

WHITHER THE UDRP: AUTONOMOUS, AMERICANIZED, OR COSMOPOLITAN?

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Recently, assessments of the Uniform Dispute Resolution Policy's [hereinafter UDRP] performance have stressed the need for internal reforms of the dispute settlement system.¹ These reforms address institutional and procedural issues such as forum shopping, panel selection, and pleading rules.² Far less attention, however, has been paid to an issue that is relevant to assessing the UDRP's performance – its external relationship to national courts and to national intellectual property laws.³ At present, this relationship is still in flux, but there are three ways in which it might evolve to change the UDRP as it is presently structured.

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¹ See Uniform Domain Name Dispute Resolution Policy (August 26, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter Policy].

² See, e.g., A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" – Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 688-711 (2002); Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP* (2001), at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>; Dr. Annette Kur, *UDRP: A Study by the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich* (2002), at <http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf>; Milton Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, at <http://dcc.syr.edu/miscarticles/roughjustice.pdf>.

³ For a more detailed discussion, see Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001); Graeme B. Dinwoodie, *(National) Trade-mark Laws And The (Non-National) Domain Name System*, 21 U. PA. J. INT'L ECON. L. 495 (2000).

First, the UDRP could be made more autonomous in character, transforming it into a body of non-national rules and procedures distinct from any one nation's laws and largely insulated from review in national courts. Second, the UDRP could become more Americanized by interpreting its substantive rules in harmony with U.S. statutes and case law, and by funneling judicial challenges to panel decisions into U.S. courts. Third, the UDRP could be made more cosmopolitan by enhancing the influence of a diverse array of national laws and legal institutions and generating new modes of interaction among national and non-national legal systems.

The remainder of this Essay discusses each of these three evolutionary pathways and explores their consequences for UDRP reform.

I. AN AUTONOMOUS UDRP

Consider first how reforms may enhance the UDRP's non-national characteristics. The UDRP was designed as a cheap, quick, and streamlined dispute settlement system that supplemented, but did not supplant, domestic cybersquatting litigation. The first WIPO domain name process stressed that national courts applying national laws would always trump UDRP rulings and that judges were not required to show any of the deference traditionally granted to private, contract-based dispute settlement procedures.⁴ Indeed, one of the UDRP's selling points was precisely this non-binding character that did not preempt national governments from applying their own rules to trademark-domain name disputes.

After three years of experience, however, the UDRP's de facto operation paints a very different picture. The system's speed, low cost and automaticity have made it overwhelmingly popular with trademark owners – far more popular than litigation. More than 7,000 disputes have been decided to date, compared with only

⁴ WIPO, Final Report of the WIPO Internet Domain Name Process (Apr. 30, 1999) [hereinafter Final Report], available at <http://wipo2.wipo.int/process1/report/finalreport.html>; see also *Dluhos v. Strasberg*, 321 F.3d 365, 371-74 (3d Cir. 2003) (holding that UDRP proceedings are not entitled to deferential review required by Federal Arbitration Act but rather require de novo review under the ACPA); *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752 (E.D. Va. 2001) (concluding that either trademark owner or domain name registrant may “seek a de novo review of a dispute that has been the subject of the [UDRP’s] administrative procedure”).

a few hundred cases in national courts during that same period.⁵ More importantly, the number of national courts asked to review UDRP panel rulings has been extraordinarily small – barely 1% of all cases decided, according to UDRPlaw.net.⁶ These statistics reveal that the UDRP's operation has been far more autonomous in practice than its drafters had envisioned.

Certain reforms of the UDRP would enhance its status as a distinct body of law and further distance it from national legal systems. For example, the choice of law rule could be revised to compel panels to apply only the UDRP. This would eliminate the discretion panelists currently enjoy to choose “any rules and principles of law that [they] deem applicable.”⁷ Proposals to create an appellate tribunal would also increase the system's non-national character.⁸ The tribunal would likely be an independent institution, distinct from existing dispute settlement providers, and staffed with a roster of permanent or semi-permanent members. It would be these members, and not national court judges, who would reconcile the overwhelming majority of conflicting panel rulings and provide the kind of coherence and checking functions that the system currently lacks.⁹

But a non-nationalized UDRP would also need to be a substantively narrow UDRP. National governments and internet stakeholders tacitly agreed on the process for creating the UDRP because of the widespread condemnation of the conduct it regulated.¹⁰ Any attempt to expand disputes beyond the heartland of cybersquatting risks fracturing that consensus. This does not mean that new trans-border legal norms must always be generated through traditional lawmaking processes such as treaty negotia-

⁵ See Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy, June 12, 2003 [hereinafter Statistical Summary], available at <http://www.icann.org/udrp/proceedings-stat.htm>. A June 15, 2003 search for “ACPA” on Westlaw yielded 138 ACPA decisions.

⁶ 1.03%, or 73 out of 7079. See UDRP Court Challenge Database, available at <http://udrplaw.net/UDRPAppeals.htm> (listing 73 UDRP decisions later challenged in court); Statistical Summary, *supra* note 5 (listing 7079 decided cases).

⁷ See Rules for Uniform Domain Name Dispute Resolution Policy, R. 15(a), at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.

⁸ See, e.g., M. Scott Donahey, *Adding Appeals Procedure to Dispute Resolution Might Satisfy ICANN Critics*, 6 ELEC. COMM. & L. REP. 33 (2001).

⁹ Even if the parties could seek review of UDRP appellate decisions in national courts, their incentive to take a second level appeal might be considerably diminished, further enhancing the importance of the appellate tribunal's rulings.

¹⁰ Final Report, *supra* note 4, at Executive Summary ¶ V.

tions. But it does suggest that the procedures for generating such novel norms must consider that decisions are increasingly enforced automatically with only limited input from national legal processes. Seen in this way, the technological trump that underlies all domain names creates opportunities for innovative lawmaking, but it also risks fracturing the legitimacy of the resulting rules.

As a practical matter, of course, it would be impossible and unwise to insulate completely the UDRP from national laws. Panels are, at least implicitly, applying the law of a particular country to determine issues such as when a complainant has rights in a mark that is registered in national trademark offices or used in domestic commerce. However, once national laws find their way into the UDRP, a pressing question arises: which national laws should influence the system?

II. AN AMERICANIZED UDRP

Thus far, American laws and legal structures predominate. Although the first WIPO domain name process considered a wide variety of sources in drafting a domain name dispute settlement proposal, the final text of the UDRP bears more than a passing resemblance to the U.S. anti-cybersquatting statute, the ACPA.¹¹ This has led panelists (many of whom are U.S. lawyers) to rely on the ACPA and the decisions of U.S. courts interpreting it. In such cases, the influence of U.S. law is overt. But such influence is often more difficult to detect, such as when a decision applying U.S. law is relied upon by subsequent panels in disputes involving parties, trademarks, and domain names with no U.S. nexus.¹²

¹¹ See, e.g., Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 379 (2003) (noting that the ACPA “wanders from the precise UDRP formula but its nine factor test for bad faith hones close to the UDRP’s understanding of the conditions that should trigger a [domain name] transfer”); see also Barbara Solomon, *Two New Tools to Combat Cyberpiracy – A Comparison*, 90 TRADEMARK REP. 679 (2000) (comparing substantive and remedial aspects of the UDRP with ACPA).

¹² Compare *World Wrestling Fed’n Entm’t, Inc. v. Michael Bosman*, WIPO Case No. D99-0001 (Jan. 14, 2000), available at <http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html> (citing U.S. case law interpreting the “use in commerce” requirement of the Lanham Act), with *Array Printers AB v. Lennart Nordell*, WIPO Case No. D2000-0092 (Apr. 10, 2000), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0092.html> (relying on Bosman’s “use” concept in dispute between two Swedish parties without citing to underlying U.S. case law).

A. *The ACPA and Judicial Review of UDRP Panel Decisions*

American influence is most keenly felt in the judicial review of UDRP panel rulings.¹³ Litigating trademark-domain name disputes in U.S. courts under U.S. laws has attractions for both trademark owners and DN registrants who are dissatisfied with a UDRP panel's ruling. For mark owners, the ACPA is directly tailored to cybersquatting and offers features (such as *in rem* jurisdiction and statutory damages) unavailable under other national laws. For registrants, the ACPA is the only national law that allows an express cause of action for review of UDRP rulings, and permits registrants to establish the legality of their conduct and restore their ownership of the domain name.¹⁴ It is not surprising, then, that of the 73 cases in which parties to a UDRP proceeding later brought suit in national courts, 58, or 80% have been litigated in the U.S. under the ACPA.¹⁵

These features of the statute explain why the ACPA has acted as a draw for UDRP review cases. As construed in several recent decisions, however, the statute is being applied not only to cases with a strong American nexus, but also to disputes that have only a tenuous connection to the U.S.¹⁶

The most well known (some would say infamous)¹⁷ of these cases is *Barcelona.com v. Excelentísimo Ayuntamiento de Barcelona*,¹⁸ in which a federal district court in Virginia applied the

¹³ For a review of the case law, see David E. Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35 (2001).

¹⁴ See Helfer & Dinwoodie, *supra* note 3, at 205 (noting that this provision of U.S. law is unique).

¹⁵ See UDRP Court Challenge Database, *supra* note 6.

¹⁶ Recent decisions from courts in the Fourth Circuit have shown a marked preference to apply the ACPA even to suits in which foreign contacts predominate. In *Heathmount A.E. Corp. v. Technodome.com*, No. CA-00-00714-A, at 18 (E.D. Va. Dec. 29, 2000), *appeal dismissed* 2002 WL 27213 (4th Cir. Jan 10, 2002), a Canadian mark owner filed a UDRP action against a Canadian registrant, but withdrew the complaint when it realized that the panel's order would be reviewed in Canadian courts. It then filed suit in the U.S. under the *in rem* provision of the ACPA. The court denied the Canadian registrant motion to dismiss on forum non conveniens grounds, because the plaintiff would "not be able to assert the same rights in Canada, which lacks a body of law equivalent to the ACPA." *Id.* at 18. A similar motion was denied in *Cable News Network L.P. v. CNNEWS.com*, 177 F. Supp.2d 506, 528 at n.49 (E.D. Va. 2001), *aff'd in part, vacated in part*, 66 U.S.P.Q.2d 1057 (4th Cir. 2003), in which both the registrar and registrant were located in China but the U.S. court doubted that Chinese judges would provide an adequate remedy for cybersquatting.

¹⁷ See Mueller, *supra* note 2, at 23 (listing *Barcelona.com* as one of seven "really bad decisions" by UDRP panels).

¹⁸ 189 F. Supp. 2d 367 (E.D. Va. 2002), *rev'd*, 330 F.3d 617 (4th Cir. 2003).

ACPA to affirm a UDRP panel's transfer of a domain name from two Spanish registrants to the City Council of Barcelona, the owner of several Spanish trademarks.¹⁹ The U.S. Court of Appeals for the Fourth Circuit later reversed this decision, holding that the district court improperly applied Spanish trademark law to decide which of the parties was entitled to own the disputed domain name.²⁰ The court of appeals reasoned that the ownership question turned on whether the Spanish registrants' conduct was "not unlawful under this chapter,"²¹ a phrase the court read to require a determination of legality solely under the Lanham Act. Because the City Council of Barcelona had no U.S. trademark rights in the word "Barcelona" (which, in any event, it could not have obtained absent a showing that such a geographical designation had acquired secondary meaning), the registration and use of a domain name containing "Barcelona" was not unlawful under U.S. law. The court of appeals therefore reversed the district court's order transferring the domain name from the registrants to the City Council.²²

Although the Fourth Circuit defended its interpretation as required by the plain language of the ACPA, the logical consequence of its reasoning is that foreign mark owners will *always* lose UDRP review cases filed by domain name registrants under section 1114(2)(D)(v). Stated another way, unless foreign mark owners can also demonstrate trademark rights under U.S. law, nothing will prevent registrants from proving that their use of the domain name embodying a foreign mark was lawful under the Lanham Act. This is so even if their conduct was egregious and would qualify as

¹⁹ After registering Barcelona.com in the U.S., the two Spanish nationals launched a web site providing information about the city. When negotiations over the sale of Barcelona.com broke down, the City Council filed a UDRP complaint seeking a transfer of the domain name. A WIPO UDRP panel agreed with the City's arguments. See *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, No. D2000-0505 (WIPO Aug. 4, 2000). But the Spanish nationals sued in the U.S. for a declaration that their use of the domain name was not unlawful under the ACPA. Although neither party had trademark rights in the name under U.S. law, the City had registered Spanish trademarks that combined Barcelona with descriptive terms such as "Teatre" and "Television." The district court applied Spanish trademark law to determine the validity of marks containing these compound words and the exclusive right of Spanish municipalities to control the registration of their names. *Id.* at 372-73, n.3.

²⁰ *Barcelona.com v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617, 626-29 (4th Cir. 2003).

²¹ 15 U.S.C. § 1114(2)(D)(v).

²² See *Barcelona.com*, 330 F.3d at 628-9.

cybersquatting under the UDRP or the ACPA (had it been challenged by a mark owner with U.S. rights).

Once foreign trademark owners appreciate the significance of the Fourth Circuit's ruling, they may attempt to channel judicial review of UDRP decisions into other national courts (presumably courts in a jurisdiction where the mark owner has rights).²³ In *Barcelona.com*, for example, the City Council, as a condition of filing its UDRP complaint, could have consented to review of the panel's decision in Spain (where the registrants were domiciled) rather than in Virginia (where the registrar had its principal office).²⁴ Had the City Council chosen this option, the registrants could have obtained an automatic stay of the panel's transfer order only by filing their complaint in a Spanish court,²⁵ where the outcome of the case might have been very different.²⁶ As this example illustrates, the UDRP contains structural features that are designed to balance the competing interests of the parties and mediate the interaction among national courts and the institutions of the non-national domain name system.

Other recent cases suggest that U.S. judges may be willing to ride roughshod over these structural features in the name of pre-

²³ Conversely, *Barcelona.com* may entice certain classes of foreign domain name registrants to seek judicial review in U.S. courts. This might be the case, for example, where a foreign cybergriper loses a UDRP dispute involving a "sucks.com" domain name and where the court of mutual jurisdiction is located in a country whose laws are less solicitous than U.S. law of the free expression dimension of such sites. For a general discussion of such cases, see Rebecca S. Sorgen, Comment, *Trademark Confronts Free Speech on the Information Superhighway: "Cybergrippers" Face a Constitutional Collision*, 22 *LOY. L.A. ENT. L. REV.* 115 (2001).

²⁴ Foreign mark owners can permissibly engage in such forum shopping under the UDRP's "mutual jurisdiction" rules. These rules require trademark owners, as a condition of filing a UDRP complaint, to consent to jurisdiction either (1) in the courts of the country in which the registrant is domiciled, or (2) in the courts of the place where the registrar has its principal office. See Policy, *supra* note 1, at ¶ 4(k).

²⁵ This is not to suggest that Spain and the United States were the only jurisdictions in which review of the UDRP panel decision in *Barcelona.com* was possible. To the contrary, both the mark owner and the registrant are free to submit their dispute to "to a court of competent jurisdiction" at any time, including after a UDRP proceeding is concluded. *Id.* Depending on the facts and their connection to particular fora, national courts *other* than the court of mutual jurisdiction might well conclude that they had the competence to hear the dispute. Litigation in such courts would not, however, trigger the automatic stay provisions that attach to complaints filed in courts of mutual jurisdiction. See Helfer & Dinwoodie, *supra* note 3, at 203, n.214 (explaining this distinction).

²⁶ The court in Spain would have had adjudicative jurisdiction to consider claims between two Spanish nationals, although the specific causes of action available to the domain name registrants and to the mark owner might be determined by analogy to established causes of action, such as unfair competition law. See *id.* at 156 and n.39.

serving the United States de facto ownership of gTLDs. A striking example of this proprietary approach occurred in *GlobalSantaFe v. globalsantafe.com*,²⁷ a case that did not involve a UDRP dispute but that has significant implications for judicial review of UDRP decisions.

In *GlobalSantaFe*, a Korean national registered with a Korean registrar a domain name which corresponded to the trademarked name of a merged U.S. corporation hours after the merger was announced. GlobalSantaFe then brought suit under the ACPA's *in rem* provision based solely on the fact that VeriSign, the registry for the .com TLD, is located in Virginia. After the district court ordered the domain name transferred to the corporation, the Korean registrant obtained an injunction from a Korean court barring the Korean registrar from transferring the domain name. The mark owner then sought an order from the U.S. court directing VeriSign, the registry, to cancel the domain name notwithstanding that such cancellation conflicted with the Korean injunction. The court acknowledged that such an order raised international comity concerns, but it refused to defer to the Korean proceedings because it had acquired jurisdiction first and resolved the dispute prior to the Korean court's injunction.²⁸

The implications of *GlobalSantaFe* for judicial review of panel rulings are profound. Speed, low cost and automatic enforcement may entice mark owners to seek domain name transfers through the UDRP. But the system imposes a *quid pro quo* for access to this quick, cheap and mandatory process. That bargain is found in the UDRP's mutual jurisdiction rules, which require the mark owner to consent to review of panel rulings either (1) in the courts of the country in which the registrant is domiciled, or (2) in the courts of the place where the registrar has its principal office. If a losing registrant files a complaint in the proper forum within ten business days of the panel's order, the registrar is contractually bound to stay the transfer of the domain name.²⁹

GlobalSantaFe permits U.S. trademark owners³⁰ to do an end run around these procedures whenever the court of mutual juris-

²⁷ 250 F. Supp. 2d 610 (E.D. Va. 2003).

²⁸ *Id.* at 624-26.

²⁹ Policy, *supra* note 1, at ¶ 4(k).

³⁰ After *Barcelona.com*, the ability of foreign mark owners to bring suit under the ACPA's *in rem* provisions is uncertain. The district court rejected the conclusion "that Congress, aware of the fact that the Internet is so international in nature, only intended for

diction is located outside the United States. By rushing to file a preemptive complaint in the judicial district where the gTLD registry is located, a U.S. mark owner with a viable ACPA claim can wrest control over a domain name even if the foreign court of mutual jurisdiction enjoins the foreign registrar from transferring the foreign registrant's domain name. The net effect of such maneuvers is a technological trump of the UDRP's jurisdictional bargain by U.S. courts applying U.S. law based solely on the location of the gTLD registries in Virginia.³¹

B. *The Response to U.S. Domain Name Hegemony*

How have other national governments responded to the extension of U.S. control over the domain name system and the UDRP? Commentators have predicted that real-space sovereigns would rebel against U.S. hegemony. They could, for example, enact cybersquatting laws that conflict with the ACPA.³² Or, far more ominously, they could engage in technological self-help by creating a rival root server outside of U.S. control, thereby segmenting the domain name system.³³

Thus far, however, these dire predictions have not come to pass. To the contrary, other governments have, for the most part, acquiesced in U.S. dominance of gTLDs in general and judicial re-

U.S. trademark owners to be protected under the Anticybersquatting statute." *Barcelona.com v. Excelentísimo Ayuntamiento de Barcelona*, 189 F. Supp. 2d 367, 373 (E.D. Va. 2002), *rev'd*, 330 F.3d 617 (4th Cir. 2003). The court of appeals did not address this issue because the City Council of Barcelona had neglected to file any counterclaim against the registrants. *Barcelona.com v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d at 629 (4th Cir. June 2, 2003). It appears, however, that the court's requirement of U.S. trademark rights to defend against a claim under § 1114(2)(D)(v) would pretermit affirmative claims for relief by foreign mark owners under § 1125(d), since any other construction would lead to inconsistent resolution of a two claims concerning identical facts.

³¹ Note that the court in *GlobalSantaFe* equated the location of the actual hardware that constitutes the gTLD server with the location of the registry. VeriSign's database is in fact located in the United States, although there is no technological requirement for this placement. In any event, the court's jurisdiction over the registry would likely lead to the same result regardless of where the database was located.

³² See Hughes, *supra* note 11, at 380 (noting Clinton Administration initially opposed passage of the ACPA, fearing that the statute "would be a green light for other countries to write their own unique cybersquatting laws").

³³ See Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 BERKELEY TECH. L.J. 989, 1031-34 (2002) (discussing ways in which other national governments could segment the domain name system).

view of UDRP panel rulings in particular. There are several plausible reasons for this acquiescence.

First, given that nearly half of all UDRP disputes involve U.S. mark owners or U.S. registrants,³⁴ it may be that other governments simply don't care if their interests are represented in the UDRP or in the review of panel rulings. Moreover, even governments that do want trademark-domain name disputes take into account that their national values may be content to let the U.S. serve as the world's domain name policeman. Litigation consumes resources and time for governments as well as private parties, and the outcomes in U.S. courts often mirror those that would be obtained in local tribunals. It also bears remembering that states have significant influence in WIPO's domain name process, through which they can shape the UDRP while remaining largely aloof from national court review panel rulings.³⁵

A second explanation for acquiescence to U.S. dominance is the ability of governments to control their increasingly valuable country code domains. A recent study by Michael Geist shows that ccTLD regulation is a patchwork of different forms of government control.³⁶ But most ccTLD registries operate with at least the tacit approval of the state, and where such approval does not exist, gov-

³⁴ See, e.g., WIPO Arbitration Center: Geographical Distribution of Parties cumulative: gTLDs, *available at* <http://arbiter.wipo.int/domains/statistics/cumulative/countries.html>.

³⁵ On Feb. 21, 2003, WIPO transmitted to ICANN two decisions of the WIPO General Assembly relating to the UDRP. See Letter From Francis Gurry, Assistant Director General of WIPO to Dr. Vinton G. Cerf and Dr. M. Stuart Lynn, *available at* <http://ecommerce.wipo.int/domains/wipo.doc>. The first decision stated that the UDRP should be modified to allow Intergovernmental Organization ("IGOs") to file complaints in respect of abusive registration of their protected names and acronyms, subject to a special appeal procedure for de novo arbitration rather than review in national courts to preserve the immunities IGOs enjoy. The second decision provided that short and long names of nation states should be protected against identical and misleadingly similar registrations as domain names by persons unconnected with the constitutional authorities of the states concerned. The first decision was supported by all WIPO member states except the U.S.; the second was supported by all states except the U.S., Canada, Australia, and Japan. If ICANN acts favorably upon these decisions, WIPO soft law processes may become an increasingly important mechanism for national governments to influence the UDRP, even in the face of U.S. opposition.

³⁶ See ccTLD Governance Project, *available at* <http://www.michaelgeist.ca/ccTldinfo/>; see also Michael Geist, *Governments Hold Reins in Those National Domains*, TORONTO STAR, Mar. 10, 2003, *available at* http://www.torontostar.com/NASApp/cs/ContentServer?pagename=Thestar/Layout/Article_Type1&c=Article&cid=1035778927272&call_pageid=968350072197&col=969048863851.

ernments like Colombia³⁷ and South Africa³⁸ are intervening. Indeed, one official has characterized ccTLDs as a “key public resource [that] helps to promote . . . [a] country’s future social and economic development.”³⁹ States can manifest their sovereignty over ccTLDs by adopting registration and dispute settlement rules that deviate from the UDRP’s off the rack model (as was recently done in China, the Philippines, Australia, and Canada), or that do not provide any dispute settlement mechanism at all (as is the case in some ccTLDs with economically significant English meanings, such as “.CD,” “.FM,” and “.AM”).⁴⁰ In short, as long as states can exercise dominion over their respective country code domains, it is not clear that they will object to U.S. dominance over the UDRP and gTLDs.

However, if the extremely low rate of judicial review of UDRP decisions persists, or if the UDRP expands to become the de facto global standard for all intellectual property-domain name disputes, national governments might rationally seek to tailor the UDRP to their own conceptions of IP protection, electronic commerce, and free expression. National courts could, for example, treat UDRP review cases not merely as occasions to apply national laws, but also as opportunities to guide UDRP panels in analyzing national law issues, such as the validity of registered trademarks or unregistered marks used within their borders, or the expressive or competitive effects of web sites operated by domain name regis-

³⁷ When a Columbian university that operated the “.co” TLD publicized its intent to enter into a contract with a private corporation to market “.co” as an alternative to “.com,” the Colombian government intervened, declaring that the “.co” DNS was “a resource of a public nature” subject to intervention by the Ministry of Communications. Does the domain “.co” have a public nature? Does the Colombian State have the authority to regulate it? See International Telecommunications Union, Workshop on Member States’ experiences with ccTLD, Doc 011-E at 1 (Mar. 3-4, 2003); see also Kieren McCarthy, *.uk.co Domain Wiped Off Face of Internet*, THE REGISTER, Feb. 17, 2003, available at <http://www.theregister.co.uk/content/6/29359.html> (describing the “battle between the university and the government of Colombia over the .co domain”).

³⁸ See Kim G. von Arx & Gregory R. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs From Foreign Control*, 9 RICH. J.L. & TECH. 1 ¶ 23 (2002) (stating that “South Africa took a sweeping step in affirming control over its own .za ccTLD when it promulgated its Electronic Communications and Transactions Bill” in March 2002, which “in essence de-privatized the ccTLD”).

³⁹ Letter from Michael Binder, Assistant Deputy Minister, Industry Canada, to Robert Hall, Chair, Canadian Internet Registration Authority, Mar. 11, 1999, available at www.iana.org/reports/industry-canada-letter-11mar99.htm.

⁴⁰ See WIPO Ecommerce ccTLD Database, at <http://ecommerce.wipo.int/databases/ccTld/output.html>. Note that many other ccTLDs have adopted the UDRP, including the commercially valuable “.TV” and “.MD” ccTLDs. *Id.*

trants targeting national markets. Thus far, most courts have been reluctant to review the reasoning or analysis of UDRP panels.⁴¹ However, nothing precludes a more robust dialogue between panelists and judges from emerging.⁴²

III. A COSMOPOLITAN UDRP

If judicial review of panel rulings generates a robust dialogue among panelists and national courts, the UDRP would become significantly more cosmopolitan and subjected to a profusion of diverse influences. This could lead in one of two directions. It could build a digital Tower of Babel, in which a smorgasbord of rule choices leaves the parties profoundly uncertain over potential outcomes. Or, it could turn the dispute settlement system into a laboratory for choice of law issues, allowing panels to develop a fund of practical knowledge that considers when particular national or non-national values should be given effect. If sufficiently well developed, that learning could eventually influence transnational cybersquatting cases being litigated in national courts.⁴³

Panels could enhance the likelihood of the second alternative and mitigate the risk of jurisprudential schizophrenia that a more cosmopolitan UDRP poses by turning to soft law, such as the WIPO Standing Committee on the Law of Trademarks, Industrial

⁴¹ Some courts have even overturned prior panel orders without so much as acknowledging the existence of a prior UDRP dispute. *See Referee Enterprises, Inc. v. Planet Ref, Inc.*, No. 00-C1391, 2001 U.S. Dist. LEXIS 9303 (E.D. Wis. Jan. 24, 2001), *available at* http://www.Loundy.com/CASES/Referee_Ent_v_Planet_Ref.html.

⁴² Evidence that such a dialogue may finally be starting in earnest appears in *Retail Services, Inc. v. Freebies Pub.*, 247 F. Supp. 2d 822 (E.D. Va. 2003), in which the district court went out of its way to discuss and critique the panel's reasoning. Interpreting the "bad faith" requirement common to both the ACPA and the UDRP, the court held that "there was insufficient evidence before the arbitrator and in this record to sustain a finding that plaintiff registered the domain name in bad faith." *Id.* at 828. The court specifically engaged the panel on its assessment of the evidence, respectfully disagreeing with the panel's reasoning but helpfully noting where the panel had gone astray. *Id.* at 828-29, at n.6. The court's extensive assessment of the panel's conclusions and its focus on a key point of commonality in both the ACPA and the UDRP suggest a deliberate effort to cross-fertilize between national and non-national systems.

⁴³ Ethan Katch's proposal for a comprehensive database to facilitate the locating, indexing, and categorizing of UDRP panel decisions, if adopted, would create an important tool for panelists to generate the coherent jurisprudence that is essential for developing such a fund of knowledge. *See Memorandum from Ethan Katch to UDRP Task Force* (Dec. 1, 2002), *available at* <http://www.disputes.org/udrp/> (regarding recommendations for improving access to UDRP panel decisions).

Designs and Geographical Indications.⁴⁴ The Committee's 2001 report on the "Protection of Industrial Property Rights in Relation to the Use of Signs on the Internet," for example, could help panels decide when the territorial effects of a domain name's global presence amount to use within a particular country and justify the application of that country's laws.⁴⁵

IV. CONCLUSION

The future direction of the UDRP is undoubtedly a critical issue for institutions such as ICANN and WIPO. This issue is also important, however, for advocates of internal reforms of the UDRP. The procedural and institutional questions that such internal reforms raise are inextricably linked to the dispute settlement system's external relationships to national laws and to national courts.

⁴⁴ See Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, available at http://www.wipo.org/eng/document/sct/index_5.htm.

⁴⁵ See Protection of Industrial Property Rights in Relation to the Use of Signs on the Internet, SCT/5/2 (June 21, 2000), available at http://www.wipo.org/sct/en/documents/session_5/pdf/sct5_2.pdf. The report is not limited to domain name disputes. Nor does it attempt to harmonize choice of law issues. But the variables it identifies could serve as a starting point for choice of law inquiries by judges and UDRP panelists.