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## **Does the need for Internet Governance justify ICANN's Anti-competitive behaviour?**

**Konstantinos Komaitis  
Jonathan Galloway**  
University of Strathclyde

### **1. Introduction**

In October 2005, the Internet Corporation for Assigned Names and Numbers – commonly known as ICANN – will celebrate seven years of efforts to coordinate the operation of the Internet. ICANN's creation and functions have been subjected to immense criticism and a divergent group of people from academics and scholars to governments and the industry have been debating on whether the corporation could really perform the tasks assigned to it.

The creation of ICANN was a manoeuvre by the US Government to ease the concerns of other governments around the world and especially the European Union concerning the US's influence and control over the Internet. The formation of a private, independent body responsible to oversight the management of the Domain Name System (DNS) was the only logical solution and one that provided viable alternatives to the US Government. America's willingness to give up control of the Internet was susceptible to a plan that had deeper roots; it should have made sense back then that the establishment of a corporation, which would be based on American soil and be administered by American laws – Californian ones to be more precise – would ultimately result in influences from the American Government. Indeed, it can be argued that even though the main policy of ICANN is that it is a private non-profit organisation, accountable to the whole Internet Community, in reality it is an American corporation regulated by American laws.

At the same time, ICANN has dramatically failed to convince the Internet Community that it is capable of undertaking the tasks that was requested to achieve. Almost seven years after the White Paper acknowledged ICANN as NewCo, the corporation has only met some of its mandates and one can argue that even in those cases it really has not succeeded in satisfying the needs and wishes of the people affected by its decisions. To be more precise the Uniform Domain Name Dispute Resolution Policy (UDRP) has been criticised for favouring trademark owners, whilst the introduction of new generic Top Level Domain Names (gTLDs) did not serve its initial purpose to take the burden off the .com gTLD registrars.

All the aforementioned fiascos made some commentators starting questioning ICANN's abilities. Nevertheless, the most worrying aspect of the way the corporation is performing its functions is that there are allegations against ICANN of being engaged in anti-competitive practices. This paper tries to shed some light on those allegations, investigating, in the beginning, who has jurisdiction to determine whether ICANN is violating competition principles, especially from the perspective of the European Union. The analysis of this paper focuses mainly on the introduction of new gTLDs and the UDRP and investigates whether these two actions manifest ICANN's anti-competitive conduct.

### **2. The creation of the Internet Corporation of Assigned Names and Numbers**

## (ICANN)

The Internet Corporation for Assigned Names and Numbers (ICANN) is a complicated and controversial answer to two problems – one political and one technical. The technical problem is derived from the structure of the domain name system, on which the smooth operation of the Internet relies.

The Internet is based on a giant network of networks that use common protocols to communicate with one another. Every resource on the network has an inimitable identifier, called an IP number.<sup>[1]</sup> Simply because IP numbers are difficult to remember, the architects of the Internet provided for the creation of mnemonic names that substitute and correspond to IP numbers. The Domain Name System (DNS) is the idiom given to the complex system of registering those mnemonics – domain names – and maintaining the vast distributed directories that allow every browser pointed to a URL to look up the correct IP number and deliver an Internet communication, and every email to reach its destination. The process of searching for a domain name and retrieving the associated IP numbers is called *name resolution*.<sup>[2]</sup>

The original design and the one that is currently in operation presupposed that there would be one hierarchically organised set of domain names, and that every domain name would be unique. The idea behind unique domain names is to ensure that every Internet user who searches for a specific URL will find that it resolves to the same IP number associated with that URL, and therefore allows a connection to the same resource. The failure to ensure uniqueness – to allow a condition where different users typing the same thing get routed to different IP numbers – has been defined as “name collision”, or more critically “instability of the Internet”.<sup>[3]</sup> To obviate these hurdles, the DNS depends upon a system of layered registrations. In what is sometimes called the *legacy DNS* – that is the DNS currently in use – there is one master file called the *root file* that incorporates a list of all approved top level domain names (TLDs). Each line in this file contains the name of a TLD and the IP number of a computer that has the authoritative *registry* for that TLD. The root file is supported and copied by the thirteen root servers, which are the computers that actually resolve any TLD queries that cannot be resolved in hierarchically organised, cached databases closer to the user.<sup>[4]</sup>

Therefore, as long as everyone uses this hierarchal-structured system of organised databases, the root file becomes the dominant means of supporting the function of the Internet; and, whoever controls this file enjoys the power to determine which TLDs are accessible to the entire WWW, and what registry's database will be considered the authoritative source of information for that TLD. The database of registrations in each TLD is in turn controlled by a single registry.<sup>[5]</sup> In contrast, today a group of diverse and highly competitive registrars provide the service of actual selling entries, or otherwise registrations, into the registries. The right to a domain name is automatically granted to a registrant in exchange for a fee and provided that the requested domain name is available for registration. Domain names in .com, .org, and .net and in most of the “country-code” TLDs (ccTLDs) are assigned on a first-come, first-served basis. Names in the newest seven gTLDs were assigned in a more complex way, giving priority to trademark owners.<sup>[6]</sup>

Therefore, the legacy DNS system has two chokepoints. Whoever controls the root server controls which, and how many, TLDs will be visible on the Internet; and, while there is the possibility of many competing registrars to exist, and many TLDs competing with each other, each TLD must have one master registry. Even though there is no natural or practical limit on the number of competing registrars, the degree of competition in the upstream registry market is determined by the number of TLDs in the legacy DNS. As for control of the root itself, for the body controlling the legacy root zone competition is provided by the existence of so-called alternate roots.<sup>[7]</sup> The existence of these chokepoints over the legacy root created the political problem over the control of the Internet. In essence, whoever controlled the root file controlled both whether a given TLD could be part of the Internet and who would eventually be granted the rather appealing and beneficial job of running the TLD's registry. By 1997, speculations surrounding who controls this exceptional checkpoint were affirmed, when the US Government found itself in the position of controlling the

root.[8]

From the standpoint of high-level policy makers, this power vested upon the US Government was a not-entirely-welcome accident. A series of largely informal arrangements, mostly directed by one person, Dr. Jon Postel, and supported by a series of initially military, then National Science Foundation contacts,[9] had been shaped into something unpredicted, imperative and increasingly contentious. It was soon realised that management of the DNS had taken an astonishing U-turn on a commercial life due to an explosion of interest in the Internet. Thanks in part to marketing efforts by Network Solutions, Inc. (NSI) – which enjoyed at the time a government-granted monopoly on selling domain name registrations in the three major gTLDs, .com, .net and .org[10] – as new users increased on the Internet the number of domain name registrations increased dramatically. In the meantime, however, the rather informal, consensus-driven, and perhaps unsophisticated mechanism for creating new gTLDs collapsed under the tension of competing interests. Registrars wishing to enter the domain name registration market alongside NSI were challenging the company for its monopolistic attitude. Users who were not first to the Internet arena were craving for new, short domain names and new gTLDs to register them in, since the ones in the existing gTLDs – and in particular in the .com one – were already registered. On the other hand, trademark owners, realising the commercial and marketing possibilities of the Internet, were asking for controls and limits on the ability of others to register words that paralleled or resembled their marks. Registrants accused for cybersquatting wanted a less draconian method of resolving such disputes compared to NSI's policy of simply de-activating their domain name pending the slow, sometimes endlessly deferred, resolution of the dispute.[11]

The issue of whether new top-level domain names should be created was particularly controversial. Even though it is relatively easy to create new gTLDs,[12] and indeed Dr. Postel proposed to create hundreds, intellectual property right owners opposed such an option arguing with some justification that they already had to cope with the mounting problems that cybersquatting was causing.[13] Meanwhile, foreign governments and especially the European Union began to question and express concerns over the United State's control of a critical feature of a global communication and commercial resource on which they predicted that their economies, culture and societies would become ever-more dependent.[14]

In June 1998, a task force headed by senior presidential advisor Ira Magaziner issued a statement of policy on the *Management of Internet Names and Addresses*, known as the DNS White Paper.[15] The White Paper called for the government to lead the Internet to its privatisation by assigning its administration to a private corporation identified only as the “NewCorporation” (NewCo).[16] The White Paper did not *actually* mandate the creation of this corporation, but – nicely striking the prohibitions of the Government Corporation Control Act (GCCA)[17] – only mentioned how “nice it would be”, if someone would form it to undertake certain specific tasks so that the government could enter into some sort of an agreement with it.[18] ICANN, a California, non-profit organisation, emerged from the necessity and flexibility of the US government to recognise a new corporation as NewCo.

ICANN's subsequent history has been surrounded with controversy and debate, but only a few aspects of that history need to be related for the purposes of this paper: specifically, there are some instances in particular of ICANN-imposed policies, which affect competition: the means by which the corporation has constrained the introduction of new TLDs, which affects competition amongst registries, and the UDRP, which limits service competition between registrars.

However, before investigating ICANN's conduct of anti-competitive practices, it is interesting to see its role on Internet Governance and whether this very role is the starting point for ICANN's anti-competitive conduct.

### 3. Determining ICANN's behaviour towards Internet Governance

For an institution to be involved in governance there is a two-part test that needs to be met; in particular, the entity should have authority and jurisdiction and should also be able to engage in policy and provide sanctions.

### 3.1. Authority and Jurisdiction

In the beginning, ICANN's creation solved a variety of problems. First of all, it replaced Jon Postel as the policy authority over the root, resolving this way the problem of stability. ICANN also solved the problem of inter-governmental conflict: ICANN was a private entity, whose bylaws explicitly forbade governmental involvement. Therefore, although its authority would extend globally, that authority was supposed to be free from governmental influence and would not collide with national governments' sovereignty. Moreover, with a clear mission to coordinate the technical infrastructure of the Internet, ICANN claimed to have no public policy role.<sup>[19]</sup>

The initial problem of ICANN's legitimacy was addressed by the composition of the board of directors. Dr. Postel was replaced by a collective group of representatives; legitimacy through experience and personal reputation was replaced by legitimacy through accountability to stakeholders. ICANN's board represented different functional and geographical constituencies. Of 19 directors, 9 represented technical expertise groups, another 9 represented Internet users, and the final director was chairing for the organisation.<sup>[20]</sup>

Nevertheless, ICANN's board was itself subject to a higher authority: the US Government. The US Department of Commerce (DoC) retained ultimate control of the root, leaving policy decisions to ICANN, which, though, were subject to a potential veto. Despite the much-publicised and anticipated privatisation, the US DoC never ceded control over the Internet. As an official "fact sheet" of the DoC stated, "[T]he Department of Commerce has no plans to transfer to any entity its policy authority to direct the authoritative root server".<sup>[21]</sup> Therefore, the Internet was internationalised and privatised, but with the United States still overlooking its main operation.

Beneath the root, contracts extended the authoritative role of ICANN and the United States to act as the administrator of the gTLDs and the ccTLDs. The generic TLDs proved to be more willing to acknowledge ICANN's authority over them, especially since NSI, which used to administer them, was under pressure from the US Government to participate in ICANN. Following a series of rather intense negotiations, NSI and ICANN reached an agreement in 1999 and ICANN achieved policy authority in the most popular domain names. The ccTLDs were proven a more difficult market and as late as 2001, ICANN was still reporting minor progress in the area.<sup>[22]</sup> Top-down policy authority in these domains failed to be established and still remains one of the most difficult issues of the system.

The embedded conflict of authority between national governments and ICANN was manifested within the Governmental Advisory Committee (GAC). The GAC was an official advisory committee in which national governments could meet, discuss and coordinate their actions. On an individual basis, each government could assert authority over the root zone file corresponding to its country code. Along with GAC, ICANN was in the position to coordinate and make policy decisions affecting the ccTLDs.<sup>[23]</sup>

GAC's initial goal was to ensure that its members were being acknowledged the authority to engage in policy making. First, GAC declared that "[T]he Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest".<sup>[24]</sup> The reason for defining DNS as a public good, the same way as electromagnetic spectrum, was to allow governments' intervention. At the same time, GAC linked that public interest to national governments' authority: "[u]ltimate public policy authority over the relevant [country code domain] rests with the relevant government."<sup>[25]</sup> This statement clarified and affirmed that ccTLD domain names are under the jurisdiction of national authorities.

Therefore, ccTLD administrators found themselves under two authorities – asserting a third of their own. ICANN argued that its authority over the administration of the ccTLDs is derived from its influential role over the “A” root; if national governments decided not to comply with ICANN’s requirements, then ICANN was in the position to impose sanctions or re-delegate that authority. For their part, national governments claimed that, as far as the root zone file, listing their TLDs is concerned, that was a public resource and hence they can assert jurisdiction over it. A third approach was supported by ccTLD administrators, who cited public policy documents that identified authority in the “local Internet Community” rather than in ICANN or in governments.[26] This last scenario would mean that the administrators would be accountable to Internet users in their home country rather than to their government or ICANN.[27]

GAC members sought to clarify the ambiguity in their benefit and requested ICANN to allow them the right of veto over the administration of ccTLDs similar to the US veto over the administration of the legacy root. GAC suggested that ICANN’s power of re-delegation be given to national governments “[w]hen ICANN is notified by the relevant government or public authority that the [administrator] has contravened the terms ...ICANN should act with the utmost promptness to reassign the delegation”. [28] Country code managers would have access to the root as long as their national governments allowed it. ICANN initially rejected this arrangement, which would have subordinated the corporation to national governments. The issue though was resolved and currently registrations of domain names within two-letter country-code top-level domains (ccTLDs) are administered by country-code managers.[29]

Therefore, it was not surprising that the multiplicity of authorities caused jurisdictional fragmentation. ICANN asserted jurisdiction over the entire space and addressing system, and, thus, over all users. Likewise, US control extended over ICANN and hence the entire name space. However, at the top level of the name space jurisdictional conflicts emerged. Authority over the administration of the gTLDs caused little problems; there, ICANN prevailed. Authority over the administration of the ccTLDs though was another issue; national governments not only claimed but demanded jurisdiction. There, ICANN found itself in the position of having to compromise authority over its “peaceful” existence. If ICANN were to reject delegating authority over ccTLDs to country-code managers, then national governments would not acknowledge ICANN’s authority over the legacy root, and ultimately the administration of the whole Internet.

### 3.2 Policy and Sanction

Although ICANN’s regulation was targeting users, the corporation had – and still has - no direct contact with users. Instead, a four-tiered system has been implemented, with ICANN at the top, users and the bottom, and two kinds of organisations – registries and registrars – in between. At the top, ICANN is acting as a regulator; beneath it, registries maintain the zone files and operate the servers; beneath the registries, the registrars function as the retail device to users. They perform customer-oriented tasks of leasing and servicing domain names to users, often mixing these with additional services such as Internet service provision. Finally, at the bottom of the ladder we find users, who are affected in different ways by the above three.

Flow-down contracts extended these levels. ICANN’s regulation policies were embodied in contracts with registries, which included the regulations in their contracts with registrars, who included them in their contracts with network administrators. Policies are “instructed” by ICANN to registries to registrars and ultimately to private networks. The terms of the contract defined the laws of the Internet.[30]

At each level, ICANN ensured that the other parties would comply with the contractual clauses under the threat of domain name denial. Registries who would not comply could have their domain re-delegated. Registrars who disobeyed could lose their access to registries, so they would no longer be able to offer domain names for sale to users. Users who did not conform to ICANN’s policies could have their domain names removed from the root file and assigned to somebody else.

The primary mechanism that ICANN used to promulgate law was the Registrar Accreditation Contract.[31] Any body that wished to become an accredited registrar had to abide by the terms of this contract. It included an open-ended clause: “[R]egistrar shall comply ... with all ICANN-adopted Policies”.[32] As ICANN policies expanded and the accreditation agreements evolved, so could the conditions imposed on domain name usage. It was this contractual blank check that gave ICANN the right to exercise broad governance activities. The contract’s clauses had to be repeated as the agreements moved down the tier to eventually reach the users who are also bound to ICANN. These regulations were enforceable with clear sanctions: “[T]he [domain name] holder shall agree that its registration of the [domain] name shall be subject to suspension, cancellation, or transfer pursuant to any ICANN-adopted policy ...for the resolution of disputes”.[33]

Consequently, it can safely be argued that the foundation for governance exercised by ICANN was flow-down contracts supported by domain name denial. The accreditation agreement stipulated the regulatory framework of the way the Internet would function, whilst the power to revoke domain names provided the sanctions for enforcement. Internet users could be listed on the WWW only if they obeyed with ICANN’s rules; in failure to do so, they could see their domain name suspended, cancelled or transferred.[34]

#### **4. Global Public Policy – The means that can determine ICANN’s anti-competitive practices**

Shortly after ICANN’s governance policies were implemented, they were put into practice. ICANN’s codes of practice in the exercise of its governance abilities has stroke a net of controversy, accusing amongst other the corporation for engaging in anti-competitive practices. What follows is an illustration of those practices.

##### **4.1 The Uniform Domain Name Dispute Resolution Policy (UDRP)**

In August 1999, ICANN promulgated the Uniform Domain Name Dispute Resolution Policy (UDRP), which outlined a set of rules that determined ownership rights over domain names.[35]

In the late 1990s, domain name became valuable assets, with names such as yahoo.com and amazon.com becoming vital economic and market assets. As the value of domain names increased, so did disputes over the rights in domain names. Some disputes dealt with individuals allegedly registering trademarks as domain names in anticipation of selling them to their original owner; others dealt with owners seeking to wrest control over desirable character strings from other users. Sometimes ownership rights conflicted with rights of fair use and/or free speech.[36] The problem with these disputes was that there was not a regulatory framework in place capable of dealing with such disputes. Trademark law is national, whereas domain name conflicts take an international character.

ICANN’s UDRP filled the existing gaps of law and offered a plausible alternative to the resolution of such disputes. Conflicts would be resolved through an alternative dispute resolution procedure, in which independent panellists would decide the question of rights based on a set of criteria defined by ICANN. UDRP decisions could be enforced by removal or transfer of the disputed domain name. The UDRP was meant to be a ‘voluntary’ system, whereby dissatisfied parties could still resolve to traditional litigation. However, since existing forums were extremely costly and time consuming, in most of the cases the UDRP would offer a final judgement on property rights. The UDRP had – and currently has – de facto the force of law.[37]

The implementation of the UDRP demonstrates ICANN’s use of all governance mechanisms. First, the UDRP was drafted and developed by various parties, nonetheless, the ultimate authority for its final version vested with ICANN’s Board. Second, the UDRP was codified into law through the

Registrar Accreditation Agreement. ICANN inserted the requirement for adopting the Policy as a take-it-or-leave-it clause for registrar access to the name space, and registrars had to include the UDRP in their retail contracts with users – it had to “flow-down”. Third, the UDRP included sanctions: Users refusing to agree with the mandatory character of the Policy were denied access to the addressing system, whilst users who did not comply with the Policy's rules could easily see their domain name registrations being cancelled or transferred to other users. Finally, the UDRP applied to ICANN's jurisdictional reach. The policy is only applicable to gTLDs, whilst in the case of ccTLDs the decision to adopt the UDRP vests entirely upon the national authorities.[38]

## 4.2 Launching of new gTLDs

ICANN selected the seven new gTLDs for inclusion in the legacy root at its second Annual meeting in Los Angeles from a numerous and highly contentious field of 47 applicants, each of whom had to pay a non-refundable fee of \$50,000.[39] On the one hand, the addition of new gTLDs was the zenith of almost two years of effort; on the other hand, it was only the beginning of an additional two years of tough bargaining negotiations over the contract terms that would ultimately bind each registrar to ICANN. The corporation signed the first new gTLD contracts in May 2001, but was not until May 2002, some several months after initially approving the registry, that reached an agreement with the last of the seven.[40] After each contract was negotiated, ICANN submitted the list containing the new seven gTLDs to DoC; DoC's approval came within a few hours of the submission, suggesting that its review was mainly superficial.[41]

Ending a series of successive failures to launch new gTLDs in the root terminated the debate of who had the authority over such an issue; ICANN was proving that it has the ultimate saying for such an action. ICANN's internal processes leading up to the final selection of new gTLDs reflected the divisions in the various affected communities. At no time prior to its decision to restrict the number of the new gTLDs did ICANN issue an opinion outlining the technical justification for this limit. Why did ICANN choose only seven top-level domain names? How ICANN chose these specific domain names and not others? The answer is almost rigorous and fundamentally political: an ICANN working group balanced a deal between the faction that wanted a very large number of new gTLDs and those who wanted none. In April 1999, the DNSO Names Council voted to “[r]ecommand to the Board that a limited number of new top-level domains be introduced initially and that the future introduction of additional top-level domains be done only after careful evaluation of the initial introduction”. [42]

ICANN's decision to restrict the number of gTLDs to a number well below of what the DNS could actually handle prevented the proliferation of competition amongst possible registries.[43] ICANN's justification for such a conduct was based on grounds of compromise, but also on the grounds that, simply because it has been a long time since new gTLDs had been introduced, the addition of too many new ones could cause Internet ‘stability’ issues that required a ‘test’ or ‘proof of concept’ period.[44] It is rather debatable if the preservation of ‘stability’ was an argument corresponding to a technical claim or if, as it seems more likely, the issue was of a more political and/or commercial nature. If the claim was that from a technical point of view stability could be preserved by introducing a limited number of gTLDs, then this argument is implausible, since numerous new gTLDs had been introduced without any noticeable effect on anyone.[45] Moreover, it is beyond any doubt that the way ICANN chose to select the TLDs substantially reduced competition in other ways that had no technical justification.[46] Amongst these was ICANN's decision to require a non-refundable “application fee” of \$50,000; ICANN's requirement that successful applicants demonstrate huge financial reserves; ICANN's decision to have most new TLDs limited by restrictive charters rather than being able to sell domains to all comers; and, ICANN's decision to select the names of the new gTLDs itself rather than allow the winners the discretion to do it on the basis of their market search.

However, there were two ways in which the addition of new gTLDs genuinely would be new. First, there was generally a huge demand for ‘good’ and ‘practicable’ domain names, leading to fears that

new registrars would face a chaotic period of registrations. Second, there was sensitivity towards trademark owners who believed that they should be the first ones to be given the opportunity to acquire registrations on the new domain names in order to avoid being victimised from cybersquatters.[47] ICANN justified the limited number of the gTLDs as a careful step towards the uncertainty that characterises the Internet's vastly increased size and commercial value,[48] a view that echoed the policy direction in the White Paper.[49]

The remarkable thing surrounding the introduction of the new gTLDs was the slow pace of the whole process. In June 2001, the ICANN Board resolved to study the creation of these new gTLDs by creating "[a] plan for monitoring the introduction of new TLDs and for evaluating their performance and their impact on the performance of the DNS".[50] This Task Force charged with this report did not rush towards a conclusion. As of July 2002, it was still "[f]ormulating its approach to its charter and the process it will be following".[51]

In reality, though, speed would never be an issue, if ICANN was able to prove that the addition of the new gTLDs served the intended purpose of preventing the Internet from 'asphyxiating'. On the contrary, the inclusion of the new TLDs did not really alter anything and no one can really determine why the specific ones were chosen over others. As John Klensin, one of the most respected Internet architects, remarked in the context of the debate over who should manage the .org domain, ICANN's approach to change has the effect of restricting competition. Indeed, Klensin argues that ICANN's behaviour too frequently resembles that of the much-criticised telephone monopolies.[52]

## 5. National Rules and Global Conduct

Applying antitrust rules to the conduct of ICANN is a complex task; one that has few precedents providing guidance, and is fraught with many uncertainties. The potential of antitrust rules to apply to the borderless world of the Internet, particularly seeking to subject ICANN to such restrictive rules is difficult and indeed highly controversial.

Antitrust is not the first area of law to encounter difficulties in trying to adapt to new problems posed by the Internet; intellectual property law has been wrestling with the unique regulatory questions posed since the inception of the new communication medium. The application of antitrust laws is dependant upon the ability to identify, delineate and analyse markets where the normal forces of supply and demand exist. Even this basic requirement of market identification encountered in the application of antitrust becomes a far greater challenge in theory and practice when dealing with the Internet. The first problem, however, is not how to begin a market analysis, rather to determine who has jurisdiction to monitor the conduct of ICANN.

Using national or single-jurisdictional rules to remedy problems encountered at an international or global level presents many difficulties. National rules are primarily designed to deal with national problems and seldom provide for effective and efficient international regulation. Antitrust authorities have had to deal with this problem for many years. Antitrust law is primarily designed to monitor market structures and company behaviour, and where necessarily permit market intervention in order to remedy anti-competitive practices.

Yet, for over 60 years antitrust authorities have had to adapt to business activity, i.e. commerce that has become increasingly transnational, while the legal jurisdictions monitoring the commercial conduct have remained entirely national. There have been many proposals put forward for international antitrust rules, such as the draft international antitrust code proposed by the Munich Group[53], although antitrust has never been able to move beyond co-operation between authorities at the international level. Therefore, there is no single authority to assess whether or not ICANN is engaged in any anti-competitive activities; this task can only be undertaken by national antitrust authorities should they have jurisdiction.

### 5.1 Subjecting ICANN to anti-trust scrutiny at home and abroad

Given ICANN's historical and geographical roots, one could fairly argue that US antitrust has prima facie jurisdiction over ICANN. At the same time US antitrust authorities, namely the Department of Justice and the Federal Trade Commission, would be unlikely to encounter problems in asserting jurisdiction over the Internet Corporation, others have additionally considered the merits of whether ICANN would be likely to benefit from antitrust immunity in US courts as a result of its relationship with the US Government[54], only to dismiss such a possibility after brief consideration. Assessing ICANN's liability under US antitrust then requires an innovative application of the Sherman Act with reference to whatever few cases capable of providing guidance. Notwithstanding US jurisdiction, given the context of a global 'corporation' and the absence of an international authority, ICANN inevitably faces potential liability under the antitrust laws of many other jurisdictions, especially as it is widely accepted that there are currently in excess of 100 jurisdictions around the world with antitrust rules[55]. In order to determine ICANN's antitrust liability, the possibility and likelihood of ICANN being subjected to non-US antitrust scrutiny must be fully discussed.

### **5.11 Transnational Activities**

ICANN is a non-profit making corporation based in California, United States, with secondary offices based in Brussels, Belgium, and others throughout the world. Under traditional bases of jurisdiction provided for by public international law, the United States would be the most obvious jurisdiction to subject ICANN to antitrust scrutiny; under US federal antitrust legislation, i.e. the Sherman Act, or alternatively even under Californian state antitrust law. Yet given ICANN's function and working practices, it is potentially subject to antitrust scrutiny from many other jurisdictions around the world.

ICANN has responsibility for managing the Domain Name System with some interest in the country code Top-Level Domain name system, thereby having very broad regulatory functions and powers over the Internet. As the Internet is a global communication medium, further facilitating trading in millions of markets in many countries, it is apparent that ICANN has a global influence around the world. Furthermore the UDRP imposed and maintained by ICANN is capable of affecting the rights of intellectual property owners, thereby demonstrating ICANN's effect within jurisdictions that have provided IP owners with such rights. ICANN's transnational activities can be further demonstrated, if necessary, from the corporation's working practices whereby 'ICANN's President directs an international staff, working from three continents'[56] and the public meetings held by ICANN around the world, recently as varied as Bucharest, Montreal, Shanghai, Rio de Janeiro and Accra. All the abovementioned demonstrate that ICANN's function and activities are indeed of a global nature, to such an extent that ICANN has a clear impact within many countries, whilst theoretically depending upon national jurisdictional rules could potentially place the corporation under antitrust scrutiny in many jurisdictions.

The mere existence of so many countries with antitrust laws coupled with ICANN's influence within such jurisdictions does not, however, create a likelihood that ICANN will be scrutinised in each jurisdiction, as many countries may not have an effective enforcement policy or mechanism in place. Furthermore, while many jurisdictions clearly have the requisite legislative basis and enforcement mechanism to investigate ICANN's alleged anti-competitive practices, many antitrust authorities will either lack the resources to engage in such an investigation, or frankly, lack the political support that is surely necessary in order to question ICANN's conduct and perhaps attempt to impose behavioural remedies; particularly daunting given ICANN's powerful position and support from the US government. In order to assess the true likelihood of ICANN being subjected to non-US antitrust investigations, the legal basis for such a jurisdictional claim must first be considered.

#### **5.1.2 Jurisdictional rules in anti-trust**

With the absence of international antitrust rules, clearly the precise jurisdictional rules determining whether national antitrust laws will be capable of scrutinising ICANN's conduct will vary from country to country, depending upon domestic legislation and established practices. Yet there appears

to be a growing acceptance amongst countries with antitrust laws that the 'effects doctrine' or a variation thereof, is a legitimate basis for asserting jurisdiction when examining transnational activities.

The 'effects doctrine' was developed by the US judiciary, and first utilised in the context of antitrust in 1945 by 2<sup>nd</sup> Circuit Court of Appeals Judge Learned Hand in *United States v. Aluminium Co. of America (Alcoa)* [57]. Judge Learned Hand proclaimed that "*it is settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends*". [58] *Alcoa* concerned a cartel of aluminium producers based in Switzerland that was limiting production in order to raise prices. The case was a prosecution against a Canadian company participating in the cartel for violation of the Sherman Act. In asserting jurisdiction of the US courts, Judge Learned Hand continued and stated that '*Both agreements would clearly have been unlawful had they been made within the United States; and it follows...that both were unlawful, though made abroad, if they were intended to affect imports and did affect them*'. [59]

Between 1945 and 1982, the controversial 'effects doctrine' was refined by other Federal Circuit courts and debated by the US judiciary and academics alike, until the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982 established that, with regard to foreign commerce other than imports, the Sherman Act (i.e. the US antitrust laws) would only apply if the foreign conduct 'has a direct, substantial, and reasonably foreseeable effect' [60] on US commerce. The 'effects doctrine' had been passed into legislation. Further clarity was provided in 1993 by the US Supreme Court in *Hartford Fire Insurance Co. v. California* [61]. The Supreme Court ruling in *Hartford Fire* confirmed: 'Although the proposition was perhaps not always free from doubt...it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'. [62]

It is obvious that extraterritorial application of national law is controversial as it can be regarded as infringing upon the sovereignty of another State. The dilemma for antitrust is that it is a de facto regulator of commercial activity, which has become increasingly globalised and not constrained by national borders. Furthermore, in the absence of international antitrust rules, the only method of ensuring transnational anticompetitive activities that do not escape antitrust scrutiny is to permit extraterritorial application of national antitrust laws to some extent. The United States was the first jurisdiction to use extraterritoriality in antitrust enforcement by means of the 'effects doctrine'. The use of this doctrine arguably equips antitrust laws with the necessary tools in order to subject ICANN's monopolistic position to proper scrutiny for the first time. Given ICANN's history and geographic location, in order for a State other than the US to have jurisdiction to scrutinise potentially anti-competitive activities; jurisdiction may have to be on the basis of the effects doctrine, or a slight variation thereof. [63] The question remains whether other States have adopted the effects doctrine as a means of asserting jurisdiction in antitrust?

Extraterritoriality was initially very controversial and provoked a lot of criticism with many countries passing defensive legislation to prevent what they saw as US antitrust encroaching upon their sovereignty, these became known as 'blocking statutes'. Starting with *The Business Records Protection Act*, passed by the Province of Ontario, Canada in 1947, there were many countries passing legislative measures designed to counter US extraterritoriality passed in the 1950s, 60s and 70s including The Netherlands [64], Australia [65], South Africa [66] and even the United Kingdom. [67]

Yet, increasing trade liberalisation, pursued through the GATT, and linked increases in the globalisation of trade effectively brought about the circumstances where-by States other than the US had to reconsider their view on the legitimacy of extraterritorial application of antitrust law. With transnational trade continuing to rise sharply since the late 1940s, by the 1970s certain States probably feared for the effectiveness of antitrust regulation and the sovereignty of their territorial borders. Increasing foreign investment and general cross-border business activities, i.e. economic

integration, in the industrialised world, served to highlight the practical limitations of antitrust when jurisdiction was strictly limited to territory, hence excluding extraterritoriality; the problem of regulating a global market became clear to a few including the EU. As Yergin and Stanislaw state 'Borders – fundamental to the exercise of national power – are eroded as markets are integrated'.<sup>[68]</sup> Hence in order to effectively monitor transnational trade and prevent anti-competitive practices, antitrust authorities could no longer be strictly confined to national borders since the private enterprises that they were regulating, were not.

The European Commission, charged with the responsibility of enforcing the antitrust, or competition, rules of the European Community has often asserted jurisdiction on the basis of the US effects doctrine. In fact Advocate General Mayras also favoured its use to assert jurisdiction under EC law in *ICI v. Commission*<sup>[69]</sup> (aka the *Dyestuffs* case), only for the European Court of Justice to later reject that approach. The ECJ did however reconsider the issue in the *Wood Pulp I* case<sup>[70]</sup>. Again the Advocate General advised the Court that the Community was entitled to assert, and should assert jurisdiction on the basis of the effects doctrine; AG Darmon reviewed relevant international and US law on the subject and concluded the EU would be better served by an express recognition of the effects doctrine. The ECJ ruled "*If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.*"<sup>[71]</sup> The ECJ hence introduced a variation of the effects doctrine into EC competition law, that of asserting jurisdiction on the basis of 'implementation', i.e. seizing jurisdiction on the basis that the conduct in question was implemented within the territory of the European Community. With the ability to assert jurisdiction on the basis of the 'implementation' theory, ICANN can clearly be subject to antitrust/competition law scrutiny by the European Commission, demonstrated by the agreements, rules and policies of ICANN (some of which may amount to anti-competitive activities) that have been universally implemented across the Internet, and has therefore been implemented within the European Community. Indeed ICANN's offices within Belgium only serve to strengthen the basis of EC jurisdiction over the Internet Corporation.

### 5.1.3 ICANN's Liability under EC Competition Rules

While the European Community is not the only jurisdiction with an antitrust authority capable of exerting jurisdiction over ICANN on the basis of a variation of the effects doctrine, the other factors already mentioned that help determine the likelihood of antitrust scrutiny, i.e. resources and political will, would be highly unlikely to impede the European Commission from investigating ICANN. Indeed following the recent modernisation of EC competition law instigated by Regulation 1/2003<sup>[72]</sup> that entered into force on 1<sup>st</sup> May 2004, the national competition authority (NCA) of each Member State assists the Commission in a decentralised network of EC competition law enforcement, providing the Commission with extra time and resources to concentrate on the larger and more serious infringements<sup>[73]</sup>. Additionally, the Commission has consistently demonstrated its willingness to reach decisions likely to result in transatlantic tensions and political conflict.<sup>[74]</sup>

It is arguable, therefore, that if ICANN is to face antitrust scrutiny from any jurisdiction other than the United States, it would probably be an investigation by the European Commission under EC law. This paper will now consider the key issues in applying the EC competition rules to ICANN's activities.

The EC competition law prohibits undertakings from entering into anti-competitive agreements that affect trade between Member States under Article 81(1) EC Treaty, and prohibits undertakings from engaging in conduct that is an abuse of a dominant position under Article 82 EC Treaty.

In order for ICANN to be scrutinised under the EC competition rules, the corporation must fall within the definition of an undertaking, given ICANN's non-profit and public-private partnership

status, as well as its public function, this is not entirely free from doubt. The European Court of Justice clearly stated in *Höfner and Elser* that the way in which the entity in question is financed, and indeed its legal status does not determine whether it is an undertaking for the purposes of competition law; the key factor is whether the entity is engaged in economic activity.<sup>[75]</sup> Hence, while ICANN is not involved in profit making activities, this will not of itself exclude the corporation from EC competition law scrutiny.<sup>[76]</sup> Yet numerous cases have demonstrated difficulties, which arise when an entity's operations are fulfilling a public or social function, as opposed to a commercial function. In *Cisal*<sup>[77]</sup> the ECJ held that INAIL, an entity 'entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases' <sup>[78]</sup>, did not fall within the definition of an undertaking because INAIL operated with a clear social purpose. *Wouters* provides further clarity by stating the competition rules "do not apply to activity, which by its nature, its aim and rules to which it is subject do not belong in sphere of economic activity".<sup>[79]</sup> In many cases, it can be a delicate judgment, yet in light of ICANN's increasing independence from the US government (although links are with the US Department of Commerce) coupled with additional factors such as charging significant fees for applicants to submit tenders for new sponsored Top-Level Domains (sTLDs), suggests that ICANN is likely to fall within the definition of an undertaking for the purposes of EC competition law. With ICANN unlikely to escape the scope of Article 81 and 82 of the EC Treaty, its conduct can be scrutinised to assess whether any infringements are taking place; the focus is upon ICANN's conduct in controlling the root server system, specifically concerning the limited introduction of new TLDs, as well as the Uniform Domain Name Dispute Resolution Policy (UDRP).

## 6. Control of Root Server System and limited introduction of new gTLDs

The US government specifically intended for the Internet to be managed by one corporation as evinced by the US Government 1998 White Paper<sup>[80]</sup> stating "The new corporation should have the authority to manage and perform a specific set of functions related to coordination of the domain name system, including the authority necessary to:

... 2) oversee operation of the authoritative Internet root server system;"

ICANN, which was subsequently created and instilled as the sole corporation responsible for managing the Internet through a series of memoranda with the US Department of Commerce, exercises sole control over the root server system, thereby also controlling the gTLDs. The 1998 White Paper also suggested the new corporation should "oversee policy for determining the circumstances under which new TLDs are added to the root system".<sup>[81]</sup> This task has been assumed by ICANN, which has been responsible for increasing the number of gTLDs from 8 to 15, with plans progressing to create .JOBS and .TRAVEL thereafter. Yet the speed, or lack thereof, with which ICANN has created new gTLDs (discussed above) has led several commentators to criticise the organisation for unreasonably restricting the potential for growth of gTLDs<sup>[82]</sup>, thereby restricting access to the root server system. ICANN has countered such criticism by suggesting that staggering the introduction of new gTLDs was necessary to ensure stability of the DNS and management of the Internet.<sup>[83]</sup> EC competition law is capable of providing a legal mechanism to review whether ICANN's conduct can in fact be objectively justified on the basis such a rationale, as ICANN contends.

As this conduct does not directly concern agreements entered into by ICANN, EC competition law scrutiny would be based on the prohibition within Article 82. In order for conduct to be caught by Art 82, the undertaking in question must be in a position of market dominance. While the European Commission could not assume ICANN to be in a dominant position, and would have to engage in a full economic assessment, for our purposes such an in depth assessment is unnecessary. It is clear that in the market for generic Top-Level Domains (for which there is undoubtedly supply and demand), ICANN currently holds a monopoly and has absolute control over the root server system such that new gTLDs can not be created without ICANN's consent. These factors demonstrate ICANN's ability to act independently, free from competitive constraints, in the marketplace<sup>[84]</sup>, and thereby illustrate ICANN's dominant position.

Under EC law, being in a dominant position places a 'special responsibility' upon ICANN 'not to allow its conduct to impair genuine undistorted competition' [85], admittedly it is difficult to envisage genuine undistorted competition in the market for new gTLDs given ICANN's historical and regulatory role, although it is arguable that such a 'special responsibility' imposes an obligation upon ICANN to try to prevent further limitations upon competition within the market. Further one could argue that by unnecessarily restricting the creation of new gTLDs, ICANN is failing in its obligations.

In spite of uncertainty over what obligations ICANN may be under as a result of its 'special responsibility' for being a dominant undertaking, clear guidance is provided from the text of Article 82, whereby one of a list of non-exclusive examples of abusive behaviour is noted as '(b) limiting production, markets or technical development to the prejudice of consumers'. Given that consumers within the market for new gTLDs are potential registrars, with downstream consumers being domain name registrants, by limiting the availability of new gTLDs thereby limiting market supply, and arguably restricting technical development, ICANN's conduct is a prima facie abuse of its dominant position in the new gTLD market.

Additionally, there is some judicial support under EC law for regarding production restrictions as abusive behaviour; Jones and Sufrin have identified a line of case law which they refer to as applying to "dominant undertakings operating inefficiently and unable to meet demand, particularly public undertakings with statutory monopolies where Article 82 has applied...". [86] While clearly not identical to the situation concerning ICANN, the ECJ ruling in *Höfner and Elser v. Macrotron* [87] whereby an employment agency was held to infringe Article 82 for failing to meet with demand for its services, supports the view that ICANN could be liable for failing to meet the demand for new gTLDs. It does however appear necessary that the undertaking is capable of meeting with the consumer demand but unjustifiably refuses to do so. [88] Another crucial factor in determining ICANN's liability may also be whether the DNS is in need of new gTLDs, as the European Commission has stated that in cases of this nature it will only intervene if there is 'clear and uncontroversial evidence that a very substantial share of the demand is being deprived of a service that it manifestly needs'. [89] While the necessity for new gTLDs is perhaps not entirely free from doubt, in light of the continuing rapid expansion and use of the Internet, the case against ICANN is nonetheless convincing.

## 6.1 Objective Justification

Having outlined arguments suggesting ICANN's conduct is potentially infringing Article 82, there is the possibility that ICANN may be able to objectively justify its conduct, or demonstrate it is objectively necessary, in order to escape competition law liability. In spite of a lack of clear guidance from the European Commission or ECJ as to what could constitute objective justification, it is clear from Commission officials [90] and ECJ rulings [91] that evidence of a legitimate public interest objective would be sufficient. ICANN's defence would clearly rely upon its argument that it is necessary to introduce new gTLDs 'using predictable, straightforward, transparent, and objective procedures that preserve the stability and security of the Internet'. [92] Furthermore, ICANN would surely argue that it's restricted introduction of new gTLDs is necessary for the 'stability and security of the Internet', and that this is a legitimate public interest objective removing ICANN from liability under Article 82. Such an argument certainly has merit, yet a further difficulty for ICANN is that in order for conduct to be objectively justified it must also be proportionate to the objective that is being pursued. [93] The possibility of objective justification only if the conduct in question complies with the principle of proportionality under EC law is a difficult test to administer. Nonetheless, it could be fairly argued that as a monopolist, ICANN's 'special responsibility' to encourage the process of competition, requires a greater supply of gTLDs into the marketplace than ICANN has provided for since 1998, and while there is a likelihood of 'stability and security of the Internet' successfully gaining recognition as an objective justification, there is an equal likelihood that the restriction of supply to seven new gTLDs in seven years will be regarded as a disproportional restriction of supply in pursuit of that legitimate public interest objective.

## 7. Uniform Domain Name Dispute Resolution Policy (UDRP)

The Uniform Domain Name Dispute Resolution Policy forms part of agreements between ICANN and all the accredited registrars responsible for generic Top-Level Domains, additionally it can also be voluntarily adopted by managers of country-code Top-Level Domains. Generally antitrust scrutiny of terms of agreements will fall under Article 81(1) of the EC Treaty which prohibits 'all agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition in the common market'.

In similar terms to Article 82, Art 81(1) contains a non-exhaustive list of examples of infringements, in particular Art 81(1) indicates that agreements will be illegal if they '(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subjects of such contracts.' In the event that the prohibition in Art 81(1) applies, Art 81(3) provides conditions allowing for exemptions from the prohibition.

Yet, it is highly unlikely that inclusion of the UDRP, even though imposed by ICANN into registrar contracts, fulfils the criteria within Art 81(1)(e), this is simply because choice of law clauses are often included within commercial contracts, and the requirement for registrars to adopt the UDRP is unlikely to be regarded as a supplementary obligation that has no connection to the management of the gTLD that is the subject of the contract. The only means by which such contractual terms could fall within the auspices of Art 81(1) would be for the method of dispute resolution to be regarded as a factor giving rise to competition between registrars in downstream markets, i.e. registrants would consider the method of dispute resolution in domain name disputes to be part of non-price competition between registrars when choosing which gTLD to have a domain name within, if such non-price competition was possible between registrars, the UDRP agreements may be seen as fixing non-trading conditions contrary to Article 81(1)[94].

Furthermore, if potential competition between gTLD registrars on account of dispute resolution policies could be established, and could form part of the wider domain name market, thereby being in competition with ccTLDs, the imposition of the UDRP upon gTLD registrars but not ccTLD managers may also be seen to be applying dissimilar conditions to equivalent transactions[95], and potentially infringing Article 81(1).

Yet, the prohibition requires that the agreement has as its object or effect the prevention, restriction or distortion of competition. It is unlikely that clauses containing the UDRP would be regarded as having an anti-competitive objective, as it is far more likely an argument based on expedited administrative proceedings to safeguard trademark rights will be considered to be the true objective of the UDRP. In order for these agreements to be contrary to Article 81(1), it will have to be demonstrated that they have an anti-competitive effect within the gTLD market, or wider domain name market. Given the possibility of price competition between registrars and ccTLD managers, as well as varying consumer (registrant) demand according to individual TLDs, it is less likely that the form of dispute resolution offered by the TLD registrant/manager will be regarded as an area of non-price competition. Even if such were the case, given the rationale for the UDRP put forward by ICANN, there is a strong possibility of gaining an exemption under Article 81(3).

A further possibility is that ICANN's imposition of the UDRP upon registrars could be a further example of abusive behaviour by the monopolist, in breach of Article 82 EC Treaty. Having already considered ICANN's dominance, the question returns to whether it is possible to regard the dispute resolution policy as a competitive factor in the downstream market involving gTLD registrars and registrants as consumers. If so, imposing such conditions upon registrars may be regarded as unfair trading conditions contrary to Article 82, if gTLD registrars could be held to be within the same relevant market as ccTLD managers, then the imposition of dissimilar conditions thereby placing gTLD registrars at a competitive disadvantage with ccTLD managers would strengthen the argument against ICANN. The difficulty is again determining whether the dispute resolution policy is actually

a potential area of competition between registrars, an argument that weakens if the market has strong price competition. Also discussed above was the possibility of obtaining objective justification for abusive behaviour if it pursued a legitimate objective and complied with the principle of proportionality under EC law. It is submitted that arguing the need for expedited administrative proceedings to safeguard trademark rights may well be objective justification for imposing the UDRP upon gTLD registrars, and may well be proportional conduct in pursuing such an objective.

The legality of the UDRP under EC competition would therefore hinge upon certain factors, and is certainly open to debate. Would allowing registrars to develop their own dispute resolution policy be a source of competition in downstream domain name markets? Are gTLDs truly in the same market as ccTLDs to such an extent that registrants regard both as interchangeable? Finally, could safeguarding trademark owners rights by providing for an expedited dispute resolution proceedings be regarded as justification in the general interests of the consumer, such that it negates any anti-competitive effects? These are questions we are unable to provide definitive answers to.

## 8. Conclusion

While many people have considered ICANN's liability under the Sherman Act and other US antitrust laws, this paper has considered ICANN's potential liability under the European Community's competition rules within the Treaty of Rome. This paper has also sought to establish that ICANN may be subject to scrutiny in many other jurisdictions, and with antitrust law and policy becoming increasingly prevalent in market economies, ICANN's monopolistic tendencies may not be free from serious antitrust scrutiny for much longer. Having long enjoyed the fruits of monopolistic power in a global market by virtue of providing stability for the Internet, ICANN may soon find its global influence to its detriment.

[1] People use the IP numbers they have been assigned in different ways. Some IP numbers are "static", i.e. assigned to the same resource for long periods of time; other (most typically IP numbers used by Internet service providers) are "dynamic", i.e. shared out and then withdrawn on an as-needed basis, i.e. to a user for the length of a dial-up connection via modem, or perhaps on a daily basis for DHCP-based DLS or cable connections.

[2] Michael Froomkin, Mark Lemley, ICANN and Antitrust, University of Illinois Review, Vol. 2003, 102, at 105

[3] See, M. Stuart Lynn, ICANN, ICP-3: A Unique, Authoritative Root for the DNS, available at <http://www.icann.org/icp/icp-3.htm>

[4] Michael Froomkin, Mark Lemley, ICANN and Antitrust, supra note 2, at 106.

[5] There is no technical reason why one registry cannot control multiple gTLDs – and indeed, VeriSign currently controls three and provides the "back end" service for several others including .edu, .cc, .tv and .bz.

[6] See, <http://nameengine.com/dotprotect/timeline.biz.pdf>; and <http://nameengine.com/dotprotect/timeline.info.pdf>

[7] Michael Froomkin, Mark Lemley, ICANN and Antitrust, supra note 2, at 107

[8] Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 Duke L. J. 17, 2000, at 51-62

[9] See generally, Vint Cerf, A Brief History of the Internet and Related Networks, Internet Society, available at <http://www.isoc.org/Internet/history/cerf.shtml>; Barry M. Leiner et. al., A Brief History of the Internet, Internet Society, available at <http://www.isoc.org/Internet/history/brief.shtml>

[10] Ellen Rony & Peter Rony, The Domain Name Handbook 140 (1998)

[11] Michael Froomkin, Mark Lemley, ICANN and Antitrust, supra note 2, at 107

[12] Michael Froomkin, Wrong Turn in Cyberspace, supra note 8, at 12.

[13] See, World Intellectual Property Organisation, The Management of Internet Names and Addresses: Intellectual Property Issues – Final Report of the WIPO Internet Domain Name Process, available at <http://wipo2.int/process1/report/finalreport.html>

[14] 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. J., 601, 1999, at 608

[15] Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, available at [http://www.ntia.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.gov/ntiahome/domainname/6_5_98dns.htm)

[16] Ibid, at 31,751

[17] 31 U.S.C. §§ 9101-9110 (1994). The GCCA sets up a regime of audit and control for wholly-owned government corporations and a looser regime for mixed-ownership government corporations. It prohibits the creation of new government corporations without explicit congressional authorisation. Sec. 304(a), 59 Stat. at 602, amended by Pub. L.

No. 97-258, 96 Stat. 1042

[18] See, White Paper, supra note 15, at 31,744

[19] Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, MIT Press, 2002

[20] *Ibid.*

[21] DOC (US Department of Commerce) 1999, *Domain Name Agreements between the US Department of Commerce, Network Solutions Inc., and the Internet Corporation of Assigned and Numbers (ICANN)*, Fact Sheet, 28 September 1999

[22] ICANN, 2001, *Third Status report under ICANN/US government memorandum of understanding*, 3 July 2001, available at <http://www.icann.org/general/statusreport-03jul01.htm>

[23] Michael Froomkin, *Wrong Turn in Cyberspace*, supra note 8, at 81.

[24] Governmental Advisory Committee, 2000, *Principles for delegation and administration of ccTLDs*. Presented at ICANN Board Meeting, 23 February 2000, available at <http://www.icann.org/gac/gac-cctldprinciples-23feb00.htm>

[25] *Ibid.*

[26] Jon Postel, 1994, RFC:1591: *Domain Name System structure and delegation*, available at <ftp://ftp.isi.edu/in-notes/rfc1591.txt>

[27] Hans Klein, *ICANN and Internet Governance: Leveraging Technical Coordination to Realise Global Public Policy*, *The Information Society*, 18, Vol.3, 193, 2002, at 202

[28] Governmental Advisory Committee, 2000, supra note.

[29] *Resources for Country Code Managers*, available at <http://www.icann.org/cctlds/>

[30] Hans Klein, *ICANN and Internet Governance* 27, supra note.

[31] ICANN, *Registrar accreditation agreement*, 12<sup>th</sup> of May 1999, available at <http://www.icann.org/ra-agreement-051299.html>

[32] *Ibid.* Section II.D.1.b.i. This part of the Registrar Accreditation Agreement is important but not particularly succinct. The full text of Section D.1.b.i. is: “[D]. General Obligations of Registrar. 1. During the term of this Agreement: b. Registrar shall comply, in such operations, with all ICANN-adopted Policies insofar as they: i.e. relate to one or more of the following: (A) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or domain name system, (B) registrar policies reasonably necessary to implement Consensus Policies relating to the Registry, or (C) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names)”.

[33] *Ibid.* Section II. J. 7.i.

[34] Hans Klein, *ICANN and Internet Governance* 27, supra note, at 203.

[35] *The Uniform Domain Name Dispute Resolution Policy*, 24 October 1999, available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm>

[36] Kathryn Kleiman, *Brief of amicus curiae Association of the Creation and Propagation of Internet Policies. Worldsport Networks Limited v. ArtInternet S.A. and Cedric Loison*, US District Court of the Eastern District of Pennsylvania, No. 99-CV-616 available at <http://www.domain-name.org/worldsport.html>

[37] A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" – Causes and (Partial) Cures*, *Brooklyn Law Review*, Vol. 67, No. 3, 605, 2002, at 634-636

[38] Hans Klein, *ICANN and Internet Governance*, supra note 27, at 204.

[39] ICANN, *Second Annual Meeting and Organisational Meetings of the ICANN Board*, available at <http://www.icann.org/minutes/prelim-report-16nov00.htm>

[40] ICANN, *Major Agreements and Related Reports*, available at <http://www.icann.org/general/agreements.htm>

[41] Michael A. Froomkin, *Commerce Dept. Wields Domain Name Rubber Stamp in Record Time*, ICANNWatch, available at <http://www.icannwatch.org/article.pl?sid=01/06/26/153742>

[42] ICANN, *Yokohama Meeting Topic: Introduction of New Top-Level Domains, § I.C.*, available at <http://www.icann.org/dns/wgc-report-21mar00.htm>

[43] See, Milton Mueller, *Ruling the Root*, supra note 19.

[44] See, ICANN, *ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains § II.A*, 13<sup>th</sup> June 2000, available at <http://www.icann.org/yokohama/new-tld-topic.htm>

[45] For example, ICANN added .pw (for Palau) to the root in 27<sup>th</sup> November 2005. See, *IANA Root Zone Whois Information*, available at <http://www.iana.org/root-whois/pw.htm>

[46] See, ICANN, *New TLD Application Instructions*, available at <http://www.icann.org/Hds/new-tld-application-instruction-15aug00.htm>; ICANN, *Criteria for Assessing TLD Proposals*, available at <http://www.icann.org/tlds/tld-criteria-15aug00.htm>

[47] A. Michael Froomkin, *ICANNWatch, Speculative Frenzy on Domain Names Begins*, available at <http://www.icannwatch.org/article.php?sid=133>

[48] *Testimony of Vint Cerf before US House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 8<sup>th</sup> February 2001

[49] *Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741, 4<sup>th</sup> June 1998, available at [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

[50] ICANN, *Preliminary Report, Meeting of the ICANN Board in Stockholm, Resolution 1.74*, available at <http://www.icann.org/minutes/prelim-report-04jan01.htm>

[51] ICANN, *New TLD Evaluation Process Planning Task Force*, available at <http://www.icann.org/committees/ntepptf/>

[52] John C. Klensin, *Second-guessing the ORG process*, available at <http://forum.icann.org/org-eval/preliminary-report/msg00006.html>

- [53] The Draft International Antitrust Code was proposed by a group of antitrust scholars, and was designed to form part of a plurilateral trade agreement, i.e. if successful the 'Code' would have set minimum standards for members of the WTO.
- [54] See e.g. Blue, L 'Antitrust Note: Internet and Domain Name Governance: Antitrust Litigation and ICANN' (2004) 19 Berkeley Tech. L.J. 387.
- [55] Lipsky 'The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?' (2002) 26-FALL Fletcher Forum of World Affairs 59 at p.60. Also, Whish 'Competition Law' 5<sup>th</sup> Ed, 2003, at p.782 stating that 'more than 100 countries now have competition law'.
- [56] See the 'ICANN Information' document available from [www.icann.org/general/](http://www.icann.org/general/)
- [57] 148 F, 2d 416 (2<sup>nd</sup> Circuit Court of Appeals, 1945).
- [58] 148 F, 2d 416 (2<sup>nd</sup> Circuit Court of Appeals, 1945) at 443.
- [59] 148 F, 2d 416 (2<sup>nd</sup> Circuit Court of Appeals, 1945) at 445.
- [60] § 402 of the FTAIA.
- [61] 509 US 764, 113 S. Ct. 2891 (1993).
- [62] 509 US 764, 113 S. Ct. 2891 (1993) at 796, or 2909.
- [63] It is accepted that given ICANN's offices in Belgium, and in light of its geographically diverse working practices, an argument in favour of asserting jurisdiction could nonetheless be presented under more traditional notions under international law, as well as an argument based on the effects doctrine.
- [64] Art 39 of the *Economic Competition Act* in 1956.
- [65] *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976*.
- [66] *Protection of Business Act 1978*.
- [67] *Protection of Trading Interests Act 1980*.
- [68] P.220, Yergin and Stanislaw 'The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World', Chapter 30 in *The Globalization Reader*, edited by Lechner and Boli.
- [69] Case 48/69, [1972] ECR 619, [1972] CMLR 557.
- [70] *Cases 89, 104, 114, 116, 117 and 125-129/85, A. Ahlström Oy v Commission* [1988] ECR 5193, [1988] 4 CMLR 901.
- [71] *Cases 89, 104, 114, 116, 117 and 125-129/85, A. Ahlström Oy v Commission* [1988] ECR 5193, [1988] 4 CMLR 901.
- [72] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
- [73] For general discussion of the modernisation of EC competition law see: Gilliams 'Modernisation: From Policy to Practice' (2003) 28/4 ELRev 451; and Venit 'Brave New world: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' [2003] 40/3 CMLRev 545.
- [74] Such as the protracted negotiations regarding the conditional clearance of the Boeing/McDonnell Douglas merger [1997] OJ L336/16, and the controversial prohibition of the merger between General Electric and Honeywell, *Cases T-209/01 and T-210/01, Honeywell International v. Commission and General Electric v. Commission*, pending before the Court of First Instance. See Zanettin, B 'Cooperation Between Antitrust Agencies at the International Level' (2002, Hart) for discussion of several cases that have resulted in conflict between the US and EC antitrust authorities. Perhaps now additionally see Commission Decision against Microsoft: *C(2004)900final of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP C-3/37.792 Microsoft)*, imposing a record €497 million fine and significant behavioural remedies, appeal before the CFI pending; Case T-201/04, against the advice of the US Department of Justice – see DoJ Antitrust Division Press Release 04-184 of 24<sup>th</sup> March 2004.
- [75] Case C-41/90 *Höfner and Elser v. Macrotron GmbH*, [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.
- [76] See also the Commission decision, *Distribution of Package Tours During the 1990 World Cup 92/521/EEC* (1992) OJ L326/31.
- [77] Case C-218/00 *Cisal di Battistello Venanzio & Co Sas v. Istituto Nazionale Per L'Assicurazione Contro Gli Infortuni Sul Lavoro (INAIL)* [2002] 4 CMLR 24.
- [78] *Ibid.* at para 21.
- [79] Case C-309/99 *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913, at para 57.
- [80] "Statement of Policy, Management of Internet Names and Addresses", 63 Fed. Reg. 31741 (1998).
- [81] *Ibid.*
- [82] Michael Fromkin, Mark Lemley, ICANN and Antitrust, *supra* note 2, at 110.
- [83] See ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains § II.A, 13<sup>th</sup> June, available at <http://www.icann.org/yokohama/new-tld-topic.htm>
- [84] The ability of an undertaking to act independently, free from competitive constraints, has been held by the ECJ to be a key factor in determining dominance in several leading cases, notably Case 27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429, see para 65 in particular.
- [85] Quote from the ECJ ruling in Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461, [1985] 1 CMLR 282 at para 57.
- [86] Jones, A. & Sufirin, B. 'Text, Cases and Materials on EC Competition Law' 2<sup>nd</sup> Ed, 2004 at p.526.
- [87] Case C-41/90 *Höfner and Elser v. Macrotron GmbH*, [1991] ECR I-1979, [1993] 4 CMLR 306, para 21
- [88] See Case C-179/90 *Merci Convenzionali Porto di Genova v. Sideruriga Gabrielle* [1991] ECR I-5889, [1994] 4 CMLR 422 where the Port of Genoa was held to breach Article 82 by refusing to use modern technology resulting in

higher costs and significant delays, to the detriment of consumers.

[89] Commission Decision of 12 April 1999 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty and Articles 53 and 54 of the EEA Agreement (*Cases No IV/D-1/30.373 — P & I Clubs, IGA and No IV/D-1/37.143 — P & I Clubs, Pooling Agreement*) [1999] OJ L125/12, at para 128.

[90] See Speech by Philip Lowe, Director General DG Comp, to Forham Corporate Law Institute 30<sup>th</sup> Annual Conference on International Antitrust Law and Policy, 23<sup>rd</sup> October 2003.

[91] Although unsuccessful, this defence was acknowledged by the Court of Justice in Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439 and Case C-333/94P *Tetra Pak International SA v. Commission (Tetra Pak II)* [1996] ECR I-5951.

[92] See ICANN Document '*Strategy: Introduction of New Generic Top-Level Domains*', 30<sup>th</sup> September 2004 at p.3.

[93] See paragraph 190 of the ECJ ruling in Case 27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429.

[94] See Article 81(1)(a) EC Treaty.

[95] Article 81(1)(d) EC Treaty.