,<sup>355</sup> so are the vices, which may in fact outweigh the virtues. Non-national lawmakers will need to consider several variables in deciding whether to create such a body.<sup>356</sup>

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353. See *supra* Part II.B.2.

354. See, e.g., Mueller, *Rough Justice*, *supra* note 169, at 12.

355. From a litigant's perspective, a UDRP appellate body would provide an immediate opportunity to correct panel errors without the expenses and delays endemic in national court proceedings. From an institutional perspective, an appellate tribunal could provide a more deliberative atmosphere in which to interpret the Policy, harmonize conflicting decisions, and highlight problematic issues for subsequent review by ICANN's political bodies.

356. They will also need to consider important questions about the jurisdiction of any appellate tribunal that is created. See M. Scott Donahey, *Adding Appeals Procedure to Dispute Resolution Might Satisfy ICANN Critics*, 6 ELEC. COMM. & L. REP. 33 (Jan. 10, 2001) (proposing UDRP appellate panel and discussing its structure and jurisdiction); *Experts Call For Right of Appeal in Domain Name Dispute Resolution*, 14 WIPO REP. 402 (2000) (discussing comments by experts participating in meeting convened by WIPO). Cf. Helfer, *Forum Shopping*, *supra* note 1, at 395-99 (discussing alternative ways of structuring a new

One variable will be determining whether an appellate tribunal contributes to an optimal level of overall checking functions. Such functions, although essential to any system of dispute settlement, are not cost free.<sup>357</sup> International commercial arbitration has long eschewed appellate mechanisms precisely because they undermine the finality and certainty of awards.<sup>358</sup> However, as we have argued, the UDRP is not purely arbitral and so might require checking mechanisms that arbitration does not.

A second and closely related variable is UDRP's substantive scope. Broadening the policy and moving it closer to a full-fledged adjudicatory model would increase the opportunities for conflicting panel decisions, which an appellate tribunal could then reconcile. By contrast, a more ministerial policy in which panel discretion is tightly constrained *ex ante* is likely to require less harmonization. The need for error correction in individual cases will remain, but this may be adequately addressed by national courts if national court review is facilitated in ways such as those discussed below.

Reformers must also consider the UDRP's relationship to national courts and national laws. Adding an additional layer of non-national review will diminish litigants' incentive to take a second appeal to national courts, further distancing national judges from trademark-domain name adjudication and from influencing the formation of legal norms. Such distance might be appropriate if ICANN were to move the UDRP toward a more autonomous system of non-national rules, but it is far less suitable for a national-non-national hybrid, particularly one whose choice-of-law clause draws at least in part on domestic statutes and case law as rules of decision.

Whether an appellate tribunal will provide a net benefit to the UDRP system will depend on how each of these variables are resolved. But on balance, we see the importance of maintaining and even enhancing national law input as weighing against the creation of such a body.

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international human rights court to complement the existing system of multiple human rights tribunals).

357. *Cf.* Stephan, *supra* note 30, at 747-48 (arguing that harmonization of international commercial law should strive for "an optimal level of legal risk that is greater than zero").

358. *See supra* Part II.B.1.

### 6. *Relations Between Non-National and National Systems*

Even though non-national institutional reform is where much scholarship has focused,<sup>359</sup> there are limits to what structural reform of ICANN could of itself achieve. A more nuanced conception of the multifarious relations between lawmakers and those that they govern must also be developed. This conception begins with creational checking functions. Those functions typically arise from the need to maintain a nexus between the progenitors of the system and those subject to the system, whether from the people who in exercise of sovereignty form a national government in whose affairs they are represented, or a legislature that assigns responsibility to an agency whose activities it oversees.

For the domain-name system, it is often remarked that the legitimacy of imposing checking mechanisms, whether as now exercised by ICANN or by earlier bodies, rests in large part upon the acquiescence of Internet users.<sup>360</sup> This is a fragile basis upon which to construct a claim of legitimacy. Just as the acquiescence of U.S. nationals in U.S. efforts at regulating the Internet does not of itself legitimate the exercise of U.S. jurisdiction over Internet activities affecting other countries, so too the acquiescence of Internet stakeholders would not legitimate preemptive or exclusive non-national jurisdiction where national interests are at stake. If creational checking functions themselves are to be valid and effective, it is crucial that national interests also be incorporated into the analysis.

For this reason, we think it necessary to proceed simultaneously along two parallel tracks. On the one hand, we urge ICANN to shore up its non-national democracy deficit by introducing direct representation and voting structures. If such reforms can be accomplished, they would strengthen the allegiances between private non-national governors and the Internet stakeholders they seek to govern, without regard to nationality or national political loyalties.<sup>361</sup> However, the example of the European Union's efforts to

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359. See, e.g., Froomkin, *Wrong Turn in Cyberspace*, *supra* note 26; Mueller, *Technology and Institutional Innovations*, *supra* note 41; Zittrain, *supra* note 53.

360. See *supra* note 84 and accompanying text (discussing representational legitimacy of Internet governance).

361. Liu, *supra* note 49, at 620-21 (discussing evolution of "direct Internet democracy"); see also Peter M. Gerhart, *Why Lawmaking for Global Intellectual Property is Unbalanced*, 22

overcome its own democracy deficit shows that legitimizing supranational or non-national lawmaking structures through direct representation mechanisms is a slow and cumbersome process, one that may never fully supplant national political structures as proxies for the interests of the governed.<sup>362</sup>

Therefore, as an additional strategy, we support the inclusion of national structures in the design or refurbishing of non-national lawmaking and dispute settlement systems on both pragmatic grounds and as a matter of principle. Pragmatically, facilitating input by the primary beneficiaries of the intellectual property system, namely the public, cannot be achieved without the input of national political structures.<sup>363</sup> This is particularly true in the short term if non-national *lawmaking* is to continue at a relatively rapid clip while non-national *democratic mechanisms* evolve more slowly.

The inclusion of national structures is important for two reasons of principle. First, as one of us has argued elsewhere, actions taken in cyberspace have spillover effects off-line, where national governments have traditionally and uncontroversially exercised their authority within their own borders.<sup>364</sup> For this reason, nations do have some legitimate claims to prescribe in cyberspace, and these must be accommodated in any non-national system.

Second, the addition of national structures into the lawmaking mix may diffuse public choice concerns. Some commentators have

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EUR. INTELL. PROP. REV. 309, 311 (2000) (recognizing “the undemocratic nature of international institutions” and noting that “it is nations, not people or their direct representatives, who make international law”).

362. See Lindseth, *supra* note 247, at 672-80 (discussing how EC member states granted greater lawmaking powers to directly elected European Parliament as a means of overcoming the EC’s “democracy deficit,” but questioning whether the creation of a European “demos” is attainable) (citing Joseph Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995)); see also Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1581 (1999) (noting the difficulty “[of] constitut[ing] international organs as democratic republics”).

363. Nor can we allow the UDRP’s resemblance to an arbitral proceeding to obscure the substance of the system. UDRP-generated opinions are creating a body of decisional law that affects the public for whose benefit national trademark systems were created. The purposes of trademark law not only “to secure to the owner of the mark the goodwill of his business” but also “to protect the ability of consumers to distinguish among competing producers.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992) (citing *Park’N’Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198 (1985) (internal citations omitted)).

364. See Dinwoodie, *A New Copyright Order*, *supra* note 8, at 542 n.224, 562-63.

argued that international lawmaking structures of various stripes are especially susceptible to strategic pressures from certain interests groups, who have the resources and incentives to distort the lawmaking process in inefficient and substantively dubious ways.<sup>365</sup> Indeed, the ICANN process has been heavily criticized in this regard. To be sure, national structures can also be strongly skewed by public choice pressures,<sup>366</sup> but we believe that a divided non-national-national rulemaking competence (and the multiplicity of perspectives it engenders) will at worst not exacerbate public choice problems and may in fact check the ability of certain interest groups to achieve the dominance they might otherwise enjoy in a single lawmaking forum. With this dual perspective firmly in mind, we next consider several devices by which the interests of all persons affected by non-national structures can be represented.

*a. Subsidiarity and Deference*

The relationship with national courts (and, separately, with national laws) will be key. Principles of non-national-national federalism must be developed. Within the EU, although the principle of subsidiarity—that is, the notion of deferring to national institutions—has proved to have little justiciable content, it has had an important political role in conferring legitimacy upon its supranational activities. And this concept has not simply been deployed as the marketing strategy of a power-hungry institution; EU officials have incorporated subsidiarity in fashioning their legislative proposals.<sup>367</sup>

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365. See Froomkin, *Governance*, *supra* note 85, at 623-25 (discussing public choice pressures applicable to different methods used to achieve international harmonization and standard setting); Stephan, *supra* note 30, at 743 (discussing political economy problems affecting public and private international commercial lawmaking). It may be that the widespread availability of digital communication and the development of bodies of critical mass over a range of countries may, at some point, reduce public choice concerns that have clouded international lawmaking in the past. See *Citizens' Groups: The Non-Governmental Order: Will NGOs Democratise, or Merely Disrupt Global Governance?*, *ECONOMIST*, Dec. 11, 1999, 1999 WL 29811934. Such a shift remains, at present, highly speculative.

366. See Gerhart, *supra* note 361, at 311 (“Even national systems face a real risk that the producer interests will be given disproportionate weight over consumer interests.”).

367. See Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, Protocol on the application of the principles of subsidiarity and proportionality, O.J. (C340) 1 (1997),

Deference to national actors (or to national laws)<sup>368</sup> is appropriate where the parties' expectations and the interests of national jurisdictions coalesce to favor the application of national laws that reflect those expectations and interests. For example, a registrant's rights and legitimate interests in using a domain name are likely to vary from nation to nation, just as do user interests in off-line disputes with trademark owners. Superimposing rigid non-national norms in such cases creates the illusion of harmonization where the consensus needed for harmonization does not exist, and it disrespects both free expression rights and the careful balance struck by most national intellectual property systems.<sup>369</sup>

Deference is also appropriate on pragmatic grounds. A pattern of unduly trademark-protective panel rulings will only create incentives for respondents to appeal to national courts to strike a more appropriate balance.<sup>370</sup> Additionally, rulings insufficiently respectful of dominant national interests will merely fuel nationalistic efforts to raise the specter of loss of sovereignty to undermine the legitimacy of the fledgling non-national institution.

In the context of domain-name dispute settlement, however, subsidiarity can function in a variety of ways. First, a methodology of deference could be incorporated into UDRP decision making either by revising the system's choice-of-law rules—a subject we address in greater detail below<sup>371</sup>—or by introducing a “subsidiarity clause” into the dispute settlement Policy. Such a clause would clarify that the

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reprinted in 37 I.L.M. 56 (1998) (requiring that legislation contain what has come to be called a “Subsidiarity Impact Statement”).

368. Indeed, the application of a particular national law may be more important to parties than the adjudication before a particular national fora. As Linda Silberman famously commented, to believe otherwise is to suggest that knowing where one will be hung is more important than knowing whether one will be condemned in the first place. Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978). Recognition of the importance of applicable law, without forfeiting the procedural advantages of the UDRP, would suggest that panels should be willing to apply national law where the interests are so strong as to warrant such application.

369. It also conflicts with the balance between calls for uniformity and calls for national autonomy reflected in current public international intellectual property law. *See* Dinwoodie, *A New Copyright Order*, *supra* note 8, at 491-92.

370. If impediments to appeals by respondents result in panel decisions enjoying a *de facto* binding status, *see supra* notes 211-27 and accompanying text, the harm to national interests is that much greater.

371. *See infra* notes 386-98 and accompanying text.

UDRP was intended to be limited to cybersquatting and other enumerated domain name abuses,<sup>372</sup> thus inhibiting expansive panel lawmaking.<sup>373</sup> However, a subsidiarity clause will not (and perhaps should not) absolutely preclude panel attention to more controversial issues. Panel jurisdiction will continually be pushed to the margins<sup>374</sup> and the flexibility to address *lacunae* and novel issues is a perceived advantage of this mechanism over existing international intellectual property structures, such as the WTO.<sup>375</sup> Nevertheless, subsidiarity language would signal to panels that they need to take national interests into account.

A philosophy of subsidiarity will also have a second beneficial effect—encouraging national legislatures and national courts to engage in intellectual property domain-name lawmaking and adjudication. A UDRP limited to cybersquatting and analogous egregious conduct does not imply that there is no need for the development of standards of conduct where the interests of the contesting parties are more balanced. However, if the UDRP is so limited, national actors will be pulled into the breach to create rules for such balanced cases. Indeed, it is striking that the UDRP was created when national jurisdictions were still in the throes of legislatively and judicially working through the myriad intellectual property puzzles that domain name registrations raise. These national law experiments should continue, but we question whether they will continue if UDRP panels exercise expansive lawmaking powers.<sup>376</sup> An expansive UDRP with comprehensive non-national rules reduces pressure on national decision makers to adopt their own cybersquatting statutes or case law, thereby privileging by

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372. A subsidiarity clause could operate even if ICANN expands the UDRP to include some or all of the more contested intellectual property issues considered in the Second WIPO Domain Name Process. See *Interim Report II*, *supra* note 284.

373. A subsidiarity clause is but one example of a variety of textual devices by which non-national lawmakers could seek to ensure a limited application of the UDRP. Other examples include preambular clauses setting forth the objectives against which the specific provisions of the Policy are to be construed, or an incorporation by reference to established interpretive frameworks, such as the one set forth in the Vienna Convention on the Law of Treaties.

374. See *supra* notes 340-43 and accompanying text.

375. See Dinwoodie, *A New Copyright Order*, *supra* note 8, at 493-94, 501-04.

376. At present, the dominance of the UDRP is overwhelming the development of alternative national solutions. See *Electronic Commerce Work Programme*, *supra* note 15, ¶ 44 (suggesting that the UDRP has “arguably become a de facto international standard”).

default the non-national model, even if it is not the (or an) optimal model. But if domestic lawmaking remains robust, it must be accommodated somewhere in the non-national system.

One means of facilitating input from national systems would be to further “soften” UDRP panel decisions by expressly encouraging national court review that is more intrusive than one would expect for a system with significant arbitral features.<sup>377</sup> A second significant step would be to revise the time limits and other procedural aspects of the UDRP that presently limit domain-name registrants when seeking effective review in national courts. Together, these steps would make it easier for respondents to involve national courts, and thus, to enlist such courts in the application of more extensive controls on panel lawmaking than currently exist.<sup>378</sup>

National involvement may also be needed to take advantage of the expertise of national institutions in applying national law. Consider the issue of trademark ownership upon which a UDRP complaint is premised. Not all countries offer extensive protection to common law marks, but panels are expected to be able to address such difficult questions as full-fledged and competent adjudicative bodies.<sup>379</sup> If panels were empowered to seek the assistance of national institutions in interpreting and applying national laws,<sup>380</sup> those

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377. The scant external checking functions of international arbitration are too limited to work in a context such as the UDRP where the notion of party consent, upon which its limited review is based, is a pure fiction. See Rau, *supra* note 184.

378. The involvement of institutions of democratic nation-states may also serve to enhance the democratic legitimacy of the non-national system. More active national court involvement would also serve an error-correction function by facilitating the review of similar facts in disparate fora. This is a more nuanced approach than simply establishing an ICANN-based appeals process.

379. In order to have standing to bring a complaint, a trademark owner must demonstrate “that the domain name in question is identical or confusingly similar to a *trademark or service mark in which the complainant has rights.*” Policy, *supra* note 17, ¶ 4(a) (emphasis added). In addition to the question of common law rights, it is unclear whether panels should be willing to review national administrative determinations of the validity of registered rights. See Ty Inc. v. Parvin, WIPO Case No. D2000-0688, ¶ 6 (Nov. 9, 2000) (majority opinion of Panelists M. Scott Donahey, Jeffrey M. Samuels and G. Gervaise Davis, III) (“As an international body, it is not for the Panel . . . to second guess the rulings of national trademark bodies, at least absent compelling evidence of changed circumstances.”), available at <http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0688.html>.

380. An additional area of tension under national trademark law is the question of “fame,” a concept that may yet affect the contours of trademark owners’ rights under the UDRP. It would greatly assist panels, elevate the ministerial nature of some of their activities, and further legitimate the non-national process if national authorities made determinations of

institutions might usefully assist panels in this quest, and thus be incorporated into the non-national decision-making process.

The extent to which national laws serve as a vibrant contributor to the non-national system might also be affected by the content of those laws. For example, the enactment of the Anticybersquatting Consumer Protection Act (ACPA) in the United States will likely affect the nature of U.S. judicial contribution to the UDRP. Although the two bodies of law are substantively similar, their procedural and remedial rules differ.<sup>381</sup> Whereas the UDRP has the advantage of low cost, speed, and ease of enforcement, the broader remedies under the ACPA might encourage trademark holders to proceed directly to U.S. federal court.<sup>382</sup>

By the same token, the substantive rules of the non-national domain name system might reduce some of the conflict between trademarks and domain names. These include introducing new generic top level domain names, restricting the open registration system by withdrawing certain names from use as a domain name, modifying the first come, first served system of domain name registration, or developing defined permissible uses of trademarks as part of domain names. Additional possible reforms of the trademark system are also important, particularly as regards the scope of rights granted a trademark owner in cyberspace. These possible reforms illustrate that the successful operation of any non-national model will depend not only upon a coherent structural and conceptual identity but also upon the different substantive rules governing non-national conduct.<sup>383</sup>

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national fame. Indeed, this interpenetration could be further aided by the development of new national institutions, such as national registries of well-known marks compiled by national trademark offices.

381. See generally Barbara Solomon, *Two New Tools to Combat Cyberpiracy—A Comparison*, 90 TRADEMARK REP. 679 (2000) (comparing substantive and remedial aspects of UDRP and ACPA).

382. For example, statutory damages are available under the ACPA. See 15 U.S.C. § 1117(d) (Supp. V 1999). Similarly, plaintiffs in U.S. federal court may obtain broad injunctive relief rather than the mere transfer or cancellation of existing domain name registrations.

383. The diversity of substantive national law in the particular area in question will also affect efforts to replicate the UDRP. This lesson is seen even in the domain name context, where technological conditions were ripe for the development of non-national systems. These conditions are not, however, limited to cybersquatting and, in fact, extend to situations giving rise to a range of disputes in which the equities vary widely. Thus, there exists a broad-based demand for non-national forms of dispute settlement. However, this demand has been fulfilled

*b. Choice of Law in Non-National Systems*

Another critical means of accommodating national interests into the development of a non-national system is via the choice of law analysis that panels employ. Because nations, in many cases, will have a strong claim to prescribe conduct even in cyberspace, the legitimacy of the rules that are applied and developed non-nationally requires respect and consideration of those national claims to prescribe. In the decision-making context, this is the function of choice-of-law principles. Choice-of-law rules reflect what William Baxter called the “external objectives”<sup>384</sup> of a political unit, namely, the policy values of how it seeks to effectuate its (internal) substantive policy preferences where another political unit also has a claim to exercise prescriptive authority over a particular dispute. Choice of law rules in the UDRP are thus at the epicenter of non-national-national relations, because they embody the values that the non-national system will seek to apply where national political units have a competing claim to prescribe conduct.<sup>385</sup>

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only with respect to cybersquatting. This limited response to the more general demand can be traced to the fact that relatively convergent values regarding cybersquatting were formed largely independently of developed national legislation. To be sure, even in disputes of a type ICANN clearly empowered panels to review, differing notions of free expression may be implicated. *Compare* Mayo Found. for Educ. & Research v. Briese, No. FA0102000096765 (Nat'l Arb. Forum May 4, 2001) (use of mayoinfo.com to criticize the Mayo Foundation does not violate UDRP), *available at* <http://www.arb-forum.com/domains/decisions/96765.htm>, *with* La Caixa v. Namezero.com, WIPO Case No. D2001-0360, ¶ 6(c) (May 3, 2001) (finding use of critical term similar to mark in domain name registration to be a violation of UDRP because respondent's distortion, while understood as critical by users of “countercultural Latin jargon,” is unlikely to be understood as such by most Internet users), *available at* <http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0360.html>. And with respect to conduct on cybersquatting's periphery (such as domain name warehousing), panelists' interpretations might be affected differently by use-based or registration-based principles of trademark law, a division which separates the United States from the rest of the world. In other intellectual property contexts, such as fair use under copyright law, one can foresee even sharper divergences. The replication of the non-national model beyond the current context, therefore, will work only if substantial weight is given to a philosophy of subsidiarity and deference where diverse national laws exist.

384. By external objectives, we refer to the objective “to make effective, in all situations involving persons as to whom it has responsibility for legal ordering, that resolution of contending private interests [that it] has made for local purposes.” William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17 (1963).

385. Choice of law rules can also be shaped by public international lawmaking and thereby

One way that any political unit may pursue its external objectives is, of course, simply to mandate the application of its own law in all situations where it has a claim to prescribe. Nonetheless, a political unit might more rationally conclude that the best route to making its own internal policy values effective in the greatest possible number of multistate situations is to take into account more than proceedings before its own tribunals. Thus, the courts of State *A* may apply, or at least consider, the internal policies of State *B* in the hope (and expectation) that the courts of State *B* will consider the internal policy values of State *A* in cases where State *A* would have a strong interest in seeing its internal values applied. To restate these strategic options in the UDRP context, the narrower unilateral perspective would involve the application of autonomous non-national principles without reference to national interests or laws.

Alternatively, ICANN might rationally conclude that its substantive policy preferences on the relationship of domain names to trademarks might best be furthered if it recognized that national courts and legislators are in a position to enhance or undermine the substantive policy choices contained in the UDRP.<sup>386</sup> Accordingly, to ensure that national courts and legislatures support, rather than undermine, those substantive policy choices, UDRP panels must be willing to accommodate national interests and laws. Choice-of-law rules can be regarded as the statement of the terms and conditions of this bargain between the competing national and non-national institutions.

Choice-of-law rules permitting panels to reflect the national interests of relevant states in regulating domain name space must therefore be developed by ICANN or by UDRP panels. It may be that in a non-national setting, the connecting factors would have to be quite substantial to justify exclusive (or even extensive) reliance on one particular national law over autonomous non-national principles. However, the current Rule 15,<sup>387</sup> by failing in any real

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constrain the scope of choices available to national and non-national lawmakers. *See infra* Part III.B.7.

386. Indeed, by virtue of their inherent legitimacy deficit, non-national institutions may need to be particularly cognizant of the ability of other (national) institutions to interfere with the effectuation of the non-national policies.

387. UDRP Rules, *supra* note 17, Rule 15(a) (authorizing panels to decide cases using “any rules and principles of law that [they] deem[] applicable”).

way to address choice of law, fails to ensure that national interests will appropriately be recognized by panels, or to provide panels with guidance on where such recognition should occur. It thus omits an important means of establishing the legitimacy of the non-national structure and indeed positively invites challenges to it. National interests are not only, by virtue of their normatively persuasive prescriptive claim, appropriately part of the non-national system; they are, by virtue of their practical ability to affect its legitimacy, an essential partner in its development.

Moreover, the lack of direction on choice of law, and hence the absence of guidance on which laws will govern particular circumstances, implicates checking functions. The citizenry (whether nationally or digitally affiliated, or both) is without guidance as to the body (national or non-national) from which to seek corrective redress.<sup>388</sup> The representational validity of the system is thus diluted and the accountability mechanism is weakened.

What then should be the choice-of-law rule? What should be the terms and conditions of the bargain that the non-national structure offers national institutions? The answer is far from clear. The choice-of-law dilemma is troubling courts and scholars in all aspects of cyberspace, and settled approaches have not yet received widespread support—even in the less complicated environment of nation to nation relations. It may be that, as in those other contexts, the question cannot be settled with absolute certainty. The illusion that any choice-of-law questions could be resolved with such assurance was disturbed by the realist conflicts scholars in the United States throughout the twentieth century.<sup>389</sup>

However, some general parameters must be established, especially if a non-national model is to supplant (or at least legitimately supplant) national regulation in any respect. If nations are legally or effectively to cede their direct authority to effectuate their prescriptive goals, then that authority must be recognized elsewhere in the system. As noted above, the choice-of-law system has

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388. The ability to seek redress might properly be classified as an external checking function falling under the rubric of error correction. *See supra* note 173-76 and accompanying text.

389. *See generally* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993); Symeon C. Symeonides, *General Report*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? (Symeon C. Symeonides ed., 2000).

historically been the locus of that recognition. The value is no different in the on-line context, even if the rule or methodology adopted may be different in order to accommodate the differences discussed above.

For a variety of reasons, in the domain-name setting in particular, the balance of prescriptive claims to regulate might appear to fall closer to the non-national than the national. Because the domain name system is an element of the Internet's architecture, domain names would appear inevitably non-national. Registration can be made in top level domains without regard to national status or location. Generic top level domain names are not allocated by national governments. Indeed, even registrations in the country-code domain names need not be administered by governmental entities.<sup>390</sup>

National interests are not without some legitimate prescriptive claim, however. At the very least, in every UDRP dispute there is *some* national interest, because any complainant at present is resting its claim upon trademark rights recognized by a national law.<sup>391</sup> The endorsement of such a claim, or the determination of the scope of protection that flows from nationally conferred rights, implicates the interests of the nation by whom the rights have been conferred. Stated more tendentiously, the non-national system is defining the scope of national rights in the cyberspace context—and nation states have not yet ceded control over such issues to ICANN.<sup>392</sup> Trademark rights exist for the benefit of more than non-

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390. The administration of country code top level domains is delegated by ICANN (formerly by the Internet Assigned Numbers Authority) to authorities ("managers") in the relevant country. For resolution of a recent controversy on the question, see Internet Assigned Numbers Auth., *IANA Report on Request For Delegation of the .ps Top-Level Domain* (Mar. 22, 2000) (concluding that the .ps domain should be delegated to managers in the Palestinian Authority and approving the managers for that purpose), *available at* <http://www.icann.org/general/ps-report-22mar00.htm>. For a fuller discussion of this point, see Dinwoodie, *supra* note 8.

391. Exceptions to this rule are evolving, such as the creation of supranational trademark rights in economically integrated regions such as the EU. See Council Regulation 40/94 of 20 December 1993 on The Community Trademark, 1994 O.J. (L 11) (creating unitary, EU wide trademark rights established by a single registration with an EU-level trademark office).

392. Juliana Gruenwald & Roy J. O'Connor, *ICANN Tethered*, INTERACTIVE WEEK, Feb. 14, 2001, 2001 WL 7347529; *Senate to Scrutinize ICANN More Closely*, THE STANDARD, Feb. 14, 2001, *available at* <http://www.thestandard.com/article/0,1902,22210,00.html>. In the more specific context of famous trademarks, national and non-national competition continues. Although belated adoption by ICANN of the "sunrise" proposal advanced in the First WIPO Process would ensure protection for famous marks throughout cyberspace without direct

national cyberspace actors. We suggest that at least three considerations should be borne in mind as ICANN and/or panels construct choice-of-law rules.

First, the determination of issues<sup>393</sup> in a non-national dispute by the *invariable* application of a single national law would be unhelpful.<sup>394</sup> Use of a single national law would minimize the potential of the non-national system to develop through an accommodation of different national values a jurisprudence that, like the social activity it regulates, transcends national borders and reflects varied national interests. It would ground the non-national system in outdated national premises by seeking to localize that which is not local. And it would surely heighten the concerns of other nations whose laws were not applied, but who inevitably have a

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national involvement, in September 1999, WIPO member-states agreed to a nonbinding resolution calling for the per se protection of famous marks against registration as part of a domain name by someone other than the mark owner. See WIPO, *Joint Resolution Concerning Provisions on the Protection of Well-Known Marks, General Report of the Assemblies of the Member States of WIPO, 34th Annual Meeting*, Doc. A/34/16 ¶¶ 171-83 (Sept. 1999) [hereinafter *Well-Known Marks Joint Resolution*], available at [http://www.wipo.org/news/en/index.html?wipo\\_frame=/news/en/documents.html](http://www.wipo.org/news/en/index.html?wipo_frame=/news/en/documents.html). We believe that non-national lawmakers should give this and similar soft law initiatives considerable deference. See *infra* Part III.B.7.

393. It may be that different laws, whether of one or more nations or non-national in nature, should be chosen to decide different issues before a panel. This would be a typical application of the doctrine of depeçage, which is found in traditional conflicts analysis. See Willis L.M. Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973) (describing doctrine as “the process of applying the rules of different states to determine different issues”). For example, the determination of whether the complainant possesses “trademark rights,” an essential element of a claim under the UDRP, see Policy, *supra* note 17, at ¶ 4(a)(i), would under present notions of international trademark law, be a question of national law. Trademark registrations can be made only with national bodies, with the recent exception of regional (but still territorial) rights such as those available through the Community Trademark System in the EU. See Council Regulation 40/94 of 20 December 1993 on The Community Trademark, 1994 O.J. (L 11), art. 25. Similarly, the existence of common law or unregistered trademark rights based upon use, which several countries such as the United States permit, will be determined by whether consumer association has developed in the country where such common law protection is sought. See *Buti v. Impresa Perosa, S.R.L.*, 139 F.3d 98 (2d Cir. 1998).

394. By this we mean to reject efforts to localize an entire dispute within a single country and apply that law to all issues in a case (even if the particular national law would vary from case to case). We are even more resistant to the notion, advanced by some writers, of reflexively applying a particular jurisdiction’s rules (such as those of the United States) to all UDRP disputes. See Angela Proffitt, *Drop The Government, Keep The Law: New International Body For Domain Name Assignment Can Learn From United States Trademark Experience*, 19 LOY. L.A. ENT. L. REV. 601 (1999) (suggesting application of U.S. law to UDRP cybersquatting disputes).

prescriptive claim, that there had been a transfer of sovereignty to another institution (a competing national law) in which it has no participatory role.

Second, for the reasons of national interest discussed above, it is imperative that panels do not reflexively decide cases solely by reference to autonomous principles unmoored from national values. As is implicit in our critique of localization above, we believe that, in the long term, the non-national system might usefully develop autonomous rules that apply in disputes transcending national borders. And certainly some autonomous rules, particularly in matters of procedure, are required for the system to function efficiently.<sup>395</sup> But the development of such autonomous principles must be grounded, at least initially and at least in part, in the underlying national interests and values. Given the critique of existing ICANN structure, and the unlikelihood that a full-fledged democratic non-national legislative body can (or should) arise in the near future,<sup>396</sup> panel efforts to implement autonomous principles without any reference to national interests rest on shaky ground.

Third, as a means of resolving these first two dilemmas, panels should recognize that non-national social structures involve participants with a complex amalgam of affinities (and hence, expectations). These affinities are part national, part regional, and part non-national. This is particularly true of cyberspace actors. To use a non-domain name example, a citizen of the United Kingdom, who is a permanent resident of the United States, but temporarily in Canada, accessing a web site based in Germany that permits access throughout the world but only to members of his profession, may expect such conduct to be regulated by a dizzying array of norms from a wide array of national and non-national sources. The rules applied to non-national conduct, and thus, the rules to which the choice-of-law provision should lead, should reflect these complexities. The legitimacy of law as an instrument of social regulation rests upon some correspondence between it and the social structures that it purports to regulate.<sup>397</sup> Thus the choice-of-law

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395. It is typical, of course, for decision makers in multistate cases to apply their own rules of procedure even if the substantive law to be applied is a foreign law. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS § 122 cmt. b (1971) (discussing substance/procedure distinction).

396. *See supra* notes 321-23 and accompanying text (rejecting “world parliament”).

397. Dinwoodie, *A New Copyright Order*, *supra* note 8, at 550-51.

rules should permit panels to draw from the variety of relevant national laws as well as the non-national policies in constructing applicable substantive rules.

*c. Relative Influence of Different National Legal Systems*

In any system where decisions from varied sources will be considered as part of the law-formation process, the potential for excessive influence of one subset of geographic rules or conceptual settings must be borne in mind. In the context of relatively homogenous constituents (such as the United States) this fear might be discounted. In the international setting, there may be a fear that the United States would dominate.<sup>398</sup>

A review of panel decisions to date, even those handed down by non-U.S. arbitrators, reveals the significant influence of U.S. legal principles.<sup>399</sup> This is not always obvious on its face. Those principles, first introduced from U.S. case law, are often “non-nationalized” by their later repetition as principles of autonomous UDRP law without full acknowledgment of their etymology. For example, the early expansion of the notion of “use” in panel decisions interpreting the UDRP can be traced to similarly expansive Ninth Circuit case law interpreting the “use in commerce” requirement of the Lanham Act.<sup>400</sup> Yet, although recognized in the first UDRP panel decision employing the Ninth Circuit case law, later panel decisions cite simply to the initial decision incorporating the Ninth Circuit case law.<sup>401</sup> A system of formal precedent might only exacerbate this

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398. Such fears were initially expressed by the EU over the privatization of the domain-name system. See *Developments in the Law*, *supra* note 45, at 1670-71 & n.105.

399. See, e.g., *Wal-Mart Stores, Inc. v. walmartcanadasucks.com*, WIPO Case No. D2000-1104, ¶ 6(B)(ii) (Nov. 23, 2000) (noting in case involving the challenge by a U.S. company, holding trademarks in Canada and the United States, to the registration of a domain name by a Canadian citizen with a Canadian-based registrar, that the “U.S. ACPA and trademark infringement cases are natural sources of rules and principles of law to apply in resolving this dispute” because of their similarity to the UDRP standards), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1104.html>.

400. See *Panavision Int'l L.P. v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998).

401. Compare *World Wrestling Fed'n Entm't, Inc. v. Michael Bosman*, WIPO Case No. D99-0001 (Jan. 14, 2000) (citing *Panavision*), available at <http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html>, with *Array Printers AB v. Lennart Nordell*, WIPO Case No. D2000-0092 (Apr. 10, 2000) (applying *Bosman's* “use” concept to dispute involving two Swedish parties without citing *Panavision*), available at

problem and undermine any benefits that a genuinely non-national system would otherwise create.

Whether U.S. litigation and law would dominate would depend, however, on several variables.<sup>402</sup> To be sure, much of the activity on the Internet is U.S.-based or -initiated. And effective U.S. control of the domain name system is still a plausible assertion.<sup>403</sup> However, control over registration of names in the generic top level domain has been dispersed widely to registrars throughout the world. Also, the structural aspects that contribute to the abundance of U.S. litigation (such as discovery rules, provisions for allocation of attorneys' fees, availability of contingency fees, etc.) need not be replicated non-nationally. Procedural reforms of the ICANN system that furthered such departures from the U.S. litigation model might help to assuage fears that input from national laws and national systems might simply mean the implementation of U.S. law. And incorporating subsidiary principles as discussed above might encourage other nations to develop domain-name-specific legislation and litigation. This would diversify the national law sources upon which UDRP panels could draw for support and ultimately mitigate U.S. dominance.

### *7. Relations Between Non-National and International Systems*

Non-national lawmakers must also carefully consider the relationship between non-national systems and the rules and norms of public international law. Public international law can interact

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<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0092.html>; *see also* AT&T Corp. v. Alamuddin, WIPO Case No. D2000-0249, ¶ 7 (May 18, 2000) (in the absence of any case law in Singapore, the domicile of the respondent, panel stated that “[p]rinciples of law set out in decisions of Courts in the United States and the United Kingdom in similar cases could easily be of assistance to Singaporean courts”), *available at* <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0249.html>; *Key Issues, supra* note 254 (noting this trend for other U.S. cases).

402. *See* Heathmount A.E. Corp. v. Technodome.Com., 106 F. Supp. 2d 860 (E.D. Va. 2000) (denying defendant's motion to dismiss ACPA suit between two Canadian nationals on forum non conveniens grounds, inter alia because Canadian law did not provide plaintiff with adequate relief).

403. *See* Gruenwald & O'Connor, *supra* note 392; *Senate to Scrutinize ICANN More Closely, supra* note 392. This possibility will continue so long as the United States does not relinquish control over the root server that maps domain name space. *See* Mueller, *supra* note 170, at 498.

with non-national structures in at least three distinct ways: first, as a constraint on the subject matter of issues committed to the jurisdiction of non-national lawmakers; second, as a source of substantive rules to be applied in disputes between private parties adjudicated in non-national fora; and third, as a source of (depending on one's perspective) competition or inspiration for the creation of new legal rules relating to intellectual property rights. Each of these mechanisms of interaction requires separate extended treatment, and therefore we highlight only a few preliminary points below.

First, mandatory rules contained in relevant treaties such as the Paris Convention and the TRIPs Agreement should, at least initially, serve as boundaries on the authority of non-national lawmakers and dispute settlement decision makers. As creatures of public international law, these treaties create legal obligations only for their nation-state signatories and cannot directly bind private non-national entities such as ICANN. However, the longstanding pedigree and widely accepted nature of these treaty obligations strongly suggest that they should be incorporated into non-national lawmaking initiatives. Thus, where the treaties impose obligations on national governments, they should constrain non-national lawmakers as well.<sup>404</sup>

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404. WIPO clearly believed that the UDRP's novel procedures permitting trademark owners to recapture domain names registered and used in bad faith was compatible with intellectual property treaty law. See *Final Report*, *supra* note 78, ¶¶ 173-74 (noting that WIPO's proposed definition of abusive registration "draws on solid foundations in international and national law and in case law," and citing in particular unfair competition provisions of the Paris Convention). It is unclear, however, whether WIPO's view fits with conventional understandings of the principal treaty regimes. The UDRP clearly furthers the objectives of those regimes, but does so in a way that (perhaps rightly) brings into question the core treaty principles of territorially circumscribed rights and national treatment. At the very least, the application of non-national substantive rules instead of potentially conflicting national laws weakens the grip of territoriality as the defining principle of international intellectual property law. See *Ty Inc., v. Parvin*, WIPO Case No. D2000-0688, ¶ 6 (Nov. 9, 2000) ("[W]e are dealing not with the sovereign territory of the United States and its laws, but with cyberspace, which is the 'territory' in which domain names exist"), available at <http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0688.html>; see also Dori Kornfeld, *Evaluating the Uniform Domain Name Dispute Resolution Policy*, nn. 32-33 and accompanying text, at <http://cyber.law.harvard.edu/icann/pressingissues2000/briefingbook/udrp-review.html> (last modified Oct. 31, 2000) (noting case transferring barcelona.com owned by a U.S. business to Barcelona city government notwithstanding conflict between U.S. and Spanish law over protection of geographic names).

Translating these obligations into the particularities of the non-national setting presents considerable conceptual challenges. Under one possible approach, mandatory treaty rules could be directly incorporated into new non-national “legislation” as rules of decision to be applied by non-national jurists.<sup>405</sup> This preserves the procedural virtues of a non-national dispute settlement setting while coupling them with settled and unobjectionable substantive norms. But such an approach could also diminish other non-national values, such as the capacity of non-national decisionmakers to adapt old norms or generate new ones tailored to rapidly evolving demands of transborder digital technologies. An alternative approach (the one apparently adopted in the UDRP) would create a new set of relatively autonomous non-national norms but subject them to implicit review for treaty compatibility through external checking mechanisms. Such mechanisms could include review of non-national rulings by national courts applying treaty-inspired national laws.<sup>406</sup>

Whichever approach is chosen, however, unanswered questions will remain. Intellectual property treaties do not always provide settled solutions for the most pressing issues plaguing digital technologies disputes or do not speak to those issues in preclusive detail. Where interstices exist, there are opportunities for new rules and norms to evolve non-nationally. But such non-national evolution must proceed in conjunction with and not in opposition to lawmaking that occurs in more traditional settings. Consider, for example, the work of WIPO’s Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, which is developing soft law recommendations for national governments

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405. Conversely, treaties can incorporate non-national norms or structures as part of their own substantive rules. *See supra* note 321 (discussing FTAA).

406. Intellectual property treaties require national governments to incorporate treaty obligations into their national intellectual property laws or otherwise to recognize them in their domestic legal systems. Thus, to the extent that national laws and institutions operate as a check on non-national authority, those laws and institutions will implicitly serve to constrain non-national powers within treaty-compatible limits. *Cf. Final Report, supra* note 78, ¶ 150(ix) (stating as a basic principle for the UDRP that “a decision by a court of competent jurisdiction, in a country that is party to the Paris Convention [or the TRIPs Agreement], which is at variance with a determination resulting from the [UDRP] should, subject to the application of normal principles for the enforcement of judgements, prevail over the administrative determination.”). For such a system to function effectively, however, national courts will need to pay greater attention to the international dimensions of their national laws. Dinwoodie, *A New Copyright Order, supra* note 8, at 550-52.

concerning well known trademarks and when use of a mark on the Internet amounts to use within the territory of a member state.<sup>407</sup> These initiatives may one day be integrated into national legislation or national judicial decisions or serve as the template for negotiating hard treaty law, and thus ripen into constraints on non-national authority. Even prior to that time, however, respectful treatment of soft-law developments is appropriate, both as sources of persuasive authority to help resolve non-national disputes between private parties and as inspiration for generating complementary non-national norms.

Public international law may also inspire competition with non-national systems, either through developing alternative substantive rules or through establishing institutional structures that facilitate the generation of new rules applicable to transborder situations. With respect to the former, for example, the WIPO Standing Committee on Trademarks proposed rules on resolving competing legitimate rights on the Internet only after that issue was omitted at an interim stage of the WIPO UDRP process. The latter issue is implicated by the relationship of non-national dispute settlement systems to existing and future international cooperative regimes for the enforcement of judgments.

Efforts are currently underway in the Hague Conference on Private International Law to draft a convention that addresses both jurisdiction and recognition of judgments.<sup>408</sup> The draft Convention is

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407. See Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Protection of Industrial Property Rights in Relation to the Use of Signs on the Internet*, WIPO Doc. No. SCT/5/2 (June 21, 2000), available at [http://www.wipo.org/sct/en/documents/session\\_5/doc/set5\\_2.doc](http://www.wipo.org/sct/en/documents/session_5/doc/set5_2.doc); Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Summary by the Chair*, WIPO Doc. No. SCT/5/5 (Sept. 15, 2000), available at [http://www.wipo.org/sct/en/documents/session\\_5/doc/sct5\\_5.doc](http://www.wipo.org/sct/en/documents/session_5/doc/sct5_5.doc); *Well-Known Marks Joint Resolution*, *supra* note 392, ¶¶ 171-83.

408. See Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (adopted by Special Commission on Oct. 30, 1999) [hereinafter Draft Hague Convention], available at <http://www.hcch.net/e/conventions/draft36e.html>. Under the current draft, the European countries would liberalize their recognition policies and the U.S. would limit its more expansive notions of jurisdiction. For an analysis of the convention debate, see Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999). Questions of enforcement are closely tied to questions of appropriate jurisdiction to adjudicate. See Draft Hague Convention, *supra*, arts. 25-26 (judgments based upon proper jurisdiction under the Convention are to be enforced by participant countries).

based upon the Brussels Convention,<sup>409</sup> which governs jurisdiction and recognition of judgments in commercial matters throughout the EU.<sup>410</sup> In recent years, the Dutch courts have used the language of the Convention to support the award of panEuropean relief in patents (and in one instance, trademark) cases.<sup>411</sup> The possibility of transborder relief from a single national court clearly implicates the importance of the non-national model reflected in the UDRP system. The Convention effectively enables national courts to assume jurisdiction not only over claims of infringement in their own countries, but also over related claims of infringement elsewhere in Europe.<sup>412</sup> For example, a company holding various patents on the same invention throughout Europe could bring an action in the Dutch courts not only against the alleged Dutch infringer, but also against any alleged German or U.K. infringer.

Although the case law under the Brussels Convention has not yet fully developed because of a provision requiring deference to the validity of acts of administrative officials in foreign states,<sup>413</sup> there

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409. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in 8 I.L.M. 229 (1969), as amended by 1990 O.J. (C 189) 1, reprinted as amended in 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention] (applied throughout Europe).

410. Compare Brussels Convention, *supra* note 409, arts. 6(1), 16(4), with Draft Hague Convention, *supra* note 408, art. 14.

411. See generally *Expandable Grafts P'ship v. Boston Scientific BV*, Court of Appeal of the Hague (1999) FSR 352 (discussing, but appearing to limit, Dutch crossborder jurisprudence).

412. Brussels Convention, *supra* note 409, art. 5(3) (providing jurisdiction "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred"); *id.* art. 6(1) (a person domiciled in a Contracting State may also be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled").

413. The approach of the Dutch courts has had to deal, however, with a further provision of the Convention. Article 16(4) provides that

in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place shall have exclusive jurisdiction over the matter notwithstanding domicile.

*Id.* What happens when a defendant interposes a defense challenging the validity of a patent, as is typical in patent infringement litigation? Do the proceedings brought under the liberal jurisdiction provisions of Articles 5(3) and 6(1) now succumb to the "state of registration" provision in Article 16(4), thus requiring litigation in the latter forum? In the last two years, prompted by some related U.K. jurisprudence, the Dutch courts have stepped back from the aggressive use of the Convention, in part because questions of patent validity are inevitably

are indications that the courts might be willing to use it in appropriate cases to provide crossborder relief.<sup>414</sup> Accordingly, if the Brussels scheme were expanded to the world stage under the auspices of the Hague Conference on Private International Law, a private international scheme for securing crossborder relief might be available to rival the UDRP.

If the Hague Convention were adopted, courts might be more willing to apply foreign laws and decide consolidated transborder litigation. Forcing courts to consider different national laws, and the respective claims of each, both in prescriptive force and substantive merit, would facilitate the convergence of national laws to generate substantive rules of intellectual property law appropriate for international disputes.<sup>415</sup> Thus, consolidated private international litigation might become an alternative vehicle to public international law for developing convergent international principles.<sup>416</sup>

Whether such a scheme would in fact develop as a rival to non-national models such as the UDRP would depend upon a number of variables, including the extent of treaty participation and whether courts would be willing to adopt novel approaches to choice of law that overcome the national nature of existing rights.<sup>417</sup> If the Convention is limited to a small number of countries, or still requires plaintiffs to plead their case under separate national laws or in

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implicated in many such proceedings. *See, e.g.*, *Coin Control Ltd. v. Suzo Int'l (UK) Ltd.*, 3 All E.R. 45 (Ch. D. 1997).

414. Trademark rights, unlike patent rights, may in some countries exist without registration, and hence implicate Article 16(4) to a lesser extent. *See Pearce v. Ove Arup P'ship*, 1 All E.R. 769 (Ct. Appeal 1999) (noting that because copyright does not involve deposit or registration, a court's analysis in a copyright case under the Brussels Convention is not complicated by Article 16(4)); *Yakult v. Danone*, 1998 E.T.M.R. 465, 472 & 479 (Hague Dist. Ct. 1998) (noting that "[t]he system under the Brussels Convention requires that the Court, even the 'own' court referred to in Article 2, must apply foreign trade mark law in the appropriate cases" but declining to extend the injunction to France although "competent to do so" because of a lack of urgency).

415. *See Rochelle Cooper Dreyfuss, An Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 U. ILL. L. REV. 421 (2001).

416. *See Dinwoodie, supra note 108*, at 58 (discussing the potential of the Hague Convention); *cf. Dinwoodie, A New Copyright Order, supra note 8*, at 569-71 (discussing the possibility of using private international litigation to effect convergence in national copyright laws).

417. Neither the Brussels Convention nor the Hague Convention addresses choice-of-law issues.

separate national fora, the non-national model would retain significant advantages.

In addition, if the UDRP is to extend its remedial scope (as some expansion proposals contemplate), difficult questions of enforcement will arise. A non-national model that awards relief that is not automatically self-enforcing would require some form of recognition and enforcement of non-national judgments in nation states. Thus, a treaty such as the Hague Convention could be an important mechanism through which complainants can effectuate their non-national judgements. Relations between the Convention and the non-national system are thus critical.

At present, the prospects for a global convention on these matters are uncertain. A diplomatic conference to adopt the Hague Convention had been scheduled for late 2000, but the United States indicated its unease with the current draft, and adoption will not occur until 2002 at the earliest.<sup>418</sup> As negotiations progress, it would behoove non-national lawmakers to work closely with the Hague efforts to accommodate cyberspace and other transborder issues within the debate,<sup>419</sup> recognizing both that the attractiveness of the non-national model may be affected by these international developments, and (more importantly) that any expansions of the remedial aspects of the non-national model might require links to international enforcement mechanisms.

#### CONCLUSION

The UDRP represents the leading edge of a new movement in non-national lawmaking. Driven by the pressures of globalization and the borderless nature of cyberspace, governments and private parties

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418. See Hague Conference on Private International Law, Press Release, available at <http://www.hcch.net/e/events/events.html#dipl2001> (last visited Oct. 3, 2001). An alternative proposal of a stand-alone treaty addressing only intellectual property law issues is the subject of ongoing work by Professors Jane Ginsburg and Rochelle Dreyfuss and may provide an alternative vehicle for pursuit of these objectives. See Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, paper to be presented at Constructing International Intellectual Property Law: The Role of National Courts, Chicago-Kent College of Law, Oct. 18-19, 2001, available at <http://www.kentlaw.edu/depts/ipp/intl-courts>.

419. See *U.S. Government Hears Widely Opposing Views on Issues to be Discussed in Ottawa*, 6 ELEC. COMM. & L. REP. 147 (Feb. 14, 2001) (discussing pressures on U.S. delegation to Hague Convention concerning e-commerce issues in proposed treaty).

will expand their efforts to transcend the limits of existing dispute settlement paradigms. Therefore, the UDRP must be evaluated not only as a vehicle for the resolution of conflicts between domain names and trademark rights—important though that issue is in a digital economy—but also as the likely default template for more broad-based non-national lawmaking and dispute settlement.

Of necessity, the nature of disputes in the digital era required the formation of a hybrid decision-making structure. We applaud the willingness of the architects of the UDRP to escape the conceptual straitjacket of existing models. Yet for all its advantages of speed and global reach, the UDRP will see its legitimacy undermined if it fails to incorporate checking mechanisms that control the scope of decision making and connect non-national governors to those whom they govern.

Just as the UDRP's hybrid structure itself transcended existing arbitral, ministerial, and judicial models, so must the checking mechanisms that it adopts. The answers lie not in routine replication of existing controls, but in attending to the relationships among the institutional components of a non-national system. The guardians of the UDRP, and the drafters of any non-national structures that follow it, must embrace the challenge of constructing new forms of control. If they do not, the potential for new models that match our increasingly non-national world will be diminished by competing assertions of national sovereignty, allegations of institutional capture, and justified complaints of illegitimately expansive lawmaking.