

WHEN WE SAY US™, WE MEAN IT!

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I. INTRODUCTION

Trademark law is traditionally about the commercial use of words, signs, and symbols. Where once trademark was something of a specialist subject, it—along with other forms of intellectual property—now finds itself occupying a greater role in both legal and public consciousness. But, much like many famous brands that find themselves appearing in new and unexpected contexts,

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trademark-like ideas are being appropriated for new uses.

As nations increasingly see “branding” themselves to be part of their national interest, pressure is growing to create trademark or trademark-like protection for country names, especially online. Although arguments for this new right come in various forms, the most substantial is the one championed by South Africa, which essentially asserts that some online addresses—amounting to virtual cultural property—are being expropriated by people who had the good fortune to live in countries that were early adopters of the Internet.¹

The argument that public international law should give special protection to a new class of virtual cultural property has a certain degree of appeal. It fits within three trends at once: (1) the trend towards recognizing the claims of indigenous peoples to prevent the uncompensated foreign exploitation of their traditional cultural property, (2) the ongoing expansion of intellectual property rights, and (3) the growing recognition of the increasing importance of rights in digital property in general and virtual property in particular. Rather than attempting to survey these three major trends, this short paper takes them largely as given. Instead, this Paper concentrates on identifying to what extent this claim of right is rooted in international law.

Although the claim to control the use of a country name is not utterly without support in international law, this Paper suggests that the claim that governments have a trademark-like right in their country names—or in particular representations of their country names—is not grounded in existing concepts of international law, and it also suggests that the case for making new law in this area is ultimately not persuasive.

II. NATIONS AS BRANDS

It is becoming increasingly commonplace to speak of nations as competitors in the international marketplace; indeed, to speak of nations as brands.² The concept of nations as megacorporate competitors may have begun as metaphor, but it has morphed, or been reified, into a guide for policy. “[T]he rhetoric of competitiveness—the view that, in the words of President Clinton, each nation is ‘like a big corporation competing in the global marketplace’—has become pervasive among opinion

1. Refer to Part III.C.2 *infra*.

2. The leading exponent of this view is Peter van Ham. See generally Peter van Ham, *The Rise of the Brand State*, 80 FOREIGN AFF., Sept.–Oct. 2001, at 2, 2.

leaders throughout the world.”³

The transformation of the nations-as-competitors vision of the world from metaphor into perceived reality leads inevitably to the importation of modes of thought and methods of “competition” from the corporate world.⁴ After all, if one believes that “the United States and Japan are competitors in the same sense that Coca-Cola competes with Pepsi,”⁵ it follows that international economic, and perhaps also political, strategies can be addressed by advertising. Indeed, the language of commerce and sales already invades U.S. foreign relations. As Secretary of State Colin Powell said in 2001, “What are we doing? We’re selling a product. That product we are selling is democracy.”⁶ He might as well have said “AmericaTM.”

Just as corporations increasingly view their brand identities as major assets, so too are national policymakers concerned with preserving and extending their national “brands” because “[t]he unbranded state has a difficult time attracting economic and political attention.”⁷ “[N]ations brand themselves for five reasons: increase tourism; obtain skilled labour; increase factory relocation; increase the number of headquarters or branch offices; or increase prestige of the nation.”⁸ The U.S. government in particular has made no secret of its desire to aggressively market its “brand” in the hopes of swaying foreign public opinion. Following the September 11 terrorist attacks on the United States, the Bush administration named Charlotte Beers, a former advertising executive who was once nicknamed “the most powerful woman in advertising,” as U.S. Undersecretary for Public Diplomacy.⁹ Beers, in turn, brought in experts from Madison Avenue to create a “branding strategy for America, just

3. PAUL KRUGMAN, *POP INTERNATIONALISM* 4 (1996).

4. In this, it is of a piece with the *Zeitgeist* in which corporations are supposed to have virtues the public sector lacks, and larger swatches of traditionally government functions—even substantial parts of the material and logistical support for foreign military adventurism—are outsourced to profit-making corporations.

5. KRUGMAN, *supra* note 3, at 4 (critiquing this view).

6. *BRAND U.S.A.*, *FOREIGN POL’Y*, Nov.–Dec. 2001.

7. van Ham, *supra* note 2, at 2–3.

8. Nick Wreden, *BRAND U.S.A.*, at <http://www.jyanet.com/cap/2003/0401fe0.shtml> (last visited Sept. 25, 2004) (quoting marketing expert Philip Kotler).

9. See *From Uncle Ben’s to Uncle Sam*, *ECONOMIST*, Feb. 21, 2002, available at http://www.economist.com/business/displayStory.cfm?story_id=998594. Under Ms. Beers’s supervision, the U.S. State Department “produced videos, pamphlets, booklets and other materials, including an advertising campaign intended for broadcast in Muslim countries depicting religious tolerance and thriving Muslims in the United States.” *Disinfopedia, Charlotte Beers*, at http://www.disinfopedia.org/wiki.phtml?title=Charlotte_Beers (last visited Sept. 25, 2004). These advertisements bombed in many Arab countries and were quickly discontinued. See *id.*

as they would for a corporate client.”¹⁰

In explaining the appointment of Charlotte Beers, U.S. Secretary of State Colin Powell said, “We are selling a product. We need someone who can rebrand American foreign policy, rebrand diplomacy.”¹¹ The United States is not alone in seeking to use both the rhetoric and reality branding as foreign policy tools. In extreme cases, governments concerned that foreign or even domestic perceptions are economically damaging have sought to “rebrand” their countries. In the late 1990s, the U.K.’s New Labour government (itself the beneficiary of a political relaunch and rebranding) tried to “relaunch” the United Kingdom as a more modern state.¹² The new brand was supposed to replace the too-imperialistic and outdated “Rule Britannia”¹³ as the national image both at home and abroad and to undo foreign perceptions of the United Kingdom that the government believed were undermining both its exports and its tourism.¹⁴

10. Shane Harris, *Brand U.S.A.*, GOVERNMENT EXECUTIVE, Oct. 1, 2003, available at <http://www.govexec.com/features/0903hs/HS0903s7.htm>.

“America,” the word and the concept, is the nucleus. The atoms are dozens of American icons: McDonald’s, democracy, dollar, Abraham Lincoln, cowboy. Different colored lines between these icons show whether their association to the America nucleus—and to one another—is positive or negative in the eyes of non-Americans. It also shows whether those associations are weak or strong.

For instance, “capitalism” is strongly and positively associated with America, as are “land of opportunity” and “democracy.” But “capitalism” also is associated with “mass production,” which is associated with the negative notion that things are “disposable.” Disposability is negatively related to “instant gratification,” and from there, it’s a short hop to America’s role as a “superpower” and a land of contradictions—“racism” exists in spite of “civil rights,” the “death penalty” is the rule of law in a “land of opportunity.”

Id.

11. *From Uncle Ben’s to Uncle Sam*, *supra* note 9. See also Charles Skuba, *Branding America*®, GEO. J. INT’L AFF., Summer/Fall 2002, at 105, 106 (“Realistically, the issue is not whether or not to brand, but how to manage and market the U.S. brand.”).

12. See Daniel H. Pink, *The Brand Called UK*, 22 FAST COMPANY, Feb. 1999, at 172, available at <http://www.fastcompany.com/online/22/branduk.html>.

13. The term is attributed to the poet James Thomson, in *Alfred: A Masque* (1740). JOHN BARTLETT, *BARLETT’S FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED BACK TO THEIR SOURCES ANCIENT AND MODERN* 318:8 (Justin Kaplan ed., 17th ed. 2002).

14. Demos, a think tank that influenced the New Labor party, concluded,

Customers around the world considered British products to be fusty and of poor quality. Foreign companies viewed Great Britain as an island that time forgot—stuck in the past, hostile to free trade, riven by labor disputes. And potential tourists stayed away, believing that they would encounter lousy weather and crummy meals served by haughty hosts.

Pink, *supra* note 12.

The government “sought to build upon the ‘Cool Britannia’ logo projecting ‘New Britain’ as a dynamic, progressive, sophisticated nation and a world leader in creativity and innovation,” but the project was derided by a journalist and others as being built around a slogan borrowed from an ice cream flavor. See Eugene McLaughlin, *Rebranding*

Branding can be part of the project of nation-building. The European Commission, for example, promoted its idea that all products manufactured in the European Union bear an identical “Made in EU” label no matter from which country they originate as part of its larger project to “project the image of the European Union and furnish it with the trappings of a powerful global entity,”¹⁵ a project that already includes a flag, a common passport, and a (largely) common currency. Moving away from national tags to a common EU tag would, the Commission argued, “consolidate the image and recognition of the EU’s single customs union and single market . . . as an element in our broader efforts to gain greater recognition of the customs union in the international framework.”¹⁶

Nowhere is the national urge to create or reinforce identity—to brand the nation—more clearly visible than in governments’ reactions to the Internet. Here again, the EU—not quite a state, but lurching in that direction—provides a leading example. For more than four years,¹⁷ the European Commission worked to create a .eu top-level domain,¹⁸ ostensibly to “strengthen the image and the infrastructure of the Internet in Europe, bolster the internal market and stimulate e-commerce in Europe.”¹⁹ In fact, however, the Commission recognized that “[t]he creation of a .eu suffix would certainly increase the power of the EU ‘brand’ and thereby diminish the significance of national identities.”²⁰ Conversely, nationalists lament the fact that local companies prefer .com to a “national” address. For example, Tushar A. Gandhi, the great-grandson of Mohandas K. Gandhi, laments

Britain: The Life and Times of ‘Cool Britannia,’ at <http://www.open2.net/newbrit/pages/features/coolbritannia.doc> (last visited Sept. 25, 2004) (“The phrase originated with an ice-cream flavour (vanilla with strawberry and chocolate covered shortbread) promoted by ‘Ben and Jerry’ in April 1996.”). See also Wreden, *supra* note 8 (“National branding campaigns can fail. Look at how rapidly the UK’s ‘Cool Britannia’—which had its genesis in a line from an ice cream carton—was shelved, and Britain went back to being the land of beefeaters, warm beer and a dysfunctional royal family.”).

15. Ambrose Evans-Pritchard, *Europe Plan to Outlaw ‘Made in Britain’ Label*, DAILY TELEGRAPH (UK), Jan. 13, 2004, at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/01/13/nmib13.xml>.

16. See Directorate-General for Trade, European Commission, Made in the EU Origin Marking—Working Document of the Commission Services, § 3 (Dec. 12, 2003), available at http://trade-info.cec.eu.int/doclib/docs/2004/february/tradoc_115557.pdf.

17. See Herbert Burkert, *About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN*, 36 LOY. L.A. L. REV. 1185, 1213 (2003) (citing 2000 as the year the Commission created the .eu plan).

18. For definitions of terms, refer to text accompanying notes 111–16 *infra*.

19. Peter Clarke, *Europe Eyes .eu Domain*, EE TIMES, Feb. 2, 2000, at 34, available at <http://www.eetimes.com/story/OEG20000202S0040>.

20. *Id.*

that Indian firms avoid .co.in (the commercial subdomain under the national country TLD), blaming this avoidance on a national inferiority complex.²¹ He advocates moving to the national country code as “a matter of national pride” and also as a means of visibly associating India’s successful enterprises with India on an international stage rather than in the “anonymous” .com domain.²² Perhaps the apotheosis of the Internet nation-branding phenomenon is Belgium, where the Prime Minister “hired a team of image-makers to rebuild the country’s reputation after years of scandals involving government corruption, child pornography, and dioxin-polluted chickens.”²³ On their recommendation, Belgium “decided to introduce a new logo and hip colors and [to] sport the cool Internet suffix ‘.be’ as its international symbol.”²⁴

Belgium may be an extreme case, but governments around the world are currently focusing on Internet presence. In part, this focus results from a series of accidents that led to the current domain-naming conventions on the Internet in which a majority of existing top-level domains consist of two-letter country codes, each corresponding to a common abbreviation for a country’s name.²⁵ In part, it is the result of the international visibility of the Internet and the likelihood that its importance will only grow over time. And, in part, governments’ interests in using the Internet to ‘brand’ themselves is a function of the Internet’s relative novelty, a novelty that suggests there may be fewer impediments to its use to publicize, or even to forge, national identity. (These factors do not, of course, exist in a vacuum. Rather, they dovetail with other factors leading governments to care about the Internet, not least of which is as a militarily significant technology with implications for national security.²⁶)

If governments are increasingly concerned with national “branding” both on and off the Internet, it follows that they must

21. See Tushar A. Gandhi, *India’s .IN: Underused and Underappreciated*, in ADDRESSING THE WORLD 43, 44–46, 52 (Erica Schlesinger Wass ed., 2003).

22. *Id.* at 45.

23. van Ham, *supra* note 2, at 3.

24. *Id.* at 3–4.

25. See J. Postel, Network Working Group, *Request for Comments 1591: Domain Name System Structure and Delegation 2*, at <http://www.ietf.org/rfc/rfc1591.txt> (Mar. 1994).

26. See Kim G. von Arx & Gregory R. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control*, 9 RICH. J.L. & TECH. 4, para. 60 (2002), at <http://law.richmond.edu/jolt/v9i1/Article4.html> (arguing that the reason nations value control over ccTLDs is that they can control who can register them, determine what names are allowed, retain the power to conduct electronic surveillance, and protect critical infrastructures that increasingly rely on the Internet, such as telecommunications, electrical power systems, gas and oil, banking and finance, transportation, water supply systems, government services, and emergency services).

also be concerned with how their “brands” are used by others. Indeed, just as the owners of trademarks protect their brands by warding off potential infringers and dilutive contemporaneous users of the same words or phrases, so too have some governments begun to argue that they should be able to control or even to own their names. These arguments appear most frequently in the context of Internet domain names, often couched in narrow terms, but sometimes also in more sweeping forms that could have implications well beyond the virtual. Less frequent, but perhaps more serious, are the country-naming conflicts that occasionally erupt between states or near-states at the international level.²⁷

These efforts expose the gaps in the international law of country naming—an area that is, at best, underdeveloped. Faced with this gap, some have suggested that trademark law fills it, or if it does not, that it should.

III. LEGAL ASPECTS OF THE “OWNERSHIP” OF COUNTRY NAMES

There is very little law relating to a country’s rights in its name. Until recently, countries were generally thought to have plenary rights to call themselves what they liked.²⁸ And, until recently, arguments that countries have the ability to control extraterritorial uses of their names were also quite rare.

States are sovereign under international law; one might think that along with sovereignty comes the freedom to call oneself whatever one wants. Furthermore, it is an established principle of international law that name changes, even if caused by revolution and complete change in the form of government, do not affect a state’s “continuity,” that is, its rights and duties under international law.²⁹ Thus, in the ordinary case, other states are not affected by a state’s name change, and they have no grounds to complain about it.³⁰

27. Refer to text accompanying notes 63–110 *infra* (describing the conflict between Greece and the Former Yugoslavian Republic of Macedonia over the latter’s choice of name).

28. See, e.g., Igor Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 93 AM. J. INT’L L. 155, 160 (1999).

29. See, e.g., *Sapphire v. Napoleon III*, 78 U.S. 164, 168 (1871) (holding that upon a regime change following the deposition of Napoleon III and the creation of the Third Republic, “[i]f a substitution of names is necessary or proper it is a formal matter, and can be made by the court”). 2 HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE 314–15 (Francis W. Kelsey trans., 1925) (remarking that “[i]t is evident” that, after a regime change, a state remains liable for prior debts and “undoubtedly” retains its position in bodies such as international councils).

30. But refer to text accompanying notes 63–110 *infra* (discussing Greek objections to “Republic of Macedonia”).

Similarly, states have traditionally had few grounds on which to complain about foreigners' private use of their names. States can, of course, regulate the domestic use of their or other countries' names. And the Paris Convention imposes obligations on states to deny trademark rights and "to prohibit . . . the use, without authorization . . . either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems [belonging to any of the signatories], official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view."³¹ Similarly, the TRIPS Agreement requires signatories to provide a legal means for "interested parties" to prevent others from misleading the public about the geographical origins of goods "where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."³² As we shall see, however, neither of these provisions applies to country names.

A. *Necessary Detour: What Is a "Country Name"?*

"[T]here exists no single widely accepted list of country names."³³

Before exploring whatever law there may be that regulates the use of country names, it is unfortunately necessary to take a substantial detour into the world of definitions. If it is sometimes moderately hard to decide just what is or is not a country,³⁴ it is surprisingly difficult to define what are potentially protectable country names even for those places that are universally agreed to be countries. The one thing that can be said with certainty is that the set of candidates for protection proves to be quite large.

A country can have many things one might refer to as its name. Most, if not all, countries have a formal name that is used in official documents, such as "The United States of America" or "The Republic of France." Many also have a short name, such as

31. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 6^{ter}, 21 U.S.T. 1583 [hereinafter Paris Convention].

32. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 22, paras. 1–2 [hereinafter TRIPS Agreement] available at http://www.wto.org/english/tratop_e/trips_e/t_agm4_e.htm.

33. *Status of Country Names in the .info Top-Level Domain*, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, WIPO Doc. SCT/S2/4, at 4, at http://www.wipo.org/sct/en/documents/special_session/pdf/sct_s2_4.pdf (Mar. 29, 2002) [hereinafter *Country Names in .info TLD*].

34. Boundary cases such as Taiwan, the Republic of China, occupied Palestinian territories, the Vatican and the Holy See (argued at times to be two countries, one, or none), and Sealand make this an interesting issue, but it is outside the scope of this paper.

“France,” or an acronym, like “USA,” or both. Some have a common nickname (“America”). These four possibilities—formal name, short name, nickname, and acronym—need, then, to be multiplied by language. The UN has six official languages.³⁵ Some countries have more; The Republic of South Africa (also known as “South Africa” and the RSA), for example, has eleven official languages: Afrikaans, English, Ndebele, Xhosa, Zulu, Pedi, Sotho, Tswana, Swazi, Venda, and Tsonga.³⁶ Only one of these, English, is an official language of the UN.

The United Nations publishes an official list of its member states called the “Terminology Bulletin.”³⁷ The entry for each state includes its usual or “short” name (for example, “France”), as well as its full or formal name (for example, “the Republic of France”).³⁸ Changes are surprisingly frequent. The UN statistical department website lists at least forty name changes that took place in the twenty-one years from 1982 to 2003.³⁹ The equally authoritative UN bulletin “Country Names” lists all entities that are either “a member country of the United Nations, a member of one of its specialized agencies[,] or a party to the *Statute of the International Court of Justice*,”⁴⁰ and the list of “Country and Region Codes for Statistical Use” used by the UN Statistics Division ranges slightly more widely to include “other UN sources.”⁴¹

Names, nicknames, and acronyms are all commonly used in speech and writing. An additional set of “names” of special importance are the two and three letter abbreviations used in international addressing. The definitive international list of two and three letter country codes is ISO 3166-1,⁴² which is maintained by a private Geneva-based body called the International Organization for Standardization (“ISO”).⁴³ The ISO jealously

35. See UN EMPLOYMENT INFO. & ASSISTANCE UNIT, EMPLOYMENT OPPORTUNITIES WITH THE UNITED NATIONS & OTHER INT’L ORGS, at <http://www.state.gov/p/io/empl/11076pf.htm> (last updated Jan. 22, 2003) (citing Arabic, Chinese, English, French, Russian, and Spanish as “official UN languages”).

36. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 2003, at 493.

37. DEPT OF GEN. ASSEMBLY AFFAIRS & CONFERENCE SERVS. OF THE U.N. SECRETARIAT, TERMINOLOGY BULLETIN NO. 347/REV.1, U.N. Doc. ST/CS/SER.F/347/Rev.1, U.N. Sales No. A/C/E/F/R/S.97.I.19 (Sept. 5, 2000).

38. *Id.*

39. U.N. Statistics Division, *Country or Area Numerical Codes Added or Changed, 1982–2003*, at <http://unstats.un.org/unsd/methods/m49/m49chang.htm> (revised Mar. 8, 2004).

40. International Organization for Standardization, *ISO 3166-1 and Country Coded Top-Level Domains (ccTLDs)*, at <http://www.iso.org/iso/en/prods-services/iso3166ma/04background-on-iso-3166/iso3166-1-and-ccTLDs.html> (last visited Sept. 25, 2004).

41. *Id.*

42. *See id.*

43. The ISO is a private federation of national standards bodies from 148 countries.

guards entry to this list, restricting it to countries listed by the UN in either the Terminology Bulletin or the “Country and Region Codes for Statistical Use” maintained by the United Nations Statistics Division.⁴⁴ As the ISO puts it, “There is no other way of having new country names included in ISO 3166-1. So if a name is not on these lists it will not get into ISO 3166-1.”⁴⁵

The ISO 3166-1 list of two-letter codes is of particular importance today because this list has become the template for the creation of Internet country code top-level domains (ccTLDs). Internet pioneer Jon Postel fixed the original list of top-level domains (TLDs) in 1984,⁴⁶ choosing most of the TLDs still in use today. Among these, the large majority were two-letter codes, one per country, drawn from the ISO 3166-1, such as .fr for France and .es for Spain.⁴⁷ Postel chose the ISO list in order, he said, to avoid deciding what was and was not a country.⁴⁸ Slightly anomalously, Postel also created a few exceptional ccTLDs that he drew from the ISO country code reserve list.⁴⁹ He also created a number of

Its mission is to promote the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological, and economic activity. See ISO, *Introduction*, at <http://www.iso.org/iso/en/aboutiso/introduction/index.html> (last modified Feb. 16, 2004).

44. See Erica Schlesinger Wass, *Lots of Dots*, in ADDRESSING THE WORLD, *supra* note 21, at xiii.

45. ISO, *Frequently Asked Questions: What is the Procedure for Adding New Country Names and Codes to ISO 3166-1?*, at <http://www.iso.org/iso/en/prods-services/iso3166ma/10faq/frequently-asked-questions.html#Q02> (last visited Sept. 25, 2004).

“Since the publication of ISO 3166-1 in October 1997 only one change has been made to the Standard: the official name of the Independent State of Western Samoa was changed to Independent State of Samoa as of [Feb. 5, 1998].” National Information Standards Organization, *About ISO 3166 Country Codes*, at <http://www.niso.org/standards/resources/3166.html> (last updated Mar. 14, 2004).

46. See generally J. Postel & J. Reynolds, Network Working Group, *Request for Comments 920: Domain Requirements*, at <http://www.ietf.org/rfc/rfc0920.txt> (Oct. 1984).

47. See ISO, *English Country Names and Code Elements*, at <http://www.iso.ch/iso/en/prods-services/iso3166ma/02iso-3166-code-lists/list-en1.html> (last visited Sept. 25, 2004). The ISO, a private standards body, created and maintains these codes for computer information systems processing purposes. It is not a treaty organization. See ISO, *Frequently Asked Questions: Just What is ISO?*, at <http://www.iso.org/iso/en/faqs/faq-general.html> (last modified May 18, 2004) (describing the ISO as a “network”).

“The ISO 3166-1 codes EH and KP, although theoretically available as ccTLDs for Western Sahara and North Korea, have never been assigned and do not exist in DNS.” Encyclopedia 4U.com, *Top-level Domain*, at <http://www.encyclopedia4u.com/t/top-level-domain.html> (last visited Sept. 25, 2004).

48. Postel, *supra* note 25, at 5 (“The IANA is not in the business of deciding what is and what is not a country.”).

49. The five exceptions are

- (1) .uk for the United Kingdom (as opposed to .gb), cf. IANA, *IANA Report on Request for Delegation of the .ps Top-Level Domain*, at <http://www.iana.org/reports/ps-report-22mar00.htm> (Mar. 22, 2000) (noting that the assignment occurred in the mid-1980s “before the IANA began using any standard list of

gTLDs, such as .com and .org, that were “generic” and for worldwide use.⁵⁰ In 2000, Postel’s successor decided to allow the use of any two-letter code in the ISO 3166-1 reserve list that is reserved for all purposes—a special rule designed to pave the way for the creation of .eu for the European Union, as it is the only code on this list reserved for everything.⁵¹

Some countries may have a large number of name variations. At a minimum, a country whose official name is the same as its common name and which is spelled the same in English, French, and Spanish is likely to have different orthography in Russian, Arabic, and Chinese. Adding a two-letter country code makes four name forms. Near the other extreme, consider the RSA, with an official name, a common name, an acronym, and ten languages in addition to the UN’s six, for a total of fifty-five permutations, including the country code.

Having established the range of possibilities, it is time to turn to the sparse law that exists relating to a country’s freedom to select and control its name.

B. Country Names Under Public International Law

Traditionally, from the point of view of public international law, states may call themselves whatever they wish because a state’s name is fundamentally a purely domestic matter,⁵² and it is a bedrock principle that every state “has the right freely to choose and develop its political, social, economic and cultural systems.”⁵³ Furthermore,

the inherent right of a state to have a name can be derived from the *necessity* for a juridical personality to have a *legal*

country-code abbreviations”);

(2) .ac for the Ascension Island;

(3) .gc for Guernsey;

(4) .im for the Isle of Man; and

(5) .je for Jersey.

See J. Klensin, Network Working Group, *Request for Comments 3071: Reflection on the DNS, RFC 1591, and Categories of Domains*, at 6, at <http://www.rfc-editor.org/rfc/rfc3071.txt> (Feb. 2001).

50. See Postel, *supra* note 25, at 1.

51. See ICANN, *Minutes, Special Meeting of the Board*, para. 1, at <http://www.icann.org/minutes/minutes-25sep00.htm> (Sept. 25, 2000).

52. See, e.g., L. Savadogo, *Sur le Contentieux Entre La Grèce et la Macédonie*, 74 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARE 248, 256 (1997).

53. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GAOR Res. 2625, U.N. GAOR, 27th Sess., Supp. No. 18, at 124, U.N. Doc. A/8018 (1970). The ICJ endorsed this declaration as declarative of customary international law in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99–100 (June 27).

identity. . . [T]he name of a state appears to be an *essential element of* . . . its statehood. The principles of the sovereign equality of states and the inviolability of their juridical personality lead to the conclusion that the choice of a name is an inalienable right of the state.⁵⁴

Conversely, in the traditional view, a particular name gives a state no rights under international law because it is a domestic choice, implying quite strongly that one state's choice of a name or interest therein does not alter the rights of any other state.

States rarely have any interest in adopting a name already in use, so name collisions between states are exceedingly rare.⁵⁵ One might expect the exception to this general rule to arise as a result of secession. But in fact, even in the case of civil war, rebellion, or partition, the relevant entities almost inevitably seem to sort themselves out. Thus, for example, during the American Civil War, the southern states became the Confederate States of America; they did not seek to call themselves the "United States of America"—indeed, their legal position was that they were leaving the Union, not remaining part it.

A few examples demonstrate the generality of this phenomenon. Although it was common to refer to the "two Germanies" after World War II, the Allies soon created a new government for West Germany that they called the Federal Republic of Germany⁵⁶ (*Bundesrepublik Deutschland*); not long thereafter, the Soviet Union created the German Democratic Republic⁵⁷ (*Deutsche Demokratische Republik*), later declared sovereign, with reservations, in 1955.⁵⁸ This division of Germany into two separately named entities was recognized by the world community when they were both admitted without opposition to the United Nations in 1973.⁵⁹

The United Nations declared the Republic of Korea to be a

54. Janev, *supra* note 28, at 160.

55. The same might be said of flags. When Finland became independent in 1917, it chose a white flag on a blue background. Because these colors resembled the Greek flag, it changed to a blue cross on a white background. See Savadogo, *supra* note 52, at 256 n.20.

56. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 275 (1979).

57. *Id.* at 276.

58. *Id.*

59. See *id.* at 273. However, the FRG soon took up what became known as the Hallstein Doctrine, under which the FRG asserted that it had the exclusive right to represent the entire German nation. *Id.* at 281–82. With the exception of the Soviet Union, West Germany would not establish or maintain diplomatic relations with any state that recognized East Germany. Chancellor Willy Brandt replaced this doctrine with his *Ostpolitik*.

state in 1949;⁶⁰ by that time, however, the Democratic People's Republic of Korea had already been established, at least in nascent and de facto form, in the north.⁶¹ Although the divisions between these two states remain profound, and both profess an interest in reunification, their names remain distinct. Even Taiwan, which, like the People's Republic of China (PRC), accepts the legal fiction that there is only one China, at most refers to itself as the "Republic of China," not the PRC.⁶²

Thus, the major modern exception⁶³ to the general rule that states self-organize name selection harmoniously comes not from rebellion or civil war, but from a recent dispute following the breakup of Yugoslavia. One of the constituent republics of what had been the Socialist Federal Republic of Yugoslavia declared itself independent in September 1991, calling itself the Republic of Macedonia (ROM).⁶⁴ Since 1945 it had been the "Yugoslav Federative Republic of Macedonia"; before that it was the "Province of Vardar."⁶⁵

The new state contained about thirty-eight percent of the area and forty-four percent of the population of the geographical region traditionally known as Macedonia, with the rest located mostly in Greece.⁶⁶ The Greeks had obtained their portion of what

60. *Id.* at 281–82.

61. *See id.* at 282.

62. Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCL A J. INT'L L. & FOREIGN AFF. 351, 352–54 (1997).

63. Professor Savadogo offers other examples, but he recognizes that none are particularly informative:

1. When the Republic of Austria voted to join with Germany in the *Anschluss*, the Allies objected, citing the 1919 Treaty of Saint-Germain-en-Laye which required Austria to refrain from directly or indirectly compromising its independence. As the claim was based on a specific treaty, its general precedential value is nil.

2. In 1975 Dahomey retitled itself the Republic of Bénin. Although both Nigeria and Togo occupy part of the territory of the sixteenth to eighteenth century monarchy, neither complained; both have also used the name Bénin—Nigeria for one of its states, Togo for a university.

3. The conflict between the United Kingdom and Argentina, which culminated in hostilities in 1982, concerned, in part, a dispute over whether the territory being fought over was the "Falkland Islands" or the "Islas Malvinas."

4. When Slovenia attained its independence, it issued currency with a picture of the throne of the Dukes of Carinthia, which is a part of Austria that has a Slovenian minority. Slovenia withdrew the notes after Austria protested.

See Savadogo, supra note 52, at 256 n.19.

64. *See* Demetrius A. Floudas, *Nationalism, Ethnic Identity and Balkan Struggles: An Analysis of Greece's Dispute with FYROM*, 24 J. POL. & MIL. SOC. 285, 293 (1996) (presenting a detailed history of "Macedonia").

65. *Id.* at 289, 293.

66. Wikipedia, *Republic of Macedonia*, at http://en.wikipedia.org/wiki/Republic_of_Macedonia (last modified Oct. 3, 2004). Fewer than ten percent of the people living in the

was historically Macedonia through annexation during the Balkan conflicts early in the twentieth century,⁶⁷ and they feared that the newly independent state might harbor *revanchiste* designs on this province, still populated by ethnic Macedonians.⁶⁸

Greek fear of “recognition of a greater Macedonia”⁶⁹ was—depending which side one took—exacerbated or justified by Article 49 of the new state’s constitution, which stated that the Republic would care “for the status and rights of those persons belonging to the Macedonian people in neighboring countries, as well as Macedonian expatriates, assist[ing] their cultural development and promot[ing] links with them.”⁷⁰ Greece claimed that this would encourage separatism among its own Macedonian Slav minority. “[H]uge demonstrations took place in Athens and Thessaloniki in 1992 against the new state, under the slogan ‘Macedonia is Greece.’”⁷¹ The Greek government objected to the use of the name Macedonia and also to the use of traditional Macedonian symbols, such as the sixteen-ray “Star of Vergina” on the state flag.⁷²

The issue came to a head when the Yugoslav Republic of Macedonia applied for admission to the United Nations.⁷³ Greece objected and sought to have the new nation recognized only as the “Former Yugoslav Republic of Macedonia” (FYROM).⁷⁴ In 1993, the Security Council recommended that the General Assembly (GA) admit “the State whose application is contained in document S/25147” to membership in the UN, “[n]oting that the applicant fulfils the criteria for membership,” but that “this State [will be] provisionally referred to for all purposes within the United Nations as ‘the former Yugoslav Republic of Macedonia’ pending settlement of the difference that has arisen over the name of the State.”⁷⁵ The GA did so, but captioned its

territory that historically was part of Macedonia live in Bulgaria. *Id.*

67. Floudas, *supra* note 64, at 288.

68. *Id.* at 293–94; see also Larry Reimer, *Macedonia: Cultural Right or Cultural Appropriation?*, 53 U. TORONTO FAC. L. REV. 359, 363–64 (1995).

69. See Reimer, *supra* note 68, at 364.

70. For a partisan account sympathetic to the Greek position, see Dean M. Poulakidas, Note, *Macedonia: Far More Than a Name to Greece*, 18 HASTINGS INT’L & COMP. L. REV. 397, 430 (1995) (explaining the threat of the Republic of Macedonia’s constitution to Greece). For a more balanced view, see Savadogo, *supra* note 52, at 251–54.

71. Science Daily Encyclopedia, *Macedonia*, at <http://www.sciencedaily.com/encyclopedia/macedonia> (last visited Sept. 25, 2004).

72. The “star [is] associated with the ancient Royal Dynasty of Macedonia and [is] found on Philip II’s tomb.” Reimer, *supra* note 68, at 363.

73. See Floudas, *supra* note 64, at 295.

74. See *id.*

75. S.C. Res. 817, U.N. SCOR, 48th Sess., 3196th mtg. at 1, U.N. Doc. S/RES/817

resolution of admission with a file number rather than the state's name, as is the normal practice.⁷⁶

The UN's 1993 decision did reflect political reality, but it also seemed to run counter to a long and authoritative advisory opinion rendered by the Internal Court of Justice (ICJ) early in its existence. In its *Conditions of Admission of a State to Membership in the United Nations*,⁷⁷ the GA asked the ICJ to give an advisory opinion on an increasingly controversial issue:⁷⁸ whether a UN member state was "juridically entitled to make its consent to the admission [of a State] dependent on conditions not expressly provided by" the UN Charter at Article 4, paragraph 1,⁷⁹ "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."⁸⁰ The ICJ answered that the five conditions in Article 4 were "exhaustive" in character,⁸¹ and thus a member state that believed the applicant to "(1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so" had no legal grounds on which to require more.⁸² Furthermore, once an applicant is admitted to the UN, "the applicant state acquires an unconditional right to UN Membership."⁸³

Yet, despite this precedent, the UN imposed a condition on Macedonia—that it be referred to as "the former Yugoslav Republic of Macedonia" rather than the name it had chosen.⁸⁴ Although one incident does not make a new rule of international law, it certainly suggests the possibility that what was thought to be the norm of state autonomy in name choice is at least under strain and is perhaps not a norm at all.

Parallel to the UN's consideration of the admission of "the State whose application is contained in document A/47/876-

(1993).

76. See G.A. Res. 225, U.N. GAOR, 47th Sess., 98th plen. mtg., U.N. Doc. A/RES/47/225 (1993).

77. 1948 I.C.J. 57 (May 28) (advisory opinion).

78. See Janev, *supra* note 28, at 155 (noting that "conditions for the admission of states were the subject of exhaustive political and legal deliberations at the United Nations during the 1940s when many states were applying for membership").

79. *Conditions of Admission*, 1948 I.C.J. at 58.

80. U.N. CHARTER art. 4, para. 1.

81. *Conditions of Admission*, 1948 I.C.J. at 64.

82. *Id.* at 62.

83. See Janev, *supra* note 28, at 157.

84. See G.A. Res. 225, *supra* note 76.

S/25147,”⁸⁵ the European Community (EC) member states were working out a common agreement for the recognition of republics emerging from the former Yugoslavia.⁸⁶ The EC required republics to submit an application to the EC, which would then be referred to an arbitration commission that would determine whether various conditions had been met.⁸⁷ One of these aimed squarely at the Macedonian issue:

The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, *including the use of a denomination which implies territorial claims.*⁸⁸

In order to ensure its acceptance, the ROM/FYROM amended its constitution to explicitly renounce any territorial ambitions,⁸⁹ and this proved sufficient to satisfy the arbitration commission, which, in January 1992, recommended the recognition of the “Republic of Macedonia,” ruling that the state was not a threat to its neighbors and would respect its international obligations, including human rights and the rights of minorities.⁹⁰ The arbitration commission also stated “that the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name ‘Macedonia’ cannot therefore imply any territorial claim against another State.”⁹¹

Nevertheless, Greece blocked EC recognition.⁹² In May 1992, the EC Council stated that the member states were ready to recognize the FYROM “under a name that can be accepted by all the parties concerned.”⁹³ And in June 1992, the European Council

85. *Id.*

86. See Danilo Turk, *Declaration on Yugoslavia*, 4 EUR. J. INT’L L. 73 (1993).

87. *Id.*

88. *Id.* (emphasis added). The requirement originated in the EC’s adoption, on December 16, 1991, of its *Guide-lines on the Recognition of New States in Eastern Europe and in the Soviet Union*, reprinted in Turk, *supra* note 86.

89. See Keith Highet & George Kahale III, *International Decisions*, 89 AM. J. INT’L L. 376, 383 (1995) [hereinafter Highet & Kahale, *International Decisions*] (providing the text of the changes); see also Savadogo, *supra* note 52, at 253–54.

90. See Arbitration Commission, *Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States*, 31 I.L.M. 1488, 1508–12 (1992).

91. *Id.*

92. See Savadogo, *supra* note 52, at 262.

93. *Id.*

announced that the EC would only recognize the applicant if its name did not include the word “Macedonia.”⁹⁴ Nevertheless, all EC member states, including Greece, voted in favor of the admission of the FYROM to the UN.⁹⁵ Six EC members recognized the FYROM in 1993, as did the United States in February 1994.⁹⁶

On February 16, 1994, Greece unilaterally imposed a total trade embargo (other than food and medicine) on the ROM/FYROM—a very serious matter for such a landlocked state.⁹⁷ Greece also blocked European Union recognition and economic aid.⁹⁸ The European Commission reacted to the embargo by filing suit against Greece in the European Court of Justice (ECJ), arguing that the embargo violated the EU’s common commercial policy.⁹⁹ In a decision on the request for interim relief, the European Court agreed that embargoes are a Community matter and that therefore it would have to decide whether the departure from EC policy could be justified by the exception for “war [or] serious international tension constituting a threat of war.”¹⁰⁰ The ECJ ruled that although the Commission had made a *prima facie* case,¹⁰¹ the question of justification was sufficiently difficult that no provisional measures could be granted against Greece.¹⁰²

As part of an agreement to lift the Greek embargo in

94. European Council, *Lisbon European Council, Declaration on Former Yugoslavia*, reproduced from Bulletin of the European Communities, No. 6/1992, at http://aei.pitt.edu/archive/00001420/01/Lisbon_june_1992.pdf (June 26, 1992).

The European Council reiterates the position taken by the Community and its Member States in Guimaraes on the request of the former Yugoslav Republic of Macedonia to be recognized as an independent State. It expresses its readiness to recognize that republic within its existing borders according to their Declaration on 16 December 1991 under a name which does not include the term Macedonia. It furthermore considers the borders of this republic as inviolable and guaranteed in accordance with the principles of the UN Charter and the Charter of Paris.

Id.; see also Highet & Kahale, *International Decisions*, *supra* note 89, at 384.

95. Highet & Kahale, *International Decisions*, *supra* note 89, at 384. Note that recognition of governments by individual states is traditionally considered to be an entirely separate matter from the admissions of states to the UN.

96. Savadogo, *supra* note 52, at 266.

97. See *id.* at 266–69.

98. Case 120/94, *Comm’n of the European Communities v. Hellenic Republic*, [1994] E.C.R. I-3037 (June 29, 1994).

99. *Id.*

100. *Id.* paras. 67–69; Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 224, 298 U.N.T.S. 11, (now found at art. 297, 37 I.L.M. 56).

101. *Comm’n of the European Communities*, [1994] E.C.R. I-3037, para. 70.

102. *Id.* para. 92. See generally Keith Highet & George Kahale III, *European Community Law—Greek-Slavo-Macedonian Conflict—Embargoes*, 89 AM. J. INT’L L. 376 (1995) (discussing the history leading up to the embargo).

September 1995 and to dismiss the case,¹⁰³ the ROM/FYROM replaced the sixteen-ray sun on its flag with an eight-ray sun.¹⁰⁴ The state's name, however, remains in a sort of limbo.¹⁰⁵ International organizations including the European Union, the European Broadcasting Union, NATO, and the International Olympic Committee follow the UN in referring to it as the FYROM.¹⁰⁶ However, more than forty countries have recognized the country as the "Republic of Macedonia."¹⁰⁷ Officially, the United States still refers to the country as the FYROM.¹⁰⁸

The conflict over the Macedonian name both clarifies and obscures the status of country names in international law. On the one hand, both the UN's and the EU's reactions suggest that Greece's claim that a country's choice of name could be a form of aggression was not, as an abstract matter, per se unreasonable. Thus, it appears that international law recognizes the theoretical possibility that a country's choice of name might amount to hostile propaganda against a neighbor, such as in "the use of a denomination which implies territorial claims."¹⁰⁹ In so doing, it suggests that the presumed norm that countries control their names has been weakened; conversely, it suggests that the idea that one country has rights regarding another country's use of names might theoretically have more merit than many had previously suspected. Indeed, Macedonia was not, in fact, the official name of Greece, but only of a region within the state—a fact that might be said to underline how much the traditional rule has been weakened. On the other hand, it seems clear on the facts, at least, that the Macedonians did everything Greece could reasonably have asked; the current impasse seems to result from Greek intransigence, not the factual merits of its claims.¹¹⁰

103. Although there was no final decision of the ECJ, see Dapo Akande & Sopo Williams, *International Adjudication on National Security Issues: What Role for the WTO?* 43 VA. J. INT'L L. 365, 393 n.119 (2003), Advocate General Jacobs had a chance to opine that the issue before the court was not who was right in the name controversy, but rather whether the court could even review Greece's claim that its vital interests might be threatened by its non-EC-member neighbor. See also Frederic L. Kirgis, Jr., *Self-Determination of People and Politics*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 86TH ANNUAL MEETING 369, 371 (1992).

104. Wikipedia, *Republic of Macedonia*, at http://en.wikipedia.org/wiki/Republic_of_Macedonia#Naming_dispute (last visited Sept. 25, 2004).

105. *Id.*

106. *Id.*

107. *Id.*

108. See, e.g., CIA, THE WORLD FACTBOOK, MACEDONIA, THE FORMER YUGOSLAV REPUBLIC OF (2004), <http://www.odci.gov/cia/publications/factbook/print/mk.html>.

109. Refer to note 88 *supra* and accompanying text.

110. Furthermore, the 'interim' name that Greece accepted, the FRYOM, also contained the word "Macedonia," suggesting that perhaps its veto was less than total.

C. *The Case for Government Ownership of Country Code Top-Level Domains and Internet Country-Name Domains*

The ownership of country names is potentially affected by the Internet in a variety of ways. As with any other medium of communication, any user of the Internet can include the name of a country in a website or in an email; this is not, at present, controversial. What makes the Internet unusual is that most users rely on the domain name system (DNS), an addressing scheme that can make use of representations of country names at multiple levels.

Every resource attached to the Internet must have a unique Internet Protocol (IP) number.¹¹¹ Without an identifying number no one can find the resource, and without a unique number correspondents would have no way of controlling which identified resource received a communication.¹¹² Because numbers separated by periods are hard to remember, the Internet's designers provided an optional method allowing people to use human-friendly, and increasingly ubiquitous, names to identify the resources with which they wish to communicate:¹¹³ domain names.

“Domain naming conventions treat a domain name as having three parts: in the address *www.miami.edu*, for example, ‘*edu*,’ the rightmost part, is the ‘top-level domain’ or ‘TLD,’ while ‘*miami*’ is the second-level domain (SLD), and any other parts are lumped together as third-or-higher-level domains.”¹¹⁴ Domain names are just conventions, and the names of the current TLDs are, from a technical point of view, purely arbitrary.

When combined with a second-level (and perhaps even third-or-higher-level) domain, the top-level domain forms a domain name. Thanks to a massively distributed hierarchical system for resolving domain names to IP numbers—the DNS—Internet

111. The next three paragraphs are drawn from previously published articles.

112. Under IPv4, which is the most commonly used standard, IP numbers are thirty-two-bit numbers consisting of four octets (sets of eight binary digits) that specify a network address and a host ID on a TCP/IP network. IPv6 expands the IP numbers to a dotted sextet, thus easing the current shortage of IP numbers. See generally STEVE KING ET AL., THE CASE FOR IPv6, at 4, at <http://www.6bone.net/misc/case-for-ipv6.html> (Dec. 25, 1999) (work in progress) (touting IPv6's “enhanced features, such as a larger address space and improved packet formats”); IPv6: The Next Generation Internet!, at <http://www.ipv6.org> (last visited Sept. 25, 2004).

113. See ELLEN RONY & PETER RONY, THE DOMAIN NAME HANDBOOK 50–55 (1998); P. Mockapetris, Network Working Group, *Request for Comments 1034: Domain Names—Concepts and Facilities* 29, at <http://www.ietf.org/rfc/rfc1034.txt> (Nov. 1987).

114. A. Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 39 (2000) [hereinafter Fromkin, *Wrong Turn in Cyberspace*].

software can rapidly and invisibly convert a domain name to its IP number.¹¹⁵ Thus, for example, a properly designed Internet browser presented with a domain name in a URL, such as <http://www.law.miami.edu>, will contact a DNS server, request the corresponding IP number, <http://129.171.187.10>, and then direct a request to that resource.¹¹⁶

It can be seen from this summary that the DNS presents opportunities for country names or identifiers to be used as addresses at each level: top, second, and third (or higher). In the case of both TLDs and SLDs, the problem is exacerbated by a need for some authority to ensure that each name is assigned at most once given the way the Internet is currently organized—there can only be one .us TLD or mass confusion is likely to result. Similarly, within any given TLD, there can be only one registrant of any name. From a technical perspective, if not necessarily a legal or social perspective, identical SLDs can coexist happily in parallel TLDs. Thus, for example, there is no technical obstacle to having france.com, france.org, and france.fr assigned to three different parties, but there can only be one “france” within the .com TLD, and there can be only one .fr TLD within the root. (There is no technical obstacle to having both a .fr and a .france, but this is politically unlikely at present.)

1. *Country-Code TLDs.* The names and quantity of TLDs are fixed by a central Internet authority that administers an authoritative list called the “root.”¹¹⁷ Originally this authority, known as the IANA function, was Jon Postel;¹¹⁸ for the past five years, the U.S. government has largely delegated the job to the Internet Corporation for Assigned Names and Numbers (ICANN), a private nonprofit California corporation.¹¹⁹ Each TLD (such as .com) needs a central authority that will manage the authoritative list of SLDs (such as “cars” in cars.com).¹²⁰ A central authority is needed to ensure that each second-level name is unique—were two parties to start using the same SLD in the

115. See RONY & RONY, *supra* note 113, at 37–38.

116. See Neil Randall, *How DNS Servers Work*, PC MAG., Sept. 24, 1996, at 217, 217 (explaining how IP requests are processed); Neil Randall, *What Happens When You Click*, PC MAG., Oct. 22, 1996, at 245, 245 (same for HTTP).

117. See Froomkin, *Wrong Turn in Cyberspace*, *supra* note 114, at 42–50 (describing the “root” file system).

118. See MILTON MUELLER, *RULING THE ROOT* 129 (2002); Froomkin, *Wrong Turn in Cyberspace*, *supra* note 114, at 70–75.

119. ICANN, *ICANN Information*, at <http://www.icann.org/general/> (last modified Jan. 13, 2004).

120. See ICANN, *Resources for Registries*, at <http://www.icann.org/registries> (last modified Dec. 5, 2003).

same TLD, no one would be sure to whom to send mail, or where to direct requests for website content. This central authority for each SLD is called a *registry*, and whoever runs the registry controls who gets which name in that TLD.¹²¹

Although Jon Postel and his successors have added new country code TLDs when new countries are added to the ISO list,¹²² the longstanding freeze on the creation of new gTLDs, which are TLDs not tied to a country code, ended only in late 2001 and only in a very limited way.¹²³ Today, the DNS system used by the vast majority of Internet users¹²⁴ is made up of more than 240 two-letter ccTLDs, fourteen three-or-more-letter gTLDs,¹²⁵ and one special four-letter TLD (.arpa).¹²⁶ A ccTLD can outlast the country it originally referred to: .su (Soviet Union) remains in service despite the dismemberment of the Soviet Union and the creation of new codes for the former republics of the USSR.¹²⁷ Similarly, .ps (Palestine) is in use today, although the “country” it refers to is not generally recognized. East Timor’s .tp was delegated long before the country achieved its independence from Indonesia and was used by activists as a “virtual” country” in the campaign for self-determination.¹²⁸

121. *Id.*

122. For example, the U.S. Department of Commerce created .ps for Palestine upon a recommendation from the so-called Internet Assigned Numbers Authority (IANA), a subsidiary of ICANN, in 2000 after the ISO moved .ps to the ISO 3166-1 to designate “Occupied Palestinian Territory.” See IANA, *Report on Request for Delegation of the .ps Top-Level Domain*, at <http://www.iana.org/reports/ps-report-22mar00.htm> (Mar. 22, 2000).

123. Thus, during the 1990s, registrants focused heavily on the three gTLDs then open to them, and especially on .com. In a long, expensive, and convoluted process, ICANN chose a list of new gTLDs that it added to the root: .aero, .biz, .coop, .info, .museum, .name, and .pro. See ICANN, *Top Level Domains (gTLDs)*, at <http://www.icann.org/tlds/> (last modified Dec. 16, 2003) [hereinafter ICANN, *Top Level Domains*].

124. In addition to the “legacy root” TLDs discussed in this Paper, there are a large number of “alternate” TLDs that are not acknowledged by the majority of domain name servers. See RONY & RONY, *supra* note 113, at 513–72 (describing the “Alterweb”). There is no technical bar to their existence, and anyone who knows how to tell his software to use an alternate domain name server can access both the “legacy root” and whatever alternate TLDs are supported by that name server. Thus, for example, choosing to get domain name services from 205.189.73.102 and 24.226.37.241 makes it possible to resolve <http://lighting.faq>, where a legacy DNS would only return an error message.

125. ICANN divides the gTLDs into two groups for administrative and regulatory purposes: sTLDs and uTLDs. ICANN, *Top Level Domains*, *supra* note 123. sTLDs are “sponsored” by a body and designed for a limited class of users, for example, .coop. *Id.* uTLDs are what most people interested in the subject call gTLDs, that is, domains open to worldwide registration (for example, .com). *Id.*

126. See *id.* .arpa is a special TLD used for technical infrastructure purposes. *Id.*

127. See Wikipedia, *Top-Level Domain*, at http://en.wikipedia.org/wiki/Top-level_domain (last modified Oct. 2, 2004).

128. See Martin Maguire, *East Timor’s .TP: From a Virtual Initiative to a Political Reality*, in ADDRESSING THE WORLD, *supra* note 21, at 17, 19.

Domains registered¹²⁹ in ccTLDs and gTLDs are equally accessible from any computer on the Internet. Although ccTLDs make up the vast majority of the TLDs recognized in the ICANN-administered root, many are not widely used. Many ccTLDs operated for years with rules that made registration difficult or even next to impossible, or semantically unattractive; as a result, the gTLDs, especially .com, garnered the lion's share of registrations.¹³⁰ Some ccTLDs restricted the number of registrations allowed per person or per firm or the type of domain name available, or sought to restrict domain names in aid of nationally protected intellectual property.¹³¹ However, an increasing number of ccTLDs, such as .tv or .to, began acting as gTLDs and accepted registrations from anywhere.¹³² A number of ccTLDs, such as .us, still require that registrants have a domestic presence.¹³³ However, many of the ccTLDs that originally had strict registration rules have liberalized them in an effort to divert registrations from .com to a national forum.¹³⁴ And, as the Internet has grown, a number of countries have sought to capitalize on the economic value of "their" ccTLDs, notably Moldavia (.md), Tuvalu (.tv), Turkmenistan (.tm), Tonga (.to), Mauritius (.mu), and Niue (.nu), by encouraging foreigners to register for a fee.¹³⁵

Not every ccTLD is or was controlled by the government with sovereignty over the territory associated with that country

129. McCarthy rightly cautions us to recall that "registered" in the sense of an Internet domain name has a completely different meaning than it carries in the trademark context because "[r]egistering' or 'reserving' a domain name from a registrar does not (contrary to popular, nonlegal, folklore) give the user any 'official' right to use that domain name free from legal claims. Entities that reserve domain names are registrars, not adjudicatory bodies." 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:73.3 (4th ed. 2004) (footnote omitted).

130. In 2002, more than two-thirds of the thirty-one million total worldwide registrations were in .com. *Id.* § 27:72.

131. See, e.g., *Registration and Information about the .eu Domain*, at http://www.websolutions.dk/eu_domain_names.htm#TM (last visited Sept. 25, 2004) (describing a "sunrise period" during which trademark holders may preregister their .eu names).

132. See, e.g., *Information About ccTLD*, at http://eng.doregi.com/shtml/domain_cctld_info_en.shtml (last visited Sept. 25, 2004) (describing international availability for registration of country codes for Cocos (.cc), Belize (.bz), Nieu (.nu), and Tuvalu (.tv) domains).

133. See, e.g., *South American Domain Names*, at http://www.websolutions.dk/domain_registration_america.htm (last visited Sept. 25, 2004) (noting that the .us ccTLD does not require a local company connection, but does require applicant to "regularly engage in lawful activities in the United States").

134. See, e.g., Patrik Lindén, *Sweden's .SE: Reestablishing Itself as the Best Choice for All Swedes*, in ADDRESSING THE WORLD, *supra* note 21, at 67, 67–68.

135. See 4 MCCARTHY, *supra* note 129, § 27:72.

code.¹³⁶ In the early days of the Internet, decisions were taken informally and by consensus.¹³⁷ Reflecting the fundamentally private and voluntary nature of the network, many of Postel's earliest ccTLD delegations depended on finding a willing volunteer with suitable computer equipment and telephone access. This often meant a nongovernmental party, such as a computer scientist or a university.¹³⁸ Postel explained that the person he selected "is generally the first person that asks for the job (and is somehow considered a "responsible person")."¹³⁹

As countries became aware of the importance of the Internet and began to focus on the marquee (and mark) value of the ccTLDs, a number of them were upset to discover that the ccTLDs were in private hands.

Just as the physical world was divided up into mutually exclusive territories controlled by sovereign governments, so could the name space be. Country codes were the most direct and obvious point of entry for this kind of thinking. If national governments could gain control over the assignment of their own country code, they could translate their geographic jurisdictions into cyberspace and gain a significant role for themselves in Internet governance.¹⁴⁰

Many of these governments went to considerable effort to persuade, entice, or force the private delegate of the local ccTLD to relinquish control of it.¹⁴¹ Much of the pressure was domestic,¹⁴² but governments also took part in an international and legal campaign to nationalize, or at least deprivatize, ccTLDs.¹⁴³

136. A survey in 2002 found a wide variety of relationships between national governments and ccTLD managers. See Michael A. Geist, *ccTLD Governance Project*, at <http://www.cctldinfo.com/index.php?v=20&c=0&b=0&PHPSESSID=f24075876cb4705250502b57330e533e> (last updated May 12, 2003).

137. See generally A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 839–40 (2003).

138. See MUELLER, *supra* note 118, at 88.

139. *Id.* at 88–89. A list of ccTLDs and dates of first designation appears at <http://www.dnso.org/clubpublic/ga/Arc11/msg00676.html> (last visited Sept. 25, 2004).

140. MUELLER, *supra* note 118, at 205.

141. See, e.g., A. Michael Froomkin, *How ICANN Policy Is Made (II)*, at <http://www.icannwatch.org/essays/dotau.htm> (Sept. 5, 2001) (describing Australian government pressure on ICANN); Michel Geist, *ccTLD Governance Project: South Africa*, at <http://www.cctldinfo.com/country.php?v=3&c=3&b=0> (last visited Sept. 25, 2004) (summarizing efforts of the South African government to gain control over .za).

142. For example, South Africa's campaign to gain control of .za relied on domestic legislation. See A. Michael Froomkin, *South African Law Unilaterally Re-Delegates .za*, at <http://www.icannwatch.org/article.pl?sid=02/06/07/142641> (June 7, 2002); A. Michael Froomkin, *More on the .za Mess*, at <http://www.icannwatch.org/article.pl?sid=02/06/10/091835> (June 10, 2002).

143. ICANN supported this campaign because it suited its interests. As each private ccTLD was brought to heel, ICANN demanded that the new delegate sign a contract with

The venue for this concerted intergovernmental campaign was ICANN's "Governmental Advisory Committee" (GAC).¹⁴⁴ Because the GAC is a somewhat anomalous body, a few words about it are necessary to set the scene before turning to the substance of its legal arguments. The GAC's legal status is obscure.¹⁴⁵ It began as a purely advisory committee to ICANN, which, as noted above, is a private corporation that the United States uses to manage the DNS and other Internet infrastructure functions.¹⁴⁶ The U.S. government has stated that it intends to give ICANN full control over the DNS, but at present the United States retains the power to overrule ICANN or to act without it, although in the past five years it has only exercised this power once.¹⁴⁷ ICANN invites all governments that are GAC members to send a representative to the intergovernmental, closed-door GAC meetings held during the tri-annual ICANN meetings.¹⁴⁸ In its early days the GAC was, on paper at least, nothing more than an advisory committee to a private corporation.¹⁴⁹ In this original version, the GAC operated independently from ICANN and its subsidiary organizations, although it did not function as an

it in which the registry promised to pay ICANN's annual levies:

Since its establishment, ICANN has delegated the .ps to the Occupied Palestinian Territory and deleted Zaire's .zr in light of the country's change of name. It has also redelegated ten ccTLDs—Pitcairn Island's .pn, Canada's .ca, Australia's .au . . . , Japan's .jp, Burundi's .bi, Malawi's .mw, Laos' .la, Sudan's .sd, Kenya's .ke, and Afghanistan's .af. ICANN has entered into contractual relationships with all the new ccTLD managers upon redelegation, with the exception of Canada's.

Peter K. Yu, *The Never-Ending ccTLD Story*, in ADDRESSING THE WORLD, *supra* note 21, at 6–7 (footnotes omitted).

144. *Id.* at 6.

145. See Wolfgang Kleinwächter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, 36 LOY. L.A. L. REV. 1103, 1115 (2003) ("Defining the legal status of the GAC is difficult.").

146. Refer to note 119 *supra* and accompanying text.

147. See ICANN, *Redelegation of .us Country-Code Top-Level Domain*, at <http://www.icann.org/announcements/announcement-19nov01.htm> (Nov. 19, 2001) (announcing that the U.S. government redelegated .us outside normal IANA processes).

148. See ICANN, *GAC Operating Principles*, at <http://www.icann.org/committees/gac/operating-principles-25may99.htm> (May 25, 1999) [hereinafter ICANN, *GAC Operating Principles*].

149. The GAC was to "consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements." ICANN, *Bylaws for Internet Corporation for Assigned Names and Numbers*, art. VII, § 3, at <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm> (1998). ICANN's only duties regarding the GAC were to "notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b)" and to "consider any response to that notification prior to taking action." *Id.*

independent intergovernmental organization (IGO).¹⁵⁰ The GAC provided advice but, again on paper, did not have the power to make decisions.¹⁵¹ As we shall see, this did not stop it from making pronouncements.

As a result of ICANN's self-transformation in 2002,¹⁵² the GAC now takes a more direct part in the management of ICANN.¹⁵³ Today the GAC sends a nonvoting liaison to the ICANN Board¹⁵⁴ and "may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."¹⁵⁵ ICANN's duties to the GAC are expanded, and include an obligation to warn the GAC's Chair "of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment."¹⁵⁶ And the GAC's "recommendations" are now more than purely advisory; rather than just hearing the GAC's comments, ICANN must "take duly into account any timely response to that notification prior to taking action."¹⁵⁷ If the ICANN Board should reject a GAC "recommendation," ICANN must "inform [the GAC] and state the reasons why it decided not to follow that advice" and then strive "to find a mutually acceptable solution."¹⁵⁸ Only if "no such solution can be found" may the ICANN Board go ahead with its decision, and even then it must explain in its final decision why it ignored the GAC's "advice."¹⁵⁹

From the moment it was organized, the GAC turned its attention to the issue of ccTLDs that were run independently of local governments. The gauntlet was thrown in May 1999 when

150. The GAC's membership policy is an example of its odd hybrid nature: "Membership is open to all national governments. Membership is also open to distinct economies as recognised in international fora, and multinational governmental organisations and treaty organisations, on the invitation of the GAC through the Chair, or on the invitation of the ICANN Board. *In the event of a dispute about whether an entity is eligible for Membership, the dispute will be referred to the ICANN Board.*" ICANN, *GAC Operating Principles*, *supra* note 148, princ. 15 (emphasis added).

151. Kleinwächter, *supra* note 145, at 1115.

152. *See id.* at 1119, 1121.

153. *See id.* at 1121–22 (discussing the GAC's expanded rights within ICANN).

154. ICANN, *Bylaws for Internet Corporation for Assigned Names and Numbers*, art. VI, § 9.1.a, at <http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm> (effective Dec. 15, 2002).

155. *Id.* art. XI, § 2.1.i.

156. *Id.* art. XI, § 2.1.h.

157. *Id.*

158. *Id.* art. XI, § 2.1.j.

159. *Id.* art. XI, § 2.2.k.

the GAC adopted its first set of “Operating Principles.”¹⁶⁰ The Operating Principles recite that ICANN is pledged to “carry out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”¹⁶¹ The Operating Principles further assert that “[t]he Internet naming and addressing system is a public resource that must be managed in the interests of the global Internet community”¹⁶²—“public resource” being code for rejecting the view that the Internet is primarily a private network subject to private law, and instead defining it as something akin to the radio spectrum, a medium appropriately regulated at both the national and international levels.

Most significantly, the GAC Operating Principles recited as fact that “[c]ountry code top level domains are operated in trust by the Registry for the public interest, including the interest of the Internet community, on behalf of the relevant public authorities including governments, who ultimately have public policy authority over their ccTLDs, consistent with universal connectivity of the Internet.”¹⁶³ In effect, the GAC asserted the right of governments at least to veto and arguably to determine the fate of their cognate ccTLDs. This is undoubtedly uncontroversial as a matter of domestic law because most governments can probably make such a rule domestically;¹⁶⁴ it is probably reasonable as a matter of contract law, although it requires interpreting the oral agreements by which Postel delegated ccTLDs to willing private administrators.¹⁶⁵ But, as a statement of public international law, it was novel.¹⁶⁶

The GAC subsequently disclaimed the trademark theory, “reaffirm[ing] its May resolution that the Internet naming system is a public resource and that the management of a TLD Registry must be in the public interest,” and elaborating with the statement that “the GAC considers that no private intellectual or other property rights inhere to the TLD itself nor accrue to the delegated manager of the TLD as the result of such delegation.”¹⁶⁷

160. ICANN, *GAC Operating Principles*, *supra* note 148.

161. *Id.* at Whereas 4.

162. *Id.* at Consideration 1.

163. *Id.* at Consideration 4.

164. In some states with a pre-existing private operator there might be issues concerning compensation due for nationalization.

165. Refer to notes 136–39 *supra* and accompanying text.

166. Novel, but not unwelcome to all commentators. See von Arx & Hagen, *supra* note 26, para. 83 (advocating the acknowledgment by national governments that each nation is authoritative for its respective ccTLD and the introduction of a peer-to-peer protocol into the DNS).

167. ICANN, *Communiqué of the Governmental Advisory Committee*, Aug. 24, 1999,

By February of the following year, the GAC was prepared to go even further, asserting that if a government believed that its ccTLD administrator had misbehaved and thereafter presented evidence to ICANN, then ICANN “should act with the utmost promptness” to reassign the delegation to a party selected by the government.¹⁶⁸ In July 2001, the GAC instructed ICANN not to enter into any agreements with new ccTLD registries without first ensuring that the local government involved had received the promises it wanted from the potential delegate; it asserted that “any future contracts between ICANN and ccTLD administrators should reflect the administrators’ commitment to be bound by the GAC Principles.”¹⁶⁹

By September 2001, the GAC was able to declare victory: “The GAC appreciates that ICANN is using the GAC Principles for the Delegation and Administration of Country Code Top Level Domains as a useful guide in matters associated with agreements between ICANN and ccTLDs.”¹⁷⁰

If the legal status of the GAC is unclear—being neither a treaty body, a freestanding government plenary meeting, nor a private gathering—then the weight one should give to its pronouncements is even less clear. For example, one of the many things we do not know about the GAC is what authority the government representatives carry to negotiate. Although not dispositive under international law, this uncertainty would indicate the extent to which the governments sending delegates saw the GAC meetings as an occasion to create binding obligations. As it happens, however, most of the GAC’s pronouncements have not been of the sort that would tend to impose duties on states; rather, they have mostly been

Santiago, Chile [hereinafter ICANN, *Santiago Communiqué*], at <http://www.icann.org/committees/gac/communique-24aug99.htm>.

168. The GAC statement did make a distinction between ccTLDs that recognized the state’s authority and those that did not. Compare ICANN, *Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee* § 7.1, at <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm> (Feb. 23, 2000) (stating that if a government requests it, “ICANN should act with the utmost promptness to reassign the delegation in coordination with the relevant government or public authority”), with *id.* § 7.2 (stating that private ccTLDs that did not recognize the state’s authority should have their authority removed “with the utmost promptness” by ICANN “upon the tendering of evidence by such government or public authority that the administrator does not have the support of the relevant local community and of the relevant government or public authority, or has breached and failed to remedy other material provisions of RFC 1591”).

169. ICANN, *Communiqué of the Governmental Advisory Committee*, July 14, 2000, Yokohama, Japan, at <http://www.icann.org/committees/gac/communique-14jul00.htm>.

170. ICANN, *Communiqué of the Governmental Advisory Committee*, Sept. 9, 2001, Montevideo, Uruguay [hereinafter ICANN, *Montevideo Communiqué*], at <http://www.icann.org/committees/gac/communique-09sep01.htm>.

suggestions that others—either ICANN or ccTLD registries, or someone else—should do something. Nevertheless, the participation of accredited delegates from governments around the world suggests that the GAC's legal statements are, at minimum, *opinio juris* that may someday contribute to the formation of a new international norm or even international law. That said, it seems very hard to argue seriously that the GAC's view alone can state anything more than a snapshot of evolving practice, and this is certainly not now a hardened norm.

State practice is not particularly informative either. Although state practice tends to support the GAC view that “no private intellectual or other property rights inhere to the TLD itself nor accrue to the delegated manager of the TLD as the result of such delegation,”¹⁷¹ there is only vague support for the suggestion that some kind of property or property-like right inures to the government. Perhaps the strongest support comes from Germany, where the Landsgericht of Berlin (Germany) found that the domain name *deutschland.de* infringed the Government of Germany's “right in its name.”¹⁷² A more uncertain case is that of Singapore, where—in what observers saw as an attempt to increase its control over domain names—the government-owned registrar of Singapore attempted to register *.sg* as a trademark in Singapore.¹⁷³ Faced with protests,¹⁷⁴ the Singaporean government backed down.¹⁷⁵ Both the United

171. ICANN, *Santiago Communiqué*, *supra* note 167.

172. See *The Recognition of Rights and the Use of Names in the Internet Domain Name System, Interim Report of the Second WIPO Internet Domain Name Process*, WIPO, para. 243 (Apr. 12, 2001) [hereinafter *WIPO2 Report*] (citing Docket number 16 O 101/00, *Computerrecht (CR) 2000*, at 700–01, and noting that the decision was being appealed), <http://wipo2.wipo.int/process2/rfc/rfc3/pdf/report.pdf>. The website now advertises itself as “the official and independent portal of the Federal Republic of Germany” offering “a representative list of links to important German information sites under the headings of Education, Health, Culture, Media, Sports, State, Tourism, Economy and Science.” *Das Deutschland-Portal*, at <http://deutschland.de/disclaimer.php?lang=2> (last visited Sept. 25, 2004). Management, which includes an independent advisory board, is an “initiative of the Press and Information Office of the German Government by the ARGE *deutschland.de*, a collaboration of Ponton-Lab GmbH and the Telekom subsidiary T-Systems International GmbH.” Press Release, *Das Deutschland-Portal, The Germany Portal Gets Prominent Support*, at <http://deutschland.de/beirat/presse.php?lang=2> (last visited Sept. 25, 2004).

173. See Eileen Yu, *Govt Wants to Trademark .sg*, *COMPUTER TIMES*, Jan. 8, 2003 (reporting that registration was sought in three classes: “education services, domain name registration services and Internet connection services”), at http://it.asia1.com.sg/newsdaily/news002_20030108.html.

174. See Eileen Yu, *.sg Trademark May Face Opposition*, *COMPUTER TIMES*, Feb. 8, 2003 (commenting on possible resistance from the international domain name registry, ICAAN, and a Singapore-based Internet service provider), at http://it.asia1.com.sg/newsdaily/news004_20030208.html.

175. See Dow Jones, *Singapore Withdraws Internet Domain Trademark Application*,

States and the United Kingdom, however, have issued rulings barring registration of a TLD. The United States' 1999 Trademark Examination Guide 2-99 stated,

If a mark is composed solely of a TLD for "domain name registry services" (e.g., the services currently provided by Network Solutions, Inc. of registering .com domain names), registration should be refused under Trademark Act §§ 1, 2, 3 and 45, 15 U.S.C. §§ 1051, 1052, 1053 and 1127, on the ground that the TLD would not be perceived as a mark. The examining attorney should include evidence from the NEXIS® database, the Internet, or other sources to show that the proposed mark is currently used as a TLD or is under consideration as a new TLD.¹⁷⁶

The United Kingdom has a similar rule banning United Kingdom trademarks of gTLDs.¹⁷⁷

ICANN itself seems unfriendly to the suggestion that intellectual property-like rights inure even to a state in regards to its ISO country-code. When ICANN was considering creating a .biz gTLD, it received a protest from the operator of .bz, a commercial concern that ran the TLD under contract with the government of Belize.¹⁷⁸ ICANN rejected the operator's claim that the creation of a .biz gTLD would be confusingly similar to .bz on the grounds that the holder of a ccTLD has no right to make such

at <http://www.whois.sc/news/2003-03/singapore-sg.html> (Mar. 14, 2003).

176. United States Patent and Trademark Office, Examination Guide No. 2-99, § II.2d (Sept. 29, 1999), available at <http://www.uspto.gov/web/offices/tac/notices/guide299.htm>.

In *Image Online Design, Inc. v. CORE Ass'n*, 120 F. Supp. 2d 870 (C.D. Cal. 2000), the plaintiff asserted trademark rights in the name "web" as applied to the service of registering domain names under the top-level domain .web. The court granted summary judgment to the defendants, finding as a matter of law that there could be no trademark rights in the name "web" based on its use in connection with the provision of registration services under the .web domain:

In sum, Plaintiff's use of the mark .web in connection with domain name preregistration services does not confer trademark protection. As a gTLD, .web does not indicate the *source* of the services; instead, it indicates the *type* of services. The Court finds that .web, as used here, falls out of the ambit of trademark categorization. Further, even if it could be categorized, .web is simply a generic term for websites related to the World Wide Web. Accordingly, the mark is not protectable.

Id. at 880.

177. UK Patent Office, The Trade Marks Registry Work Manual, § 6.5.3, <http://www.patent.gov.uk/tm/reference/workman/chapt6/sec28.pdf> (last updated July 6, 2004) (stating that ".uk" is devoid of distinctive character and hence not trademarkable).

178. There was some dispute as to whether the contract was valid. See Letter from Louis Touton, Vice President and General Counsel, ICANN, to Anthony R. Kinney, Lawyer for Economic Solutions, Inc. (ESI) (Oct. 23, 2000), <http://www.icann.org/tlds/correspondence/bz-response-23oct00.htm>.

a claim.¹⁷⁹ ICANN stated that “one does not gain trademark or service-mark rights over use of a top-level domain by virtue of provision of registration services within that domain.”¹⁸⁰ Thus,

[b]ecause there are no trademark rights in a top-level domain (.web) based on provision of registration services in that same top-level domain, it is plain that there can be no trademark rights over domains (.biz or .ebiz) based on the provision of registration services within a different top-level domain (.bz).¹⁸¹

Furthermore, before one could conclude that the GAC-proposed norm had hardened into custom, one would have to overcome a fundamental problem with the entire exercise.¹⁸² Until and unless the DNS is reclassified as a “public resource,”¹⁸³ it must be seen as a fundamentally private network. Also, whether or not the DNS gets taken out of the realm of private law, there is little question that a very large fraction of the machines connected to each other via the Internet will be privately owned, and many of them will use private networks such as LANs and WANs. In each of these cases, the computer will have a name by which it identifies itself to other machines and an address by which other machines can reach it. Groups of machines can run their own short-form addressing schemes, either as “alternate roots”¹⁸⁴ or as localized conveniences. Just as it would take a very different conception of public international law to properly regulate what people name their pets, so too would it require an avulsive shift to regulate the addresses individuals give their machines. In that sense, a trademark model might be preferable. First, the international obligation applies only to states, which undertake an obligation to enact conforming domestic rules. Second, the reach of the rules is traditionally limited to commercial uses and a small number of bad-faith actions with commercial repercussions rather than a blanket rule removing terms from the public domain. This latter

179. *Id.*

180. *Id.*

181. *Id.* (emphasis removed).

182. It is unusual to consider international law as a source of property rights, but this would not be the first such rule. For example, the Law of the Sea Treaty, which went into effect in 1994, codified territorial waters of twelve nautical miles and an exclusive economic zone of two hundred nautical miles, customs that had gradually evolved from the former rule of three nautical miles from the low water line, a measure originally derived from the distance of a cannon shot. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 636–41 (1998).

183. Refer to text accompanying note 162 *supra* (discussing the GAC Operating Principles).

184. Refer to note 95 *supra*.

issue may not seem serious when speaking of two-letter country codes, but it becomes much more of an issue when applied to an entire country name.

2. *Country Names as SLDs in gTLDs.* Some countries, notably South Africa, argue vociferously that “second level domain names the same as Country Names are valuable national assets belonging to the respective sovereign nations.”¹⁸⁵ The forcefulness of the claim may be exemplified by a lawsuit between the owners of southafrica.com and the government of the Republic of South Africa,¹⁸⁶ and also by domestic troubles the RSA has had concerning who should control the .za ccTLD.¹⁸⁷ However strategic this claim may seem, it nonetheless appears heartfelt and merits attention.

Once a TLD is established in the root, its second-level domain names (SLDs) can be any text string, subject only to limitations of the character set,¹⁸⁸ a length limit of sixty-three characters,¹⁸⁹ and whatever additional policies a TLD registry might impose.¹⁹⁰ Perhaps because many ccTLD registries are conservative in what they allow, or because there is no real danger of confusion if someone registers—say, espagne.fr—the flashpoint of controversy has been the open gTLDs—especially .com. In its second report on the DNS, WIPO was able to identify just over forty countries where the .com version of the nation’s common name had been registered by a nonresident person or corporation.¹⁹¹ Of those, several returned a server error, and in

185. Submission by Republic of South Africa in Response to WIPO2 RFC-2, at <http://wipo2.wipo.int/process2/rfc/rfc2-comments/2000/msg00059/wipo2-submission.doc> (last visited Sept. 25, 2004).

186. In *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 235 (2d Cir. 2002), the Second Circuit affirmed the dismissal of a declaratory judgment action by Virtual Countries, Inc. on the grounds that the RSA was protected by sovereign immunity because the alleged action that formed the basis for the suit—a press release by the RSA announcing its views as to its rights to southafrica.com—was insufficiently commercial and did not have a direct effect in the United States. See generally Jason Nielson, *Virtual Countries, Inc. v. Republic of South Africa*, 16 N.Y. INT’L L. REV. 209 (2003).

187. See, e.g., A. Michael Fromkin, *.za Zone File Expatriated*, at <http://www.icannwatch.org/article.pl?sid=02/06/13/200805> (June 13, 2002).

188. See i-DNS.net, *Internationalized Domain Names for Beginners*, at http://www.i-dns.net/support_download/beginners/beginners.html (last visited Sept. 25, 2004) (presenting an introductory discussion of the international domain name (IDN) project, which layers over the DNS to allow domain names to include non-ASCII characters).

189. See Dan Oscarsson, *[idn] Length Limits on a Domain Name*, at <http://ops.ietf.org/lists/idn/idn.2000/msg00803.html> (May 20, 2000).

190. The same is substantially true of TLDs: Although full country names could be used for TLDs (e.g., .france), the current convention is to limit them to two-letter ISO codes (e.g. .fr). Changing to long TLD names might cause problems for users whose software was not designed with long TLDs in mind.

191. WIPO2 Report, *supra* note 172, Annex XII.

almost half of the cases, the registrant used the site to provide tourism or travel-related information.¹⁹²

South Africa argues that nations have a legal right to their names and to any economic benefits that flow from the use of that name on the Internet.¹⁹³ Thus, in South Africa's view, when the U.S.-based Virtual Countries, Inc. registered southafrica.com and a host of other country-name SLDs,¹⁹⁴ it "appropriated these valuable assets of the sovereign nations."¹⁹⁵ South Africa derives a nation's legal right to its country-name.com SLD from two sources: (1) the absence of any morally or legally superior claimant and (2) the particular needs of developing countries to overcome the "digital divide" and to harness the Internet for development.¹⁹⁶

Thus, South Africa's argument is both legal and equitable. The equitable case centers on the commercial value of SLDs in popular gTLDs, which in practice means .com, because .com is more or less the only gTLD that currently has commercial importance. South Africa argues that the .com policy of registering SLDs on a first-come, first-served basis worked to disadvantage developing countries because the initial registrants

192. *Id.* Many names of indigenous peoples also are registered as domain names. *See id.* Annex XIV.

193. *The Protection of Country Names in the Domain Name System, Comments Submitted by the Government of the Republic of South Africa*, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Annex, at http://www.wipo.org/sct/en/documents/special_session/pdf/sct_s2_6.pdf (May 17, 2002) [hereinafter South Africa RFC2 Comments].

194. Virtual Countries is currently the registrant for country-name SLDs consisting either of the countryname.com, E-country.com, or countryTRADE.com for the following countries: Algeria, Argentina, Bangladesh, Belgium, Brazil, Chile, China, Denmark, England, Ecuador, Germany, Holland, Hong-Kong, Israel, Italy, Morocco, Nepal, New Zealand, Nicaragua, Norway, Peru, Puerto Rico, Russia, Scotland, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, and Ukraine. *See Virtual Countries.com, About Virtual Countries*, at <http://www.virtualcountries.com/corporate/index.html> (last visited Sept. 25, 2004).

195. South Africa RFC2 Comments, *supra* note 193, at 1 (emphasis added).

196. As to what exactly was the name at issue, South Africa argued that "[b]oth the long and the short name should be protected. The Republic of South Africa believes that both the United Nations Terminology Bulletin and the ISO Standard 3166-1 should be utilized, including names that use variations based on punctuation, such as dashes, and in addition other terms by which countries are generally known should also be protected." *Id.* In addition, "Country Names should be protected at least in the official language(s) of the particular country and in the six working languages of the United Nations." *Id.* at 3. The Government of Mauritius proposed that "Country names should be protected in English, French and Spanish as these are the most widely used languages worldwide and on the Internet. In addition, the country name in its native language must also be protected." *The Protection of Country Names in the Domain Name System, Comments Submitted by the Government of Mauritius*, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Annex, at http://www.wipo.org/sct/en/documents/special_session/pdf/sct_s2_7.pdf (May 21, 2002).

were primarily “private [W]estern corporations and individuals.”¹⁹⁷ Yet those same developing countries were precisely the ones that most needed a means to use national branding to further nation-building.¹⁹⁸ In short, the “taking” of “their” names by the West is an act of colonial expropriation akin to the taking of indigenous people’s cultural property.¹⁹⁹

The legal claim has two prongs. The first is that, as an initial matter, the gTLD registries “had no right to give away the names of sovereign nations in the second level domain names to private entities acting without permission or authority of the nations whose names were registered.”²⁰⁰ Because this initial transaction was wrongful, the registrant should not be seen to have acquired any rights in the name, whether by sweat equity, secondary meaning, or any other form of trademark right.²⁰¹ But this first claim is actually second in time, for it presupposes the

197. South Africa RFC2 Comments, *supra* note 193, at 1.

198. South Africa elaborated,

The governments of developing nations need to harness the power of the internet to promote a positive image of their country and to provide information on national resources and history, as well as to focus global attention on national and local businesses and resources for purposes of trade, tourism and investment, in an increasingly competitive global environment. It cannot be disputed that the primary internet sites utilized by individuals seeking information about particular countries would be domain names which are the same as the Country Names themselves, particularly at the dot-com gTLD. In developing countries, many nationals need the assistance of their governments to reach out into the global internet economy, since individually they lack the resources to create significant web site portals on their own. In contrast, in developed nations, there generally is a far lesser need for the sovereign to establish one national internet site that supports domestic businesses and the domestic economy and attracts global attention to the nat[i]on.

Id. at 2.

199. See United Nations, Sub-Commission on the Promotion and Protection of Human Rights, and the Sub-Commission’s Working Group on Indigenous Populations, at <http://www.unhchr.ch/html/menu2/2/sc.htm> (last visited Sept. 25, 2004) (undertaking studies and making recommendations concerning fundamental freedoms and the protection of racial, national, religious, and linguistic minorities); WIPO, *Traditional Knowledge, Genetic Resources and Folklore Intellectual Property and Life Sciences*, at <http://wipo.int/traditionalknowledge/introduction/index.html> (last visited Sept. 25, 2004); Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, Case Study 2: Use of Trade Marks to Protect Traditional Cultural Expressions*, at 37 (2003) (emphasizing the importance of indigenous domain names in Australia and New England), <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>. But see Sompong Sucharitkul, *The Inter-Temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3, 8 (2002) (noting lack of uniformity among world legal systems in the extent to which they recognize such property rights).

200. South Africa RFC2 Comments, *supra* note 193, at 1.

201. *Id.* at 1–2 (“[R]egistrants of second level domain names the same as Country Names do not have and never had any legitimate claim to property rights in those domain names.”).

existence of a government's inherent right to control a country-name SLD that is, in fact, nothing more than an entry into a database maintained by a private company—as it happens, Network Solutions, located in northern Virginia in the United States.²⁰²

This prior claim of right to what one might call virtual cultural property must come from somewhere. It must exist in some body of law or it must be added to it. For South Africa's arguments to make any sense, that place can only be public international law, because it is clear that a rule of, say, South African municipal law cannot control the private contract by which the southafrica.com registration was conveyed from a U.S.-based registry to a U.S.-based registrant, unless for some reason the United States were to choose to recognize and enforce the South African rule.²⁰³ South Africa, however, was somewhat ambiguous as to where this right, if asserted, might come from. It disclaimed any broad claims of sweeping trademark protection for its name, stating that, "The Republic of South Africa . . . does not seek new intellectual property protection in general for the names of sovereign nations. Rather, any protection sought is limited to domain names."²⁰⁴ Yet, its argument remained based on the assertion of the existence of "a sovereign's rights in [its] own name[]," a right "deserving of substantially greater protection than other geographical terms generally," as sovereigns are entitled to protect their country names "from monopoly, commercial exploitation by private parties."²⁰⁵ In effect, this is either a trademark right or some *sui generis* right sounding in public international law that resembles it.

Meanwhile, however, the semiprivate ordering regime managed by ICANN is creating de facto reservation rights for country names in the domain name system. At the Montevideo

202. See Rodney A. Myer, Comment, *Domains Without Borders: Reconciling Domain Name Dispute Resolution Policies and Trademark Rights Between the United States and the Nations of the European Union*, 20 PENN. ST. INT'L L. REV. 415, 418 (2002) (reviewing Network Solutions' historical maintenance of a "government-approved monopoly on the registration of domains").

203. An obligation arising from South African law might also be recognized by the laws of other states. Indeed, the Lanham Act § 44, 15 U.S.C. § 1126 (2000), recognizes the priority of foreign marks against U.S. marks so long as the foreign marks are filed in the United States within six months of the original foreign trademark filing. However, when it comes to foreign country names, no such rule currently applies.

204. South Africa RFC2 Comments, *supra* note 193, at 2.

205. Ministry of Communications, Republic of South Africa, *Submission by Republic of South Africa in Response to WIPO2 RFC-3*, at <http://wipo2.wipo.int/process2/rfc/rfc3/comments/msg00099.html> (June 7, 2001) [hereinafter South Africa RFC3 Comments].

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ICANN meeting, the GAC issued a request to the ICANN Board that

the names of countries and distinct economies . . . should be reserved by the .info Registry . . . in Latin characters in their official language(s) and in English and assigned to the corresponding governments and public authorities, at their request, for use. These names in other [nonroman] character sets should be reserved in the same way as soon as they become available.²⁰⁶

Operating with record speed, the next day the ICANN Board

determined that it is appropriate to take temporary steps to prevent the registration of [country names in the .info Top-Level Domain] in order to allow [the Board] and the community the time to consider carefully this issue and determine what if any policy should be adopted with respect to it.²⁰⁷

ICANN then compiled a list of 329 names inspired by the ISO 3166-1 standard and

[instructed] the registry operator for .INFO with the request (1) that the names in question, to the extent they were not already registered in the names of third parties, be registered in the name of ICANN for safekeeping purposes and (2) that any names already registered but successfully challenged and cancelled on the basis of the .INFO Sunrise Challenge Policy also be registered in the name of ICANN.²⁰⁸

D. Paris Convention

Although trademark law does indeed seem like the obvious source for a country-name right of the sort asserted by the RSA and others, no such right can be found in the Paris convention nor in other trademark-related international agreements. Indeed, WIPO itself recognized in its interim report in the second WIPO domain process that “any recommendations in favor of establishing such protection would be tantamount to proposing

206. ICANN, *Montevideo Communiqué*, *supra* note 170.

207. ICANN, *Preliminary Report, Regular Meeting of the ICANN Board in Montevideo*, at <http://www.icann.org/minutes/prelim-report-10sep01.htm> (Sept. 10, 2001).

208. *Country Names in .info TLD*, *supra* note 33, at 2. The list of names in Latin characters (in English and in the official languages of the countries concerned) is available at http://www.nic.info/whois_search/reserved_names (last updated June 27, 2003). In actuality, only 198 of the 329 names were reserved in the name of ICANN as the others were already registered in the names of third parties at the time ICANN made this request. *Country Names in .info TLD*, *supra* note 33, at 2.

the creation of new law (at least from the international intellectual property perspective).²⁰⁹ Similarly, the final report in that process concluded that the protection of country names fell in among the “questions in respect of which there are no existing international norms, however unjust the absence of such norms might be”—at least insofar as intellectual property law is concerned.²¹⁰ Given WIPO’s historically aggressive posture toward finding and enforcing IP rights, its admission against interest that “a plain reading of the relevant provisions and the negotiating history of the Convention leads to the conclusion that it does not offer protection to the names of countries”²¹¹ ought to work as a decisive interpretation. Readers who accept this assertion are invited to skip the next paragraph.

For those who require details, the argument goes as follows. Article 6^{ter} of the Paris Convention provides for the protection of some state-related symbols against their registration and use as trademarks, but does not mention country names.²¹² In its report, WIPO placed great stress on the difference between subparagraphs 1(a) and 1(b) of Article 6^{ter}.²¹³ Subparagraph 1(a) prohibits the registration and use as trademarks of “armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.”²¹⁴ Subparagraph 1(b) extends 1(a) to the “armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations.”²¹⁵ For WIPO, the absence of “names” from 1(a) meant, via *expressio unius exclusio alterius*, that it could “not provide an existing legal basis for the protection of country names in the DNS,”²¹⁶ a conclusion WIPO found supported by subsequent state action, because several states had advanced a proposal between 1979 and 1982 to amend 6^{ter} to include the “official names” of states in the items to be protected under subparagraph 1(a) of Article 6^{ter}, but ultimately the proposal was not adopted.²¹⁷ Similarly, a proposal to allow

209. WIPO 2 Report, *supra* note 173, para. 280.

210. See *The Recognition of Rights and the Use of Names in the Internet Domain Name System, Report of the Second WIPO Domain Name Process*, WIPO, para. 67 (Sept. 3, 2001) [hereinafter WIPO2 Final Report], <http://arbitrator.wipo.int/processes/process2/report/pdf/report.pdf>.

211. *Id.* para. 278.

212. See Paris Convention, *supra* note 31, art. 6^{ter}.

213. WIPO2 Report, *supra* note 172, para. 281.

214. Paris Convention, *supra* note 31, art. 6^{ter}(1) (a).

215. *Id.* art. 6^{ter}(1) (b).

216. WIPO2 Final Report, *supra* note 210, para. 281.

217. *Id.* paras. 282–83.

states to amend Article 10^{quater} in a way that would have extended protection to “usual” (i.e., unofficial) names also fizzled.²¹⁸ WIPO further noted that due to a “lack of harmonization and the resultant differing treatment of the issues at the national level, any protective measures that might be adopted for the gTLDs, and the results that they might produce, run a greater risk of being invalidated, if contested at the national level.”²¹⁹ Similarly, the TRIPS Agreement requires that signatories provide the legal means for any interested person to prevent misleading geographical origins of goods where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin,²²⁰ but as regards to geographical indicators such as country names, this requirement does not go beyond what is already in Article 6^{ter}.

The absence of existing law may, however, prove to be the occasion for new law.²²¹

IV. WHAT SHOULD BE DONE? AND SHOULD TRADEMARK LAW DO IT?

The claim that country names deserve increased international protection raises two sets of questions. First, *should* countries have a greater ownership right in the use of their names abroad²²² than they have traditionally been thought to have under public international law? And against whom—states, their “competitors” in the new “market” for regulation, citizens, capital, and other assets? Or should it be against everyone? If protection is warranted, is it warranted generally, or only in special circumstances such as Internet top and second-level domains? The Internet more generally? Or everywhere?

218. *Id.* paras. 284–86.

219. *Id.* para. 285.

220. TRIPS Agreement, *supra* note 32, art. 22, paras. 1–2.

221. For example, during their meeting from September 23 to October 1, 2002, the WIPO Member States agreed that

a number of issues with respect to the protection of country names in the DNS warrant further discussion. These issues concern, in particular, (1) the list to be relied upon to identify the names of countries which would benefit from the protection envisaged, (2) the extension of the deadline for the notification to the Secretariat of names by which countries are commonly known, and (3) how to deal with acquired rights. The General Assembly decided that discussions should be continued in the SCT with a view to reaching a final position.

WIPO General Assembly Twenty-Eighth (13th Extraordinary) Session, Geneva, September 23 to October 1, 2002, WIPO Doc. WO/GA/28/7, para. 81 (Oct. 1, 2002), http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/doc/wo_ga_28_7.doc.

222. Domestic use of a country’s name is, of course, a matter for the domestic law of that country, subject only to its international obligations under human rights treaties.

Second, if one believes this protection should exist, how best to implement it—in the Paris Convention or in other intellectual property law? In some other treaty? Primarily through informal processes such as ICANN? And, whichever route one takes, how to decide which set of things we might call country names deserve protection?

A. *Should Country Names Be Protected at All?*

As governments are increasingly concerned about their respective images at home and abroad, they are adopting business-inspired methods of “brand management.” And one nearly inevitable aspect of such a businesslike approach is a desire to control the brand as much as possible:

In the corporate world, once a “brand identity” is settled upon by the head office, it is enforced with military precision throughout a company’s operations. The brand identity may be tailored to accommodate local language and cultural preferences (like McDonald’s serving pasta in Italy), but its core features—*aesthetic, message, logo*—remain unchanged.

This consistency is what brand managers like to call “the promise” of a brand: It’s a pledge that wherever you go in the world, your experience at Wal-Mart, Holiday Inn or a Disney theme park will be comfortable and familiar. Anything that threatens this homogeneity dilutes a company’s overall strength. That’s why the flip side of enthusiastically flogging a brand is aggressively prosecuting anyone who tries to mess with it, whether by pirating its trademarks or by spreading unwanted information about the brand on the Internet.

At its core, branding is about rigorously controlled one-way messages, sent out in their glossiest form, then hermetically sealed off from those who would turn that corporate monologue into a social dialogue. The most important tools in launching a strong brand may be research, creativity and design, but after that, libel and copyright laws are a brand’s best friends.

When brand managers transfer their skills from the corporate to the political world, they invariably bring this fanaticism for homogeneity with them.²²³

The current state of trademark law provides a handy model for government “brand managers” who seek a higher degree of

223. Naomi Klein, *Brand USA: America’s Attempt to Market Itself Abroad Using Advertising Principles is Destined to Fail*, L.A. TIMES, Mar. 10, 2002, at M1.

control over their “messages.” Where once trademark law was primarily, if not solely, concerned with the trademark as a source identifier of goods with the main objective being to protect consumers’ interests, it has now evolved to recognize not just the interests of the producer in its investment in goodwill, but also the reality that the brand itself can be a supremely valuable product.²²⁴ Where once protection against a likelihood of confusion was the primary engine of trademark enforcement, now—at least for major, famous brands—antidilution remedies are coming to the fore.

It is easy to see how governments—and others²²⁵—might argue that if country names are becoming increasingly brand-like, they too should be entitled to the increasingly wide-ranging and preemptive remedies available to Coca-Cola and Pepsi for all the same reasons we have given ultrafamous marks increasingly broad protection. If so, the logical source of that protection would be the Paris Convention. Indeed, some governments appear willing to amend the Paris Convention to protect country names. WIPO, in its second Report on Domain Names, stated that, although there are no

international intellectual property norms protecting country names . . . some commentators . . . suggest that . . . [the appropriate venue for these discussions would be] treaty processes or other forms of agreement between sovereign States and, in particular, to the Assembly of the Paris Union for the Protection of Industrial Property, the competent organ for the Paris Convention.²²⁶

It is not at all clear, however, if this argument has more than superficial appeal.²²⁷ Despite the attempt to equate country names with even super-famous marks, countries and their names play a very different role in our lives than do companies and their brands. And, despite all the talk of regulatory competition and regulatory arbitrage,²²⁸ the fact remains that for most people

224. See, e.g., Jessica Litman, *Breakfast With Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1725–28 (1999) (discussing how trade symbols may have a far higher value than the products they represent).

225. See, e.g., von Arx & Hagen, *supra* note 26, para. 21; Kenneth Neil Cukier, *Eminent Domain: Initial Policy Perspectives on Nationalizing Country-Code Internet Addresses* [draft version], at <http://www.cukier.com/inet02.html> (last visited Sept. 25, 2004).

226. WIPO2 Report, *supra* note 172, paras. 266–67.

227. It certainly has opponents. See *id.* para. 265 & n.73.

228. This is something I’ve been guilty of myself. See A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE 129 (Brian Kahin & Charles Nesson eds., 1997) (stating that “the multinational nature of the Internet makes it possible for users . . . to choose to evade disliked domestic regulations

most of the time, there is little realistic choice as to which national regime one is subject. Country names are an essential part of content-rich political discussions at the core of political speech. Any general rule that allowed governments as a class even greater control over their ‘message’—much less any sort of monopolistic control—might affect political uses of country names that would have an undesirable impact on fundamental human rights norms, particularly those relating to the freedom of expression.²²⁹

A more tailored and thus more powerful argument is the South African one set out above.²³⁰ Although couched in terms that suggest a risk of slippery slopes, the core of the South African claim is that the right at issue is not a trademark right but a separate one sounding in public international law. It is a right that South Africa argues should be primarily tailored to benefit less-developed nations, especially insofar as it relates to the use of country names for Internet *addressing* (not content). South Africa’s argument self-consciously amounts to a claim to a new international norm protecting a special type of virtual cultural property, akin to the evolving norm protecting tangible cultural property.²³¹ It fits well with the emerging tendency to see virtual goods as the engines of future economic growth.²³² WIPO

by communicating/transacting under regulatory regimes with different rules”).

229. This in no way detracts from the prohibition of fraudulent commercial speech, or the nonregistration of primarily geographically misdescriptive marks.

230. As noted above, South Africa argues that “the names of sovereign nations are deserving of substantially greater protection than other geographical terms generally.” South Africa RFC3 Comments, *supra* note 205. Specifically regarding the Paris Convention, South Africa argued:

Country Name domain names already have limited intellectual property protection under Article 6^{ter} of the Paris Convention for the Protection of Industrial Property, since Country Name domain names are the equivalent of “armorial bearings,” “other State emblems,” “official signs and hallmarks indicating control and warranty,” or “heraldic” symbols. The Republic of South Africa recognizes that this view has not been universally and definitely accepted. Thus, the Republic of South Africa’s position is that Article 6^{ter} of the Paris Convention should be clarified or amended to make explicit that Country Name domain names are protected and can be utilized only under the authority of the various sovereign nations.

South Africa RFC2 Comments, *supra* note 193, at 2–3.

231. See Reimer, *supra* note 68, at 370–71. Reimer concludes that because cultural symbols are socially constructed, embedded in time, and have ‘owners’ who tend to change as time passes, “as a general policy, international legal protection of cultural intangibles may well be an illegitimate enterprise.” *Id.* at 374.

232. See, e.g., Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* (CESifo Working Paper Series No. 618, Dec. 2001) (describing the *Everquest* universe and giving an overview of the economic and social impacts these games have generated in the real world), <http://papers.ssrn.com/abstract=294828>; Edward Castronova, *Theory of the Avatar* (CESifo Working Paper Series No. 863, Feb. 2003) (arguing that participation in virtual-world games like *Everquest* and

itself supports it.²³³ Additionally, there is something undeniably attractive about the .nu model, in which the island nation of Niue's government used its ownership claim over a particular representation of its name to allow it to license its ccTLD, producing a revenue stream it was able to use for the benefit of its people.²³⁴ Indeed, registration fees in .nu have been the primary source of foreign exchange and revenue for the Niue government.²³⁵

It could be argued as an initial matter that this claim to virtual cultural property stands or falls with the more general family of indigenous claims to cultural property to which it seems to be a part. Nevertheless, the "cultural" "property" to which the virtual cultural property claim is directed is sufficiently different that it is not in fact subsumed by the traditional-cultural-property claim, and it instead deserves to be considered independently on its own merits. Unlike traditional cultural property, country names are often new. To the extent that they are protected in foreign languages, they are not really traditional at all; the same could easily be said of Internet addresses.

A more serious argument against the virtual cultural property claim goes to the nature of the activities that would be regulated if the claim were accepted. The TLD registry in which the SLDs reside is nothing more than a database that enjoys an agreement with the root zone operator (currently ICANN). Anyone else can keep a database of addresses, and indeed much of the information in registries is routinely copied and cached by other computers in order to speed Internet access times.²³⁶ The only thing that makes the databases relied on by the domain name system different from any other database is the network effect by which we all benefit from having a given address always point to the same recipient or data supplier, no matter who is doing the pointing.²³⁷

Similarly, although some commentators argue that a ccTLD

Ultima Online has "net positive effect" on the well being of players and allows participants to experience a variety of social roles and normative values), <http://papers.ssrn.com/abstract=385103>; F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004).

233. WIPO2 Report, *supra* note 172, para. 286 ("[W]e strongly believe that, as a matter of policy, country names and the names of administratively recognized regions and municipalities within countries should be protected against abuse in the gTLDs.").

234. See Richard St. Clair, *Niue's .nu: Providing a Free Internet to an Isolated Nation*, in ADDRESSING THE WORLD, *supra* note 21, at 82–83.

235. See *id.*

236. See RONY & RONY, *supra* note 113, at 59.

237. See generally A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93, 105 (2002) [hereinafter Froomkin, *Form and Substance*].

is a matter of national sovereignty,²³⁸ this is anything but obvious. A ccTLD's name is just a convention, a two-character label chosen by one private body, the ISO, and then repeated by another, IANA.²³⁹ It is difficult to see under what legitimate theory any state could claim an exclusive right to use labels as an appurtenance of sovereignty when those labels do not have significance as a result of anything the government or its people did, nor as a result of a long-accepted historic practice, but instead (for almost all countries) as a result of private actions by foreigners abroad.

B. If There Is to Be Protection, By What Means?

If, despite the reasons not to do so, governments are determined to forge ahead with a new trademark-like protection for country names, there are many ways in which it could be achieved. The tidiest, but most difficult, would be to amend an existing intellectual property treaty via an existing institutional structure. And here the most obvious candidate is the Paris Convention itself, which seems to provide in Article 6^{ter} a natural candidate for amendment.²⁴⁰ The problem with this approach is that amending Article 6^{ter} to add country names to the list would be both underinclusive and overinclusive. It would be overinclusive because it would prevent many legitimate marks from being registered, both those for business relating to a foreign country ("Japan importers") and those relating to place names that happen to be the same or similar to the name of a foreign country (anything named "Columbia"). It would be underinclusive because it would not address the ccTLD issue at all. ISO 3166-1 is in the public domain, and it is used for many types of addressing, and although most of these uses are not trademark, it would be unfair to the ISO, and chilling to many private users of those codes, to suggest there might be liability for using them in any circumstances.

A second mechanism would be to agree how domain names should be protected as part of some other overarching agreement to internationalize the domain name system. As governments slowly become impatient with the United States' reluctance to relinquish its control over the DNS, representatives of other governments increasingly warn that some such solution may be in the offing. There are other reasons why this might not be a

238. See Cukier, *supra* note 225.

239. Internet Assigned Numbers (IANA), *Procedures for Establishing ccTLDs*, at <http://www.iana.org/cctld/cctld-establishment-procedures-19mar03.htm> (Mar. 19, 2003).

240. But refer to note 217 *supra* (mentioning a failed attempt to amend Article 6^{ter}).

desirable outcome for the Internet, but if it came to pass that the governments of the world attempted to restructure the DNS system or even just its Byzantine governance structures,²⁴¹ then defining rights to ccTLDs and even to country names in SLDs would probably be among the less harmful outcomes likely to emerge from such a process—although even there the rights of existing private operators of ccTLDs would need to be protected in order to avoid the precedent of an international agreement expropriating property from private parties.²⁴²

A third possibility would be to use ICANN's power over the DNS to enforce some standard of conduct on domain name registrants. ICANN currently administers a quasi-arbitration system designed to stop "cybersquatting"—which is usually the bad faith registration of a name akin to a trademarked word or term with the intent of reselling the name to the trademark holder. In response to WIPO's suggestions, ICANN is currently considering whether its Uniform Dispute Resolution Procedure (UDRP) should be amended to protect country names and the names of intergovernmental organizations (IGOs) as well as trademarked terms. The committee assigned to discuss this proposal is deadlocked,²⁴³ and at the time of this writing the matter is before the ICANN Board of Directors.

The proposal faces several stumbling blocks, not least the fact that, as noted above, there is currently no clear law to apply in deciding country-name related controversies. Questions have also been raised concerning the propriety of ICANN regulating in areas so far-removed from its technical mission. In addition, there is a serious jurisdictional issue: Currently, complainants in the UDRP must agree to the "mutual jurisdiction clause" in which the complainant agrees to submit to the jurisdiction of a court in the event that the respondent loses and wishes to exercise his right to challenge that outcome in court. The complainant (the markholder) may choose either the jurisdiction where the respondent (the registrant) is domiciled or the place where the name was registered. Protecting the respondent's right to go to court after an adverse decision was a critical element of the compromise that produced the UDRP,²⁴⁴ and it is further

241. See Froomkin, *Form and Substance*, *supra* note 237, at 116–18.

242. As the existing Internet standards require a ccTLD administrator to have a presence in the country served, all governments have jurisdiction to regulate 'their' ccTLD, and even to take it over, subject to whatever due process or compensation requirements exist in their law.

243. I should disclose that I was a member of this committee.

244. Michael A. Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 705, 715 (2002), available at <http://>

justified by the very limited scope of factfinding and response the UDRP vouchsafes participants. Governments, however, are ordinarily unwilling to waive sovereign immunity and allow themselves to be sued in foreign courts, and IGOs are equally protective of their immunities. Were the Board to adopt the expedient of creating a parallel process that had the effect of preventing losing registrants from seeking to vindicate their rights before a non-ICANN tribunal, it would at least change the balance hammered out in the debates over the UDRP, and it would at worst suggest that ICANN had provided a special deal for the governments that increasingly control it at the expense of domain name registrants, a deal they had been unable to achieve through traditional means. It might also create an important precedent in that ICANN's control of the DNS would be used to achieve a legal or social policy goal not even arguably required to ensure the stability of the Internet.

If there is a consensus that countries deserve *sui generis* protection in the SLD name space, there is an easier way to provide it. An alternative method modeled on the back-door approach pioneered in the launch of .info would be intellectually untidy, but it would be very easy to implement. It would have the virtues of predictability, and it would be least likely to create a new bureaucracy of its own. Recall that in the .info launch, the GAC asked ICANN to make the new .info registry "reserve" (i.e., make nonregistrable) a list of official and common country names.²⁴⁵ This could become a standard feature of the rollout of new TLDs, ensuring that no one but the government of the named country would ever have the name. Because this rule would apply only to new TLDs, it would have the advantage of not harming any investment-backed expectations.

The problem with both the third and fourth possible solutions is that they rely on ICANN (advised by the GAC) to decide the rules under which country names would be protected. This is not only of dubious legitimacy in theory, but fairly risky in practice, as both the GAC and ICANN decisionmaking processes are opaque and unreviewable. Even WIPO seems to suggest that this is not the best way to proceed:

- (i) The question of the appropriateness of the registration of country names in the gTLDs is inextricably linked by some governments to what they perceive to be their national sovereign interest.

www.law.miami.edu/~froomkin/articles/udrp.pdf

245. Refer to notes 206–08 *supra* and accompanying text.

(ii) Protecting country names in the gTLDs would require or amount to the creation of new law, a function traditionally reserved for States.

287. Both points lead us to conclude that we have reached the limits of what can be achieved legitimately through consultation processes, such as the WIPO Internet Domain Name Processes or any similar ICANN processes. In other words, we agree with those commentators who are of the view that this particular question is more appropriately dealt with by governments.²⁴⁶

The GAC-ICANN process is indeed a bad way to make decisions about international law. It would set an unfortunate precedent to allow an international decision about property rights to be made by a government advisory body to a private corporation, not to mention by the private corporation itself.²⁴⁷

It might be suggested that because the GAC is made up of governmental representatives, it fulfils the need for public input and representation. To the extent that the model is an executive agreement, this argument has force because even though neither the GAC nor ICANN tends to be particularly transparent, both the GAC and executive agreements are handled entirely by representatives of the executive branches of the governments involved. To the extent that the GAC-ICANN procedure is compared to treaty making—itsself not the most democratic or open of legislative processes—it suffers in comparison. Multilateral treaties are typically published for public comment, often several times when in draft. When agreed upon, they are submitted to nations for ratification, which typically involves the participation of nation's legislatures and additional opportunities for public debate. Contrast this somewhat democratic and deliberative process to the .info decision, reached within twenty-four hours.²⁴⁸

Ultimately, however, the biggest argument against a new rule protecting country names is really the simplest: The rule was not needed in the past and will not be needed in the future. Countries have managed well without it, even during their transition to “branded” states. To the extent that South Africa's

246. WIPO2 Report, *supra* note 172, paras. 286–87.

247. Furthermore, when the corporation happens to be ICANN, hackles should rise. See Froomkin, *Form and Substance*, *supra* note 237, at 94–95 (arguing that ICANN is too unrestrained in and unaccountable for its actions); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000); Jonathan Weinberg, *Geeks and Greeks*, 3 INFO 313, 325 (2001) (observing that ICANN makes public policy choices in a top-down manner, raising questions of legitimacy).

248. Refer to notes 206–08 *supra* and accompanying text.

claim of inequity regarding less industrialized nations' access to early registrations in the DNS had merit, it applied to a special set of circumstances that are less and less likely to be repeated. What South Africa was primarily concerned with was .com, but there will never be another .com.²⁴⁹ Instead, we are likely to move to a world of increasingly competitive registries, just as 800 numbers eventually had to compete with 888 and other numerical combinations. If I am wrong and there is ever another unique and popular new gTLD in which early adopters have an advantage, South Africans and the rest of the world are now well aware of their likely importance. Even in the world of branded nations, all nations have, or will very soon have, all the tools they need to protect their legitimate interests by securing visible positions on the Internet.

Today, the greatest threat to USATM is not that international law fails to allow it to be USA[®], but rather the danger that the current CEO's policies are tarnishing the brand.

249. Perhaps some day we will even wean ourselves from domain names and move to directories, or all search.