UNCHARTED DOMAINS AND THE NEW LAND RUSH: INDIGENOUS RIGHTS TO TOP-LEVEL DOMAINS

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"[Former French President Nicolas] Sarkozy like many others—I include myself—tie ourselves in knots when we try to define the new world in the terms of the old. He is trying to put the net under some new form of international governance among those he anoints as the good guys, our benevolent new overloads. When I call it the eighth continent, I treat it as a new land to be conquered. Let me try another way."

—Jeff Jarvis, author and professor[1]

INTRODUCTION

It is a truism that the proliferation of the Internet offers hope to those who otherwise lack access to education, resources, wealth, and democracy. Indeed, recent Twitter revolutions (named as such from social media's role in mobilizing and organizing citizens and groups) came to stand for endorsements of democratic values against existing totalitarian power structures. At the same time, however, governments have not stood by idly as revolts occurred. They too have organized for power in the new Internet world that is commonly regarded as anarchist. Existing

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[1] Jeff Jarvis, *e-G8: A discussion about sovereignty*, BUZZ MACHINE (June 3, 2011), http://buzzmachine.com/2011/06/03/e-g8-a-discussion-about-sovereignty/.

legal structures have expanded to apply to this uncharted world. Property law has expanded to adapt old models to a stronger, more-defined intellectual property sphere. With these expansions, the result is perhaps unsurprising: New legal structures have developed based on existing rights and assignments. For indigenous tribes in America and internationally, it represents an all-too familiar struggle for economic and cultural rights amidst a technological backdrop.

In this paper, I will argue that the failure to assign country codes to indigenous tribes has deprived sovereign nations of economic opportunities and intellectual property rights and protections associated with top-level domain assignments and administration. Part I outlines the recent opening up of top-level domains to generic names. It also goes into a brief history of top-level domain assignments, including those issued to countries as country code top-level domains. Part II provides examples of how sovereign entities and cultural groups that were not part of initial top-level domain delegations have mobilized for assignments. Part III attempts to critically examine the systematic hierarchy that continues to exclude sovereigns today, particularly through the contexts of critical race theories, federal Indian law and property rights regimes in the United States. Because of the potential implications resulting from this exclusion, this paper will explore domestic and international safeguards and options for indigenous tribes, as well as possible remedies to this problem.

PART I: ICANN TRIGGERS NEW LAND RUN

In January 2012, the Internet Corporation for Assigned Names and Numbers (ICANN) opened up the universe of top-level domains to new registrations.[2] As a non-profit, California-based organization formed in 1998 to help coordinate the Internet's unique identifiers, such as

[2] *New gTLDs Update: Applications Accepted Today; New Guidebook Posted; Financial Assistance for Qualifying Applicants*, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS [hereinafter ICANN] (Jan. 11, 2012), http://www.icann.org/en/news/announcements/announcement-11jan12-en.htm.

domain names,[3] ICANN's steps did not surprise most of the organization's followers. The idea to expand the domain name universe had actually been in the works for at least a decade by then.[4] What was noteworthy about the expansion, however, was the procedures for attaining a top-level domain and the applications that ultimately resulted.

A domain name is generally a series of alphanumeric characters or strings that forms part of a corresponding address for a computer network.[5] For instance, the domain name of my graduate institution is asu.edu, which corresponds to a unique numeric address that directs me to Arizona State University's homepage whenever I type in this string. Everything to the right of the dot in a string is considered the top-level domain. Thus, in the string www.asu.edu, the .edu is considered a generic top-level domain, or gTLD. Although a user reads a domain name from left to right, the underlying technology of the Internet reads names from right to left.[6] After I type in www.asu.edu, my computer will query a name server hierarchy with the translated version of that domain, which is typically a set of numbers. The query moves up levels—from top (.edu) to secondary (.asu), and if applicable, higher levels—until it finds a unique match and displays ASU's webpage. Up until now, most new domain name registrations occurred at secondary or third (for example, law.asu.edu) levels, not the top.

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[3] *See What Does ICANN Do?* ICANN, http://www.icann.org/en/about/participate/what (last visited Mar. 22, 2013). For an argument that ICANN's actions either violate the Administrative Procedure Act or the constitutional non-delegation doctrine, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 125-153 (2000).

[4] *See, e.g.,* ICANN, *supra* note 2; Sascha Meinrath & Elliot Noss, *ICANN, Make a Difference*, SLATE.COM (Nov. 27, 2012 at 1:46 PM), http://www.slate.com/articles/technology/future_tense/2012/11/icann_s_gtld_auction_proceeds_should_be_used_to_bring_mesh_technologies.html ("ICANN's new generic top-level domain process has been dragging on for years—basically since the organization's inception in 1998.").

[5] *Definition of domain name*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/domain (last visited Mar. 22, 2013).

[6] Erica Schlesinger Wass, *Introduction: Lots of Dots*, *in* ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS, xi (Erica Schlesinger Wass ed., 2003).

A. Investment Opportunities Abound for Those up to the TAS

At the time of ICANN's announcement in 2012, there were twenty-two gTLDs in use in the domain namespace,[7] with .com being the most popularly used worldwide.[8] ICANN's decision to open up new gTLDs had the potential to make the number of new TLDs limitless. Echoing early questions on Internet governance, including the origins of ICANN in general, the opening up of domain names implicated economic consequences, property and trademark issues, and in the United States, First Amendment questions.[9] By now, as was the case when ICANN was formed, it is clear that domain names hold economic value. As one professor who has written extensively on Internet governance put it, domain names "are valuable resources, a kind of virtual real estate that can be bought and sold."[10]

Yet the administrative costs of applying for a TLD and subsequently running a registry deterred some applicants. Those who wished to register a new TLD had to work with the often glitchy and cumbersome TLD Application System (TAS). Application problems were common, with TAS often down or otherwise not properly functioning closer to the submission deadline.[11] As perhaps a sentiment on just how cumbersome the process was, ICANN later reported that

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[7] ICANN, *gTLD Applicant Guidebook* [hereinafter *Guidebook*], 2 (June 4, 2012), newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf.

[8] *Monthly Registry Reports*, ICANN (August 2012), http://www.icann.org/en/resources/registries/reports (drop down to "com" in "Registry" box, then follow PDF or CSV hyperlinks) (indicating more than 106 million domains registered under .com); Anick Jesdanun, *VeriSign wins .com renewal, but can't hike prices*, ASSOCIATED PRESS (Nov. 30, 2012, 6:29 PM), http://finance.yahoo.com/news/verisign-wins-com-renewal-cant-154647435.html.

[9] *See, generally,* MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 8–9 (2002) (outlining conflicts that arose over decisions of who would have the right to register early TLDs).

[10] *Id.* at 6.

[11] *See, e.g.*, *TAS Temporarily Offline*, ICANN (April 12, 2012), http://www.icann.org/en/news/announcements/announcement-12apr12-en.htm; Akram Atallah, *TAS Interruption - Update*, ICANN (May 2, 2012), http://www.icann.org/en/news/announcements/announcement-2-02may12-en.htm (noting more than 100 applicants might have had their files viewed by other applicants and extending open application period as a result).

many applications appeared to have typos within the TLD, which required reviewers to clarify what TLD the applicant was proposing to register.[12]

To apply for a TLD, an applicant was required to submit an $185,000 application fee.[13] Industry insiders estimated that if the registry was granted, subsequent administration of the gTLD would cost at least $25,000 annually.[14] This did not include the human capital that was required to submit an application through TAS and maintain the registry thereafter, if maintenance was kept in house.[15] Considering these costs, others have put the monetary estimate of applying for a gTLD at $500,000 and upwards of $20 million if the gTLD goes to auction.[16]

Public and private auctions are one type of dispute resolution process within ICANN if applications for identical or similar names manifested. Its existing dispute resolution procedures for general domain disputes encourage private negotiations between parties.[17] This may be ideal for a dispute involving only two or relatively few parties, where losing parties could leave with a settlement rather than ICANN receiving auctioned-off domain funds or fees from internal dispute processes.[18] ICANN's policy also includes public objection and dispute resolution options for competing domains. Under those procedures, one could object on the grounds that an applied-for string is confusing (too similar to an existing TLD or another application string); infringes on the challenger's legal rights; is against the public interest (an applied-for string is contrary to

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[12] *See,* ICANN, *Transcript: Applicant Webinar – Start of New gTLD Initial Evaluation*, 4 (Aug. 9, 2012), http://newgtlds.icann.org/en/announcements-and-media/transcript-start-initial-evaluation-09aug12-en.pdf (noting post-application closing requests for changes for simple typos); ICANN, *Transcript: ICANN 45 Toronto – New gTLD Update for Applicants*, 4 (Aug. 9, 2012), http://toronto45.icann.org/meetings/toronto2012/transcript-new-gtld-update-15oct12-en.pdf (pointing out "mistakes in attaching objections, typos, changing string names, changes of primary contact as organizations morph.").

[13] *Guidebook*, *supra* note 7, § 1.5, at 44–46.

[14] *Id.* at §5.4.1, at 222–27.

[15] *See, id.* at §5.4.1 (outlining what is expected of a registry operator, including implementation of compliance policies and start-up protection measures, delivery of monthly reports, and providing WHOIS service).

[16] DomainIncite, *ICANN new gTLD discussion panel*, YOUTUBE, 14:33–16:14 (Sept. 29, 2011), http://www.youtube.com/watch?v=mtltGGO-4WM.

[17] *Guidebook*, *supra* note 7, §4.1.3, at 190.

[18] *See, e.g.*, *id.* at §1.5.2, at 46–46 (outlining dispute resolution filing fees).

public morality and interest); or is opposed by a targeted community (substantial opposition to the gTLD application from a significant portion of an affected community).[19]

Within gTLDs are sub-categories that allow for registration of cultural or linguistic names; city names; sub-national places (states, counties, and provinces); and UNESCO region names (macro geographical or continental regions). Applicants who wished to apply for a geographic term as their TLD were required to provide documentation showing that the relevant government or public authority approves of or does not object to its application.[20] Outside these gTLD categories and already in existence are country code top-level domains, also known as ccTLDs.[21] With its new application process, applicants may propose TLDs under any of the aforementioned categories, except for ccTLDs or geographic regions without proper governmental approval.[22]

On June 13, 2012, also known as Reveal Day, ICANN revealed the 2012 applicants for new TLDs.[23] International and American organizations, including corporate entities, vied for gTLDs.[24] For instance, Google applied for 101 TLDs.[25] gTLD applications included requests for .books, .wtf, .sex, .lol, and .law.[26] As expected, branded gTLD applications were also

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19 *Id.* at § 3.2.1, at 151–52; *Objection and Dispute Resolution*, ICANN, http://newgtlds.icann.org/en/program-status/odr (last visited Mar. 22, 2013).

20 *Id.*

21 *See infra*, Part B; E-mail from Eric Brunner-Williams, Chief Technology Officer of Wampumpeag (March 12, 2013) (on file with author) [hereinafter Mar. 12 Brunner-Williams e-mail]. As Brunner-Williams pointed out, ISO-3166 "country codes" represent not only countries but also territories. *Id.* For instance, Palestine and European Union have been assigned .ps and .eu, respectively. *See id.* The United States has had several code points, consolidated now as "United States Minor Islands," but none for Indian country. *Id.*

22 *Id.*; *Guidebook*, *supra* note 7, § 2.2.1.4.1, n.6 at 67–68.

23 *New Top-Level Domain Name Applications Revealed: Historic Milestone for the Internet's Domain Name System*, ICANN (June 13, 2012), http://www.icann.org/en/news/announcements/announcement-13jun12-en.htm.

24 *Reveal Day 13 June 2012 – New gTLD Applied-For Strings*, ICANN, http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en (last visited Mar. 22, 2013).

25 *Id.*; Chris Barth, *Amazon Just Spent Millions Applying For Domain Names. Why?* Forbes.com (June 13, 2012, 12:56 PM), http://www.forbes.com/sites/chrisbarth/2012/06/13/amazon-just-spent-millions-applying-for-domain-names-why/ (reporting Google's Charleston Road Registry number of submitted applications).

26 *See, Reveal Day*, *supra* note 24.

popular, with applications for strings like .coke, .godaddy, and .google.[27] Geographic and cultural identity submissions included .africa, .arab, .dotafrica, .eus, .irish, .lat, .latino, .scot, .swiss, .thai, and .zulu.[28] A company based in India, Reliance Industries Limited, applied for the cultural identity TLD of .indians.[29]

After the first round of gTLD applications was revealed, ICANN's Governmental Advisory Committee (GAC), which comprised of representatives from numerous countries, met.[30] In a GAC public session, the Argentinian representative expressed her country's opposition to the outdoor company Patagonia, Inc.'s application for the branded gTLD .patagonia.[31] Her opposition was also later directly memorialized to ICANN in correspondence:

> Argentina has expressed its concern about [.patagonia as a branded gTLD]. Patagonia is a region of Argentina that comprises the provinces of the south of the country. It is a vast and beautiful region, it is well known by the beauty of its landscapes, it is a relevant region for our economy because it has oil, fishing, mining and agricultural resources. It is also a region with a vibrant local community. . . . [I]f the TLD .patagonia is granted to a private company as a closed brand TLD without the corresponding authorization of the relevant government of the provinces that comprise Patagonia and of the national government, this will be a precedent for future rounds of new gTLD requests and then other regional names could be captured by brands.[32]

Because Patagonia does not clearly fall into any of the geographic categories as a city, sub-national place, or UNESCO region,[33] it is not clear that the branded gTLD .patagonia would be denied under not receiving Argentina's or any local government's approval. Although the Patagonia region encompasses five different provinces in the country, Chile also includes the

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27 *Id.*
28 *Id.*
29 *Id.*
30 *Prague: ICANN 44 | 24-29 June 2012*, ICANN, http://prague44.icann.org/ (last visited Mar. 22, 2013).
31 ICANN, *Transcript: PRAGUE – Public Forum*, 132 (June 28, 2012), http://prague44.icann.org/meetings/prague2012/transcript-public-forum-28jun12-en.pdf.
32 Letter from Alfredo Morelli to Steve Crocker (Aug. 3, 2012), ICANN, http://www.icann.org/en/news/correspondence/morelli-to-crocker-03aug12-en.pdf.
33 *Guidebook*, *supra* note 7, § 2.2.1.4.2, at 68–70.

region within its borders but has not expressed its disapproval of .patagonia.[34] In discussing disputes between sovereign countries, however, it should be noted that Argentina and Chile both already have authority to operate a TLD registry of their own—their country code TLDs.[35]

B. Country Code TLDs: The Boomer Sooners of the Twentieth Century

In ICANN's 2012 new application process, ccTLDs were off limits because many were already assigned.[36] In fact, ccTLDs were implemented during the early days of the Internet, before they held any real value outside of academia.[37] Today, there are more than 250 ccTLDs, with total registrations under ccTLDs reaching approximately 84 million in 2011.[38] As a private domain name management company noted, second-level registrations under a ccTLD has advantages of a registrant being perceived as more trustworthy from local web visitors.[39] Additionally, registration under a ccTLD is an alternative domain name option if the .com TLD is already taken.[40] ccTLD registrations also allow for stronger geographical targeting by search engines.[41] In order to understand the evolution of ccTLDs, it is important to understand the beginnings of the Internet domain naming system and how ccTLDs were originally assigned.

Commonly known as one of the founding fathers of the Internet for his integral role in creating the hierarchical organizational structure in the Domain Name System (DNS),[42] Jon

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[34] Fairwinds Partners, *.UHOH: Patagonia, Inc.'s Application for .PATAGONIA gTLD in Hot Water*, A FAIRWINDS BLOG (June 29, 2012), http://www.gtldstrategy.com/technical-details-vendor-advice/uhoh#more-552.

[35] Specifically, Argentina's ccTLD is .ar; Chile's is .cl. *Root Zone Database*, INTERNET ASSIGNED NAMES AUTHORITY [hereinafter *Root Zone Database*], http://www.iana.org/domains/root/db/ (last visited Mar. 22, 2013).

[36] *Guidebook*, *supra* note 7, § 2.2.1.4.1, n.6 at 67–68.

[37] Schlesinger Wass, *supra* note 6, xii.

[38] *ccTLD Database*, WIPO ADR: ARBITRATION AND MEDIATION CENTER, http://www.wipo.int/amc/en/domains/cctld_db/index.html (last visited Mar. 22, 2013); *Net Names can register any Country Code Top Level Domain (ccTLDs)*, NETNAMES, http://www.netnames.com/domain-name-management/domain-services/cctlds (last visited Mar. 22, 2013).

[39] *Net Names*, *supra* note 38 ("Anyone can obtain and own a .com domain name, but having a more specific domain such as a ccTLD may seem more trustworthy and official").

[40] *Id.*

[41] *Id.* (noting that "in some countries such as Sweden, local search results will show preference to websites with the appropriate ccTLD").

[42] *Jon Postel Condolences and Remembrances*, Internet Society (ISOC), http://www.isoc.org/postel/

Postel catapulted TLDs—and the registration structures that underlie it—to its current status. In the 1980s, Postel, along with fellow computer scientists and engineers, developed a new addressing scheme that would open ARPANET to what is now known as the Internet.[43] By 1984, the group expanded TLDs from beyond .arpa, initially the only ending for network addresses.[44] Because of the group's efforts, gTLDs like .com soon joined the more than 240 ccTLDs that opened up.[45] Initially Postel delegated ccTLDs to anyone who requested one, and whom Postel considered a "responsible person" and trustworthy enough to manage a ccTLD.[46] In fact, the informal delegation process often bypassed institutions in other countries that typically had control over the country's communications. Because many countries at the time were not connected to the Internet, the demand for running a ccTLD was initially low.[47] When conflicts between countries did arise, however, Postel encouraged parties to come to a resolution on their own.[48]

By 1989, perhaps foreseeing a future demand for services, Postel created the government-funded Internet Assigned Numbers Authority (IANA).[49] As others have put it, in its early days,

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condolences.shtml (last visited Mar. 22, 2013).

[43] Schlesinger Wass, *supra* note 6, xii.

[44] *Id.*

[45] *Id.*

[46] *Id.*; Peter K. Yu, *The Never-Ending ccTLD Story*, *in* ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS, 3 (Erica Schlesinger Wass ed., 2003) ("[T]he person in charge of assigning second-level domain names 'is generally the first person that asks for the job (and is somehow considered a "responsible person.")' (citing MUELLER, *supra* note 9, at 88).

[47] Schlesinger Wass, *supra* note 6, xii; Peter K. Yu, *supra* note 46 (adding that "[e]ven when they needed one, ccTLD delegations usually fell into the hands of university computer science departments and educational and research networking organizations rather than government agencies and organizations that historically provided postal, telephone, or telegraph services") (citing MUELLER, *supra* note 9).

[48] Schlesinger Wass, *supra* note 6, xii.

[49] *Id.* at xiii.

Postel not only ran the IANA, but was the IANA.[50] The organization still exists today and maintains the current list of codes that become ccTLDs.[51]

In one of the early papers of the IANA, Postel wrote, "The IANA is not in the business of deciding what is and what is not a country."[52] As such, he further explained, IANA would designate new ccTLDs based on a preexisting list of country codes provided by the International Organization for Standardization (ISO). He reasoned that "ISO has a procedure for determining which entities should be and should not be on that list."[53] True to Postel's words, IANA's website currently echoes Postel through its statement that the organization "is not in the business of deciding what is and what is not a country."[54] Today, IANA continues to assign ccTLDs through ISO country codes.[55]

ISO is an independent, non-governmental federation of 164 member bodies that develops voluntary international standards.[56] With representatives' input from its national standards bodies, its mission is to help promote the development of standardization and related activities to ease international exchange of goods and services.[57] In 1974, ISO published ISO 3166, which became the international standard for country codes used in global mail processing and other international trade.[58] Since then, in order to account for subdivisions and country names that are

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[50] *Id.* (citing *e.g.,* Memorandum from Vinton G. Cerf, RFC 2468: I remember IANA (Oct. 17, 1998), *available at* http://tools.ietf.org/html/rfc2468).

[51] *Domain Name Services*, IANA, http://www.iana.org/domains/ (last visited Mar. 22, 2013).

[52] Memorandum from Jon Postel, RFC 1591: Domain Name System Structure and Delegation (March 1994), *available at* https://tools.ietf.org/html/rfc1591.

[53] *Id.*

[54] *Procedure for Establishing ccTLDs*, IANA, http://www.iana.org/procedures/cctld-establishment.html (last visited Mar. 22, 2013) [hereinafter *Procedure for Establishing ccTLDs*].

[55] *Id.*; *Guidebook*, *supra* note 7, § 2.2.1.4.1, n.6 at 67–68.

[56] *About ISO*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION [hereinafter ISO], www.iso.org/iso/home/about.htm; *ISO members*, ISO, http://www.iso.org/iso/home/about/iso_members.htm (last visited Mar. 22, 2013).

[57] *ISO Standards in Action*, ISO, http://www.iso.org/iso/home/news_index/iso-in-action.htm (last visited Mar. 22, 2013).

[58] *Country Codes - ISO 3166*, ISO, http://www.iso.org/iso/home/standards/country_codes.htm (last visited Mar. 22, 2013).

no longer in use, the original ISO 3166 publication was expanded into three parts—ISO 3166-1, ISO 3166-2:2007, and ISO 3166-3:1999.[59] Of these, the ISO 3166-1 codes have been used to create ccTLDs for countries, such as .us for the United States, .fr for France, .ca for Canada, .br for Brazil, and so on.[60]

ISO's listed countries derive from United Nations sources, specifically from the U.N. Statistics Division and the U.N. Terminology Bulletin.[61] Once either organization publishes new names and codes, ISO automatically adds those names and codes to the ISO 3166-1.[62] Names for subdivisions are taken from relevant official national information sources.[63] IANA then makes available ccTLDs for countries and subdivisions that appear on ISO 3166 lists, should a representative of that region apply to maintain the registry.[64]

Responding to individuals and entities interested in obtaining a TLD through inclusion into ISO 3166 (subsequently resulting in a ccTLD), the ISO maintenance agency noted that "[s]uch requests are absolutely futile."[65] The agency added that in order for a sovereign to be listed, it must be registered in either the United Nations Terminology Bulletin *Country Names* or *Standard Country or Area Codes for Statistical Use* of the U.N. Statistics Division.[66] Those in *Country Names* were either U.N. member countries, U.N. members of one of its specialized

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59 *Id.*

60 *Id.*; ISO 3166-1 decoding table, ISO, http://www.iso.org/iso/home/standards/country_codes/iso-3166-1_decoding_table.htm (last visited Mar. 22, 2013) (laying out all code elements in the alpha-2 code of ISO's country code standard).

61 *Country Codes*, *supra* note 58, *What is ISO 3166?*

62 *Id.*

63 *Id.*

64 *See Procedures and Guides*, IANA, http://www.iana.org/domains/root/procedures (last visited Mar. 22, 2013).

65 *Procedure for Establishing ccTLDs*, *supra* note 54.

66 Current list of listed countries available at *Countries or areas, codes and abbreviations*, UNITED NATIONS STATISTICS DIVISION, http://unstats.un.org/unsd/methods/m49/m49alpha.htm (last updated Sept. 20, 2011).

agencies, or a party to the Statute of the International Court of Justice.[67] If the country's name is not on either of the U.N. lists, it will not be incorporated into the ISO 3166-1.[68]

Like gTLDs, ownership or licensing rights to popular ccTLDs can potentially generate significant revenue. For instance, Internet entrepreneur and former doctor Kevin Ham reportedly built a $300 million empire based on buying and selling domain names.[69] Part of his business portfolio included assets from his registration of domains in the second level, such as from his registration and administration of popular-sounding names like God.com and Satan.com.[70] His portfolio also included generic names like weddingshoes.com, targeting those who did not use search engines but preferred to type their search directly as a domain.[71]

But Ham did not limit his business to buying and selling publicly available domains; he also approached governments with desirable ccTLDs. The African country of Cameroon, for instance, happened to have been assigned the ccTLD of .cm, which is a typo away from .com.[72] Ham made connections with Cameroon governmental officials and partnered up with them, registering domains under their ccTLD, .cm.[73] As a result, those who accidentally entered .cm instead of .com for popular websites (such as facebook.cm or newyorktimes.cm), were directed to Agoga.com, which included Yahoo! advertisements. Users who clicked on the advertisements generated revenue for Ham and Cameroon.[74]

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67 *Procedure for Establishing ccTLDs*, *supra* note 54.

68 *FAQs-General Questions: What is the procedure for adding new country names and codes to ISO 3166-1?* ISO (archived on June 6, 2011), http://web.archive.org/web/20110606080232/http://www.iso.org/iso/country_codes/iso_3166-faqs/iso_3166_faqs_general.htm; E-mail from Doug Ewell to LTRU Working Group at Internet Engineering Task Force (July 12, 2005), http://www.ietf.org/mail-archive/web/ltru/current/msg02724.html.

69 *The Man Who Owns the Internet*, CNN.COM (May 22, 2007), http://money.cnn.com/magazines/business2/business2_archive/2007/06/01/100050989/index.htm (last visited Mar. 22, 2013).

70 *Id.*

71 *Id.*

72 *Id.*; *Root Zone Database*, *supra* note 35 (listing .cm as registered to Cameroon Telecommunications (CAMTEL)).

73 CNN.COM, *supra* note 69.

74 *Id.*

As Ham's ventures demonstrate, the potential of TLDs to bring economic growth for countries and regions has not gone unnoticed by investors and the media. Some suggest that domain auctions could generate up to $100 million in domain sales for regions in Africa.[75] Yet to attain a ccTLD, that sovereign must be placed on one of the U.N. lists in order to appear on ISO's list, which then gets assigned a ccTLD from IANA.[76] For many sovereigns that do not appear on the U.N. list, this results in what appears to be a Hobson's choice: register a gTLD through ICANN's next opening round for applicants, or forego managing a TLD altogether.

PART II: FIGHTING BACK AGAINST NEOCOLONIALISM ON THE NET

Aside from increased economic opportunities associated with delegating and administering a top-level registry, many organizations applied for a branded gTLD for defensive purposes. For instance, one consulting director who specialized in domain name management noted that along with the potential for innovation and security, company representatives cited intellectual property protection as impetus for registering their brand.[77] By administering their own branded gTLD, companies could prevent others from registering their names and potentially infringing on their intellectual property. Higher-end companies were especially interested in protecting their brand in this way.[78] Additionally, the consulting director noted that a branded gTLD could improve the company's domain security, as the new program represented a sort of "privatization of the Internet."[79] A company that had its own gTLD could secure it through claiming ownership of its own "chuck" or "island" of that new, private world.[80]

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75 Sascha Meinrath & Elliot Noss, *supra* note 4.

76 *See Procedure for Establishing ccTLDs*, *supra* note 54.

77 DomainIncite, *supra* note 16, at 6:05 (Lorna Gradden, director of Com Laude, cited IP protection, communication, security, and innovation as reasons driving companies to seek a branded gTLD).

78 *Id.*

79 *Id.*

80 *Id.*

Those that do not have their own TLD, like indigenous tribes, similarly face the possibility for IP infringement, which could hinder their economic opportunities. But indigenous tribes and individuals are also in the unique position of potentially facing cultural violence associated with such infringement. And in an increasingly Internet-based world, there are affirmative and broader implications of sovereignty and recognition for tribes with TLDs. Already cultural groups have reported a type of resurgence correlated with the granting of its TLD.

In recognizing the benefits of obtaining a TLD, and notwithstanding their exclusion from the U.N. lists that resulted in ccTLD assignments, unrecognized entities and cultural groups have previously mobilized for TLDs. Petitions were successful on an ad hoc basis. For instance, in 2004, Fundació puntCAT (English translation: catalan for dotCAT Foundation) successfully applied for its sponsored top-level domain, .cat.[81] As the chief technology officer for the Catalan application reported, after .cat was granted in 2004, neither he nor the applicants themselves predicted that they "would be creating a renaissance of Catalon writing, that a Google search in 2010 would show an explosion of Catalon content."[82] The Catalon language had seemingly resurged from its once endangered status.[83] Since .cat, other groups have unofficially proposed their own cultural strings, including .gal (Galacia), .eus (Basque), .scot (Scotland), and .krd (Iraqi Kurdistan).[84]

Another instance of an ad hoc granting of a TLD involves Palestine, which successfully lobbied for and was eventually assigned the ccTLD .ps. In 1995, after the U.N. Statistics Division added Palestine to its interim list of area names, ISO reserved .ps as Palestine's code in

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[81] Mar. 12 Brunner-Williams e-mail, *supra* note 21. In 1998, Brunner-Williams advocated for the category of "sponsored" TLDs, which is most equivalent to today's community-based TLD classification. *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

case the United Nations officially moved Palestine to its names list.[85] By 1997, the IANA reported receiving inquiries and requests to delegate .ps to the region.[86] The IANA noted that because Palestine was not on the ISO 3166-1 list, it declined to designate a TLD to it at the time.[87] Instead, because of Palestine's status as a Permanent Observer to the United Nations, the IANA delegated Palestine "palestine.int," a secondary-level domain.[88] Only when the U.N. Statistics Division reported including the "Occupied Palestinian Territory" on its *Standard Country or Area Codes for Statistical Use* list did ISO officially list .ps in ISO 3166-1.[89] In 2000, after managers and organizations within the Palestinian Authority applied to operate .ps and IANA conducted an investigation, .ps was delegated as requested to Palestine.[90]

Other international efforts have been less successful. As talks of new gTLDs increased in the latest round, in 2008, Māori Internet activist Karaitiana Taiuru proposed that his group, Dot Indigi, apply for the gTLD .indigi. He noted that the gTLD would offer "indigenous organizations the opportunity to register their own second-level domains under the .indigi gTLD — for example, māori.indigi or diné.indigi."[91] In applying, Dot Indigi would also petition ICANN to use the characters *ā* and *é* for its secondary and lower levels.[92] Through .indigi, Taiuru envisioned that indigenous groups could govern, resell, and distribute their own domain

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85 *IANA Report on Request for Delegation of the .ps Top-Level Domain*, ICANN (March 22, 2000), http://archive.icann.org/en/general/ps-report-22mar00.htm.

86 *Id.*

87 *Id.*

88 *Id.*; *Permanent Observers: Non-Member States*, UNITED NATIONS, http://www.un.org/en/members/nonmembers.shtml (last visited Mar. 22, 2013).

89 ICANN, *supra* note 85.

90 *Id.*

91 KARAITIANA TAIURU: ON-LINE MĀORI AND INDIGENOUS ADVOCATE/ASIA PACIFIC INTERNET LEADER, http://www.taiuru.maori.nz/ (last visited Mar. 22, 2013); *Indigenous Top-Level Domains*, SINGING TO THE PLANTS: STEVE BEYER'S BLOG ON AYAHUASCA AND THE AMAZON (Feb. 13, 2009), http://www.singingtotheplants.com/2009/02/indigenous-top-level-domains/; Simon Maghakyan, *Indigenous Activists Seek New .Indigi Domain*, GLOBAL VOICES (Feb. 20, 2009), http://globalvoicesonline.org/2009/02/20/indigenous-activists-seek-new-domain/.

92 *Id.*

name space through third-level registrations such as ocetiwakan.lakota.indigi.[93] Ultimately Dot Indigi did not apply for any gTLDs in 2012.[94] As Taiuri reported, the project is currently on hold as it awaits the statuses of other applied-for strings.[95] He added that there was certainly international support for .indigi, but in the end "[t]he cost was a huge factor that prevented us from applying in this round."[96]

After the 2012 gTLD registration period closed, Taiuru indicated that he planned to object to applied-for cultural identity strings, specifically citing .indians and .zulu as strings that commercial entities, rather than cultural groups, have applied for.[97] This was concerning because cultural strings are considered more descriptive, brand terms, rather than about governmental control and administration as city and ccTLDs were.[98] By allowing private entities to register cultural names, Taiuru warned that the Māori "and any other group defined by culture in the world . . . could quickly see their cultural description used by a commercial entity or government without consultation."[99] As a result, Taiuru noted that many indigenous groups, including the Māori, were likely to endure "a repeat of cultural and Intellectual abuses on the Internet as many Indigenous Peoples including Māori have already endured."[100]

For Native American tribes, the struggle for domain name rights has also encountered obstacles. In 1997, the Tribal Law mailing list recognized the problem of cybersquatting for indigenous people. Their findings were reported in an application letter for an Indigenous

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93 *Id.*

94 E-mail from Karaitiana Taiuru, Māori Internet activist and blogger (March 13, 2013) (on file with author); ICANN, *supra* note 35.

95 E-mail from Karaitiana Taiuru, *supra* note 94.

96 *Id.*

97 *Cultural and society GTLD objections will help protect Maori online*, KARAITIANA TAIURU: ON-LINE MĀORI AND INDIGENOUS ADVOCATE/ASIA PACIFIC INTERNET LEADER, http://www.taiuru.maori.nz/cultural-and-society-gtld-objections-will-help-protect-maori-online/ (last visited Mar. 22, 2013).

98 *Id.*

99 *Id.*

100 *Id.*

Intellectual Property Constituency (IIPC) within ICANN.[101] The letter noted that at the time, makah.org was being used by critics of whaling, not the Makah tribal council; abnaki.org was being used by the Girl Scouts, not the Ab[e]naki bands of the northeastern United States; pequot.com was being used by three people doing business, not the Mashantucket Pequot Nation; and crazyhorse.com was a cyber-sex site, and not the Estate of Tasunke Witko (also known as "Crazy Horse").[102] In 2000, a member of a separate mailing list reported that "a racist group" plagiarized makah.org, and because tribes had to register under either commercial (.com) or non-profit (.org) TLDs, they were vulnerable to outside encroachments on their names.[103] Additionally, the poster noted that commercial entities were regularly purchasing tribal names, forcing tribes to re-purchase their names.[104]

Consistent with these observations, the World Intellectual Property Organization (WIPO) has acknowledged the problem of private registrations of indigenous names. WIPO is an international intergovernmental organization with 185 states as members.[105] In a 2001 report, WIPO reported that in its study of indigenous names registered as domain names, it found that:

> (i) most of the registered indigenous names were not registered by persons or entities representing the indigenous group;
> (ii) most non-North American indigenous registrants were from different countries than the indigenous group;
> (iii) activities conducted under the indigenous domain names rarely provided information about the relevant indigenous group;
> (iv) most activities that are conducted under the indigenous name fell under one of the following categories: no activity (DNS lookup error or holding page), general information or portal sites . . . of a person or entity that does not

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101 (INDIGENOUS) INTELLECTUAL PROPERTY CONSTITUENCY, *ICANN VI-B(3)(b)(7) Application* (May 6, 1999), http://www.world.std.com/~iipc/our-iipc.html; Mar. 12 Brunner-Williams e-mail, *supra* note 21 (noting that the goal of the IIPC was to be a member organization of the Intellectual Property Constituency of ICANN).

102 *Id.*

103 Posting of Ishgooda, to NatNews@onelist.com (April 5, 2000), http://groups.yahoo.com/group/sovernspeakout/message/2671?o=1&d=-1] (arguing that as sovereign nations, tribes "should not be forced into purchasing [their] own tribal designations from commercial entities").

104 *Id.*

105 *About WIPO: Member States*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/members/en/.

> appear to represent the people, website of company with a (product) name corresponding to the name of the people, and personal website of an individual whose first name corresponds to the name of a people; and
>
> (v) In one case . . . the [indigenous] domain name is offered for sale.[106]

In 1999, a working group comprised of representatives from the Abenaki Community of Portland, the Intertribal Council on Utility Policy, Nevada Indian Environmental Coalition, and the Treaty 7 Tribal Council affirmatively advocated for ICANN to open up the process for gTLDs.[107] Specifically, it proposed that the registry .naa be opened up for Native American aboriginals, and administered by the National Congress of American Indians (NCAI) and the Alaska Federation of Natives (AFN).[108] But because of the high risk and resources required to apply for a TLD each time the application period opened, the application for .naa has yet to be officially submitted.[109]

Despite unsuccessful attempts at attaining a TLD through ICANN, Native American tribes still recognized the need for apparent legitimacy in tribal domain names. Many tribes, along with states, advocated for a secondary level domain within the .gov TLD.[110] According to regulators at the time, state and tribal governments "believe[d] that their citizens are likely to

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106 *The Recognition of Rights and the Use of Names in the Internet Domain Name System: Report of the Second WIPO Internet Domain Name Process*, WIPO ADR: ARBITRATION AND MEDIATION CENTER, http://www.wipo.int/amc/en/processes/process2/report/html/report.html#_ednref269 (last visited Mar. 22, 2013).

107 *Interim Report of Working Group C of the Domain Name Supporting Organization, Internet Corporation for Assigned Names and Numbers*, WORKING GROUP C – NEW GTLDS, 4 (Oct. 23, 1999), http://www.dnso.org/dnso/notes/19991023.NCwgc-report.htm.

108 *Id.*

109 E-mail from Eric Brunner-Williams, Chief Technology Officer of Wampumpeag (March 13, 2013) (on file with author) [hereinafter Mar. 13 Brunner-Williams e-mail]. In the 2000 and 2012 rounds, Brunner-Williams lacked the personal capital to apply for a TLD and was unwilling to ask "the few network aware tribal contributors." *Id.* In the 2004 round, Brunner-Williams declined an investor's offer to loan capital for the application because of the strings attached to the investment. *Id.*

110 Federal Management Regulation; Internet GOV Domain, 68 Fed. Reg. 15089-90 (Mar. 28, 2003) (noting that "there is increasing interest from non-Federal U.S. government entities, such as State and local governments, and Federally recognized Indian tribes, known in this rule as Native Sovereign Nations (NSNs), to provide service within the dot-gov domain.").

associate their government at all levels with the dot-gov domain, and therefore, want the additional option of positioning their governmental portal to the public within this space."[111]

In 2003, the naming convention for native sovereign nations became a secondary level domain within .gov, specifically as .nsn.gov.[112] Only federally recognized tribes can register under .nsn.gov.[113] The General Services Administration (GSA), an independent agency within the U.S. federal government, is responsible for registrations in .gov.[114] Federally recognized tribes that seek a domain through .nsn.gov must apply to the Bureau of Indian Affairs, which authorizes the domain and seeks registration through the GSA.[115] Although the GSA will mostly "not make determinations on the appropriateness of the selected domain names," the agency has discretion to register or reject a tribe's selected domain under .nsn.gov.[116] As of 2006, 86 tribes were reportedly registered under .nsn.gov.[117]

Although .nsn.gov at least partially addresses the need for legitimate tribal government domains, the structure still promotes a quasi-sovereign notion of tribes within the United States. By requiring names to be submitted for approval, it perpetuates an all-too-familiar paternalistic structure of U.S. colonialism, where the overarching sovereign may exercise authority over tribal

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111 *Id.* at 15090.

112 41 C.F.R. § 102-173.65 (2003) (outlining that "to register any second-level domain in dot-gov, Native Sovereign Nations (NSN) may register any second-level domain name provided that it contains the registering NSN name followed by a suffix of '-NSN.gov' (case insensitive))."

113 41 C.F.R. § 102-173.25 (2003) (defining Native Sovereign Nations (NSN) as federally recognized tribes).

114 *See, id.*; *DotGov Domain Policy Registrar*, U.S. General Services Administration, http://www.gsa.gov/portal/content/122707 (last visited Mar. 22, 2013).

115 *Gov Internet Program Guidelines*, .GOV Domain Name Registration Service, https://www.dotgov.gov/portal/web/dotgov/program-guidelines (last visited Mar. 22, 2013) (providing contact information of Chief Information Officer representative within the Bureau of Indian Affairs to request a Native Sovereign Nations domain).

116 41 C.F.R. § 102-173.35 (2003) ("GSA will only accept authorization from the Bureau of Indian Affairs, Department of the Interior. In most cases, GSA will not make determinations on the appropriateness of the selected domain names, but reserves the right to not assign domain names on a case-by-case basis").

117 *4,000 Gov't Websites Registered with DotGov Domain*, BE SPACIFIC, http://www.bespacific.com/mt/archives/012843.html#012843 (last visited Mar. 22, 2013).

nations. Though arguably many TLDs are subject to U.S. control,[118] .gov domains are by law under U.S. authority.[119]

The .nsn.gov structure is particularly unhelpful for those who do not meet the regulatory criteria and for tribes and tribal coalitions that are divided by external federal boundaries.[120] For instance, a tribe or tribal grouping within multiple countries, such as Mexico and the United States, would be forced to either choose to register under one country over another, or to apply for separate domains in this existing framework.[121] Additionally, because only federally recognized tribal governments may register under .nsn.gov,[122] this necessarily excludes solely state-recognized tribes or non-recognized tribes, as well as private persons or businesses in Indian country. A private business or individual may wish to register under their government's ccTLD for search engine optimization purposes, as a source of national and cultural pride and identity, or simply because registration under the ccTLD is conventional practice. For instance, as the Chilean ccTLD representative noted, "[m]ost Chileans take for granted that their favorite stores, magazines, and television shows have a website address ending in .cl."[123] By contrast, businesses and individuals in Indian country not only do not have their tribe's TLD to select, but also lack an official, general indigenous TLD to represent its Indian identity and connections at all.[124]

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118 *See* Angela Proffitt, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L.J. 601, 608 (1999) (noting international concerns that the United States had "too much control over the DNS").

119 *See* 40 U.S.C. 486(c) (2011); 41 C.F.R. § 102-173.30 (2003).

120 Skype interview with Eric Brunner-Williams, Chief Technology Officer of Wampumpeag (March 20, 2013).

121 *Id.*

122 41 C.F.R. § 102-173.30 (2003) (allowing "[r]egistration in the dot-gov domain . . . to official governmental organizations in the United States"); 41 C.F.R. § 102-173.25 (2003) (defining Native Sovereign Nations (NSN) as federally recognized tribes); Brunner-Williams, *supra* note 120.

123 Patricio Poblete, *Chile's CL: A Virtual Home for Chileans Worldwide*, *in* ADDRESSING THE WORLD, *supra* note 6, at 36–37.

124 Brunner-Williams, *supra* note 120.

Moreover, as a result of the status quo, tribes are at risk of gTLDs infringing on their cultural and economic rights to their intellectual property. As the Tribal Law Mailing List's findings suggest, domain names that directly mirror tribal names and interests will likely be registered.

Tribal governments that face an apparently infringing application have several options. Not unlike other assertions of rights to intellectual property, tribes may choose to litigate for rights once infringed.[125] Individuals and groups may also organize against unjust cultural misappropriation. Because expansion of domains is nonetheless riddled with risks of cultural misappropriation and economic inequalities, an inquiry into the status quo is needed. Explanations and solutions necessarily require analyses of federal and international laws, and the history leading to the current system.

PART III: INDIGENOUS RIGHTS TO TLDS: A CRITICAL RACE APPROACH

Although the IANA, ISO, and the United Nations may disclaim endorsements of nations' political statuses through their respective lists, the organizations necessarily have recognition power with their discretion of what sovereigns to include and what lists to use.[126] Inclusion on these lists can inevitably strengthen a sovereign. Conversely, exclusion from the lists may harm and retard economic growth, especially vis-à-vis other sovereigns and organizations that are included. This bureaucratic system that allows discretionary authority of the United Nations, ISO, IANA, ICANN, and the United States to grant ccTLDs for some sovereigns but not others is an example of what colonialism has become today.

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125 *E.g.,* Navajo Nation v. Urban Outfitters, No. 1:12-cv-00195, (D. N.M. filed Feb. 28, 2012).

126 *See, Procedure for Establishing ccTLDs*, *supra* note 54.

Contrary to the federal government's stated goals of supporting tribal sovereignty,[127] by not assigning and then not affirmatively ensuring a ccTLD for tribes, the United States is implicitly committing violence against that sovereignty. Although now less direct and explicit about its motives, throughout history, the federal government has demonstrated its intent to eventually rid itself of its duties to Native American tribes—including those obligations contracted by treaty.[128] If it was in the economic interest of the United States to diminish another sovereign's power, the government acted, and it acted efficiently. In 1783, it was George Washington who advocated that as settlers increasingly encroach on tribal territory, the government should seek purchasing tribal land rather than initiating war. Because, as Washington put it, "it is the cheapest as well as the least distressing way of dealing with them."[129]

Today, that desire to diminish tribal sovereignty in the name of preserving economic resources is more implicit.[130] It is demonstrated through federal policies that are set forth, from U.S. Supreme Court decisions, to administrative policies encouraging strict membership requirements for tribes.[131] As Professor Matthew L.M. Fletcher put it, "Colonialism is complete, it appears, when the front end of colonialism—the wars, the disease, and the genocide—gives

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127 *See, e.g.,* 25 U.S.C.A. § 3601(3) (West, Westlaw Next current through Pub. L. 112-97 approved Nov. 27, 2012) (finding "Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes"); *The Forgotten American*, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1968-1969, 336 (March 6, 1968); *Special Message to the Congress on Indian Affairs*, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON, 565–66 (July 8, 1970).

128 *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (affirming congressional plenary authority to unilaterally abrogate Indian treaties).

129 Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 186, 187 (2007).

130 Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL'Y 273, 277 (2005) (explaining that "overt colonialism in defiance of self-determination or as a remnant of termination takes many forms even today").

131 *Id.* at 282 (explaining that the Interior Secretary supported tight membership requirements because fewer members "means that there are fewer persons eligible for services from the federal government").

way to the back end—the incompetent trustee."[132] Now, Fletcher explained, tribes are dealing with the "the paradox of colonialism: the efficiency of the conqueror versus the inefficiency of the occupier."[133]

It is that inefficiency that manifests itself when indigenous groups ask why they were not assigned ccTLDs and confront the bureaucracies of ICANN, IANA, ISO, and the United Nations—all of which would claim that the discretion to include and assign belongs to someone else. At the same time, consistent with the goals of colonialism, the United States acts efficiently, choosing the path of least resistance—inaction and maintaining its status quo system of property law. But in examining this structure through a "racial" lens, what explains the insidious exclusion of sovereigns? Surely the United Nations, issuer of the Declaration of the Rights of Indigenous Peoples, does not seek to deprive indigenous tribes of their economic and cultural rights.[134]

Scholars in critical race theory may provide a general framework to explore. Part of the impetus behind the movement was their increasing frustration with presuppositions of conventional scholarly discourse by conservative and liberal ideologues alike.[135] It rejected neat black and white categories upon which mainstream civil rights discourse tends to focus.[136] Here, perhaps TribalCrit—rather than solely the field of critical race theory—is a better approach to take, as it addresses American Indians' experience as legal, political, and racialized beings and

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132 *Id.* at 309.

133 *Id.*

134 UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2, 3 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For instance, DRIP "welcom[ed] the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur" and acknowledged other actions "affirm[ing] the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development." *Id.*

135 KIMBERLÉ CRENSHAW, ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xviii (Kimberlé Crenshaw, et. al., eds. 1996).

136 *Id.* at xiv.

the experience of colonialism.[137] As Professor Bryan McKinley Jones Brayboy explained, "the basic tenant of TribalCrit emphasizes that colonization is endemic to society."[138]

Perhaps one can attribute the failure to assign a TLD to indigenous groups as a type of cultural bias that could lead to cultural genocide, consistent with their experience:[139] If gTLDs infringing on indigenous groups are granted while tribes are denied ccTLDs, the risk of cultural misappropriation is great. On the other hand, the problem may more directly be traced to economic self-interest through legal structures, rather than cultural and racial interests.[140] Certainly the non-assignment of TLDs to tribes is not "racist" in the sense that as Vine Deloria, Jr., characterized, "the un-thoughtful Johnny-come-lately liberal who equates certain goals with a dark skin" would see it.[141] After all, plenty of non-white countries were assigned and operate ccTLDs.[142]

Here, it may be possible to expand what we know about the American colonial experience with today's endemic neocolonialism. In explaining the differences between the struggles of black and Native Americans, Deloria urges readers to think beyond focusing on "the

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137 Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 Urban R. 428–29 (2005).

138 *Id.* at 429.

139 William Bradford, *'With A Very Great Blame on Our Hearts': Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 175 n.78 (2003) (citing ROY L. BROOKS, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 241 (Roy L. Brooks ed., 1999) ("Massacres at the hands of military and civilians, slavery, wars, removal, treaty deceit, starvation, disease, genocide, forced sterilization, and cultural genocide [were] used in the Euro-American effort to destroy the native peoples and their cultures").

140 *Compare* Robert A. JUAN F. PEREA ET AL., *supra* note 129 at 234 ("Perceived deficiencies in in culture, rather than biology and genetics, have served to justify the denial of equal rights of self-determination to indigenous peoples of the New World as cultural groups"), *with* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168–74 (1988 ed.), *reprinted in* JUAN F. PEREA ET AL., *supra* note 129 at 234, 238 ("For Indians to continue to think of their basic conflict with the white man as cultural is the height of folly").

141 VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168–74 (1988 ed.), *reprinted in* JUAN F. PEREA ET AL., *supra* note 129 at 236.

142 *See generally* supra Part IB (describing Kevin Ham's business with ccTLDs in Cameroon); Schlesinger Wass, *supra* note 6 (outlining experiences of East Timor, Chile, India, Malaysia, China, Swaziland, and Niue in their ccTLDs); *Root Zone Database*, *supra* note 35 (displaying list of ccTLDs).

White Man" as a theme for racial problems and to focus on specific facts.[143] Framing problems in this oversimplified manner, Deloria explained, is no different than carrying on the prejudicial view of the Indian problem, Negro problem, China problem, and so on.[144] Instead, because the experiences of each group obviously differ, such histories must be considered in determining where the problems lie. A theme that non-whites do share, however, is that whites' primary response to each group's problem was based "according to the manner in which it believed the non-whites could be rescued from their situation."[145] For instance, Deloria noted that once whites realized that "Orientals" and "Mexicans" preferred to remain among themselves, they were discarded.[146] He added that this dismissal was also because those groups "owned little; they provided little which the white world coveted."[147]

As the history of Indian law in the United States demonstrates, it was the legal status of Native American tribes vis-à-vis the United States that the United States had to reorder. Deloria observed that "[t]he problem is and always has been the adjustment of the legal relationship between the Indian tribes and the federal government, between the true owners of the land and the usurpers."[148]

A. Traditional U.S. Property Concepts Inherently Lead to Resource Disparities

In the United States, property rights and sovereignty are intrinsically linked. In *Johnson v. McIntosh*, Chief Justice John Marshall wrote that in establishing relationships with Native Americans, "the rights of the original inhabitants were, in no instance, completely disregarded;

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143 VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168–74 (1988 ed.), *reprinted in* JUAN F. PEREA ET AL., *supra* note 129 at 236.

144 *Id.*

145 *Id.*

146 *Id.* at 236–37.

147 *Id.* at 237.

148 VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168–74 (1988 ed.), *reprinted in* JUAN F. PEREA ET AL., *supra* note 129 at 238.

but were necessarily, to a considerable extent, impaired."[149] While recognizing that Native Americans "were the rightful occupants of the soil . . . with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," he stated that "their rights to complete sovereignty, as independent nations, were necessarily diminished" through the doctrine of discovery.[150] According to *Johnson*, discovery gave exclusive title to the competing European sovereign that "discovered" a land. As Robert A. Williams argued, *Johnson* laid the groundwork for subsequent Supreme Court decisions that constructed the principle of congressional plenary power over Indian affairs, which manifested in its use of the trust doctrine's guardian-ward relationship against tribes.[151] Thus, *Johnson* has drastically impacted federal Indian law and Native Americans since, but at the exclusion of any input from Indian tribes or individuals.

As Cheryl Harris points out, property rights are drawn legal boundaries that enforce or reorder existing power regimes.[152] Inequality from property laws is not inevitable, but the result of conscious social selections.[153] Harris rejects notions that property rights and resulting structures are somehow "natural," but instead argues that they are "creation[s] of law."[154]

Indeed, federal Indian law and policy, and the property systems associated with it, could have been decided differently and resulted in more equitable outcomes. Although Justice Marshall's "domestic dependent nations" dictum in *Cherokee Nation v. Georgia* is often cited as the opinion of the Court, the panel was divided 2-2-2 in its approach to Indian sovereignty.[155]

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149 *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

150 *Id.*

151 Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism against American Indian Tribes*, 39 FED. BAR NEWS & JOURNAL 358, 368–63 (1992), *reprinted in* JUAN F. PEREA ET AL., *supra* note 129 at 184, 185; *see also* United States v. Kagama, 118 U.S. 375 (1886) (using trust relationship as a sword against tribes in declaring U.S. jurisdiction over crime involving Indians on reservation).

152 Cheryl I. Harris, *Whiteness as Property*, *in* CRITICAL RACE THEORY AND LEGAL DOCTRINE 276, 280.

153 *Id.*

154 *Id.* at 281.

155 *Notes and Questions*, CRITICAL RACE THEORY AND LEGAL DOCTRINE 208 (citing D. GETCHES, C. WILKINSON & R. WILLIAMS, JR., CASES ON FEDERAL INDIAN LAW 111 (5th ed. 2004)).

In his dissenting opinion, Associate Justice Smith Thompson wrote that the Cherokee retained absolute sovereignty over its unsold territory.[156] He pointed out that this was the case "from the earliest settlement of the country by the white people."[157] In turn, Thompson could not understand how the Cherokee Nation was a sovereign state according to the law of nations, but now not considered as such under the U.S. Constitution.[158] Rejecting Marshall's argument that because the Cherokee Nation was within the exterior boundaries of the United States, it was a domestic dependent nation, Thompson argued that it was the Cherokee Nation's political status that constituted its foreign character.[159] He further acknowledged that although "inconvenient" for Georgia to have Cherokee territory within its exterior boundaries, this did not impact the political relationship of Georgia and the Cherokee Indians.[160] He further implored the Court to consider a hypothetical:

> Suppose the Cherokee territory had been occupied by Spaniards or any other civilized people, instead of Indians, and they had from time to time ceded to the United States portions of their lands precisely in the same manner as the Indians have done, and in like manner retained and occupied the part now held by the Cherokees, and having a regular government established there: would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States.[161]

By arguing that if the inhabitants of the territory were Spaniards or another "civilized" group, the Court would have characterized it as a foreign nation, Thompson made obvious the Court's flawed reasoning in determining the Cherokee Nation's political status.

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156 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

157 *Id.* at 53–54.

158 *Id.* at 54.

159 *Compare id.* at 17 ("[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations") *and id.* at 40 (Baldwin, J., concurring) (reading the U.S. Constitution as "the United States asserting the right of soil, sovereignty, and jurisdiction, in full dominion; the Indians occupant, of allotted hunting grounds," *with id.* at 55 (Thompson, J., dissenting) (noting that under the U.S. Constitution, foreign status is a political condition that "can have no relation to local, geographical, or territorial position.").

160 *Id* at 55.

161 *Id.* at 55–56.

As Harris noted, the bundle of sticks that create property rights include the exclusive rights of possession, use, and disposition; rights to transfer or alienate; rights to use and enjoyment; and rights to exclude others.[162] Rights to intellectual property similarly include the rights to use, dispose, enjoy and exclude. Once granted or assigned, those who "own" a TLD will have the rights to use, dispose or squat, and exclude others.[163]

Already countries with existing ccTLDs struggle with who or what entities get to run the ccTLD registry, be it a task designated to a particular person or an administrative entity. Once the administrator of the ccTLD is determined, that person or entity decides who and what can register domains at other levels under that TLD. Some sovereigns had strict requirements for ccTLD registrations; others took a more liberal approach to new names under their ccTLD.[164] Thus, consistent with Harris's notions, the property rights to include or exclude entrants into the domain name system is entrusted to the United Nations, ISO, IANA, ICANN, and the United States. But once a sovereign obtains a ccTLD, that sovereign, through its chosen entity to run and administer the name, gets the rights to include or exclude. In other words, that sovereign gets the inclusion and exclusion property rights to a TLD.

It is important to note that examining the current status of indigenous intellectual property rights through the framework of U.S. federal Indian law does not imply that the existing property rights regimes directly bind the legal rights that tribes inherently retain. The U.S. government has undoubtedly largely impacted the structure of the Internet and the domain naming system currently in place. Although the Internet is not officially under U.S. jurisdiction,

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[162] Harris, *supra* note 152, at 281–83.

[163] DomainIncite, *supra* note 16, at 6:05.

[164] Patricio Poblete, *Chile's CL: A Virtual Home for Chileans Worldwide*, *in* ADDRESSING THE WORLD, *supra* note 6, at 36–37 (describing how Chile's .cl registration rules ensured that its registry operated as a neutral arbiter and did not have authority to ban proposed names, consistent with the Internet's "general laissez faire culture").

the U.S. government still plays a large role in the system.[165] But similar to the discretion that international entities have over tribes, tribal governments maintain their ability to pave their own paths through many of the still uncharted domains of the Internet.

B. Asserting Indigenous Rights to TLDs Going Forward

1. Preventative steps

In order to prevent another organization from registering a name that a tribe has intellectual property rights to, a tribe could itself register a gTLD when ICANN reopens its process for accepting new gTLD applications.[166] If the gTLD application is granted, the tribe has a presumptive right to that registration should it be disputed. Registering a gTLD also has the benefit of allowing a tribe to be more creative with its name than a restrictive two-letter ccTLD would have allowed. For instance, a tribe could register its full government's name, so a user would immediately associate the governing tribe by simply glancing at the domain extension. By contrast to proposals that incorporate multiple indigenous groups in an area, this also allows individual tribes to have its own unique identifier.

Although preventing a domain name dispute by prospectively registering a gTLD sounds ideal, a tribe or other organization should consider the costs of taking these steps. As noted, applications for gTLDs are not inexpensive, ranging from $185,000 for the application fee alone to around $500,000 as a general estimate. Additionally, navigating the TLD application system is reportedly a cumbersome process, so a tribe should be prepared to employ counsel or other competent agents to devote substantial time to the tribe's application. On top of this, the

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165 *See generally U.S. Throws its Weight Around on Domain Names*, 3 No. 1 CYBERSPACE LAW. 12 (outlining the Clinton administration's Green Paper retaining U.S. control of the domain name system).

166 It is unclear when ICANN will reopen its window for new applications. Rod Beckstrom, then CEO of ICANN, has explicitly stated, "We don't know when it's going to open again." DomainIncite, *supra* note 16, at 4:57–5:24. He noted that in the thirteen-year history of ICANN, the 2012 period was the third time the organization opened up its new gTLD program. *Id.*

subsequent costs of maintaining a registry should be considered as well, which could run at least $25,000 annually.[167]

Furthermore, a tribe that is considering applying for a gTLD should consider the restrictions of each type. For instance, in order to have a cultural identifier, the tribe must agree to what has been described as a "sufficiently restrictive" registration policy that requires the cultural group to limit registrations under the TLD to members of the community.[168] This could have the consequence of curtailing economic opportunities for tribes seeking to market secondary level registrations to those outside its community.[169]

Alternatively or additionally, a tribe may also wish to lobby the United Nations, ISO, IANA, ICANN, and the U.S. Congress for a ccTLD. It should be noted, however, that indigenous groups have previously attempted this route to no avail.[170] Furthermore, tribes in the Americas are likely to face opposition from the U.S., Canadian, and Latin American federal governments.[171] If a tribe does attempt this route, it can point out that other U.S. territories, such as Guam and Puerto Rico, have ccTLDs under the ISO 3166-2:2007 list.[172] ISO 3166-2:2007 provides universally applicable codes for principal administrative divisions of countries and territories included in ISO 3166-1.[173] As such, sub-territories of the United States were included on this secondary list upon the U.S. government's request. This suggests that the federal

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167 See *supra* text Part IA, at 4.

168 Mar. 12 Brunner-Williams e-mail, *supra* note 21.

169 *Id.*

170 Mar. 13 Eric-Brunner-Williams e-mail, *supra* note 109 (pointing out that indigenous groups have sought country codes "for a very long time." In reference to his work with the League of Arab States and its unsuccessful attempts to attain a country code, Brunner-Williams stated: "If the Arab League can't get an iso3166-1 code point, it isn't easy.").

171 *Id.*

172 *Country Codes*, *supra* note 58; *ccTLD Database*, *supra* note 38 (Specifically, Guam runs the ccTLD .gu, and Puerto Rico administers .pr).

173 *ISO 3166-2:2007: Codes for the representation of names of countries and their subdivisions -- Part 2: Country subdivision code*, ISO, http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=39718 (last visited Mar. 22, 2013).

government could unilaterally take action on the matter, and preempts the argument that international organizations must act before American Indian tribes are granted a ccTLD.

Lobbying specific U.S. agencies may also prove helpful. When approached by a tribal council seeking its own TLD, Eric Brunner-Williams, a petitioner for the Indigenous Intellectual Property Constituency, proposed that the tribe initiate dialog with the Office of Insular Affairs (OIA) within the Department of Interior.[174] He suggested proposing to OIA officials that OIA's deactivated or underused country codes be put their best social use.[175] If OIA acquiesced, the tribe could petition the National Telecommunications and Information Administration (NTIA) within the Department of Commerce to use those codes. It could argue that the codes that were not being used should be held in trust for federally recognized tribes. If enacted, the model could serve as an alternative to tribes being forced to bear the prohibitive costs of applying for their own names to conduct essential government functions.[176]

Additionally, tribal governments would likely benefit by coalescing with other governments and like-minded individuals to accomplish their goals and participate in the decisionmaking of relevant international entities. Some international entities, such as WIPO, directly encourage indigenous participation. Other organizations, like ICANN, may require more global participation to maintain its legitimacy.[177]

Although ICANN strives to be a consensus-based organization, in reality, most of its decisions—including its more limited authority on ccTLDs—are based on hierarchical

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174 Mar. 12 Brunner-Williams e-mail, *supra* note 21; Mar. 13 Brunner-Williams e-mail, *supra* note 109.

175 *Id.*

176 *Id.*

177 *See* Froomkin, *supra* note 3, at 78-105 (arguing that despite ICANN's claims to have "only the power of the consensus that it represents," ICANN is engaged in governance and the federal government's relationship with it is unlawful under the Administrative Procedure Act or U.S. Constitution).

structures.[178] Within the Governmental Advisory Committee (GAC) of ICANN, current sovereign participation even for governments with ccTLDs is lacking. During U.S. congressional hearings on gTLDs, an industry insider noted that, compared to the more than 300 nations that participate in the United Nations, "inside of the GAC, we only have about 100 member countries, and of those 100, only about 60 show up at the typical ICANN meeting, and of those 60, well, roughly six do most of the talking."[179] As Brunner-Williams has pointed out, currently American indigenous communities as a group do not have an institutional role or means of participation within ICANN.[180] Under the IIPC, he proposed applications for pan-tribal TLDs like .nai and .naa, which would have benefitted tribes without the capital to purchase their own TLD. It would have also promoted tribes exercising a sovereignty that is not intrinsically linked to territory.[181] Individuals interested in participating and discussing data and voice policy in Indian country may also consider joining a new Internet mailing list devoted to such topics.[182]

2. Post-infringement actions

Because of the high costs to register its own gTLD, tribal governments may also wait for their intellectual property rights to be infringed and take remedial action after being harmed. Action should be initiated upon a tribe identifying an infringing application for a gTLD. This may include close monitoring of applied-for strings and objecting immediately after an application period closes. As an insider of the process has warned, "[o]bjection has a non-trivial

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178 MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE 230 (2010) (emphasizing that "[f]or the most part is *not* a loose or networked form of governance. It has more limited, but still important, forms of authority over the country code top-level domains.").

179 *ICANN Generic Top-Level Domains (gTLD): Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet*, 112th Cong. 91 (2011) (statement of Steve DelBianco, Executive Director, NetCHOICE).

180 Mar. 12 Brunner-Williams e-mail, *supra* note 21.

181 Mar. 13 Brunner-Williams e-mail, *supra* note 109 ("A 'sovereignty' that . . . wealthy gaming tribes buy, but hundreds of other tribes cannot, is a poor platform to promote a model of aterritorial sovereign policy exercise and all its eventual sequella.").

182 Mar. 12 Brunner-Williams e-mail, *supra* note 21. For those interested in participating in a tribal law mailing list on the topic, Brunner-Williams may be reached at ebw@abenaki.wabanaki.net.

cost regardless of the ground for which an objection is brought."[183] The steps that a tribe chooses to take in this case depend on the circumstances of the infringement and how much resources the tribe plans to spend in its action.

a. Private party negotiations

This could entail initiating private party negotiations with the potential infringing party as Postel and ICANN recommend. Private negotiations is especially preferred when a domain name dispute involves relatively few parties and a prevailing party can directly pay out the losing parties. Additionally, parties can agree to particular terms of a settlement, such as assigning limited rights to a secondary level domain in exchange for registry of the disputed TLD.

b. ICANN auction

Although this could be an extremely costly action, tribes may consider this path as a last resort, or for especially valued names that tribes feel are too important to allow a foreign organization to administer. An auction may involve an unlimited number of entities, and the costs of winning the auction are highly unpredictable.

c. ICANN arbitration

The ICANN Guidebook addresses the types of administrative-like actions that a tribe could take upon discovery of an infringing domain name. First, a tribe should argue that the infringing entity never received their government's approval to use its name. Under the delineated grounds for objection, a tribe may object on the grounds that the domain name necessarily confuses the user in associating that name with a tribal entity. A tribe may also claim that the proposed name infringes on the challenger's legal rights by asserting domestic or international law. Furthermore, a tribe could petition the community on how they feel about the

183 *Id.*

proposed TLD extension. If it receives enough feedback or petition signatures, the tribe may argue that the majority of its affected community substantially opposes the registration.[184]

d. U.S. and WIPO litigation

Another action involves invoking laws to effectuate racial equality, which should be a main purpose of law.[185] In bringing these claims, tribes should reference the Uniform Domain Name Dispute Resolution Policy (UDRP).[186]

If a tribe sought to bring a domestic cause of action in federal court, it would invoke domestic intellectual property laws. Some of these include trademark protections through the Lanham Act,[187] Indian Arts and Crafts Act,[188] Anti-Cybersquatting Consumer Protection Act,[189] and federal court cases on Internet and domain name disputes.[190]

Tribes may also seek action through WIPO, which is a resolution service provider.[191] As an institution, WIPO has previously decided disputes on an ad hoc basis, including issues involving indigenous rights to domain names. In 2001, WIPO directly acknowledged the problem of private registrations of indigenous names, but did not definitively assert a policy specific to the issue. In its report, WIPO stated that it "believe[d] that it is too early . . . to formulate any recommendations regarding the protection of the names in question in the DNS."[192] It added that it reserved recommendations because "the communities who are most

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184 *Guidebook*, *supra* note 7, § 3.2.1, at 151–52.

185 DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 3 (2d ed. 2007) ("[M]ost crits agree that the basic objective of CRT is to use the law to effectuate racial equality").

186 *Uniform Domain Name Dispute Resolution Policy*, ICANN, http://www.icann.org/en/help/dndr/udrp/policy (last visited Mar. 22, 2013).

187 Lanham Act, 15 U.S.C. §§ 1501–1141n (2011).

188 Indian Arts and Crafts Act, 25 U.S.C. §§ 305–305f (2011).

189 Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2011).

190 *E.g.,* Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006).

191 *Trademark Database Portal*, WIPO ADR: ARBITRATION AND MEDIATION CENTER, http://www.wipo.int/amc/en/trademark/output.html (last visited Mar. 22, 2013); *Frequently Asked Questions: Internet Domain Names*, WIPO ADR: ARBITRATION AND MEDIATION CENTER, http://www.wipo.int/amc/en/center/faq/domains.html#7 (last visited Mar. 22, 2013) [hereinafter WIPO *FAQs*].

192 WIPO, *supra* note 106.

affected by the topic (indigenous peoples) have not yet had the opportunity to participate fully in the debate."[193] As such, the report proposed focusing its efforts on encouraging indigenous communities to participate through WIPO's work on intellectual property and genetic resources, traditional knowledge, and folklore.[194]

Another advantage of employing WIPO's resolution services is that resolution may be achieved in a more cost efficient and expedited manner compared to traditional litigation. According to WIPO, WIPO domain name disputes are normally concluded within two months, using online procedures and requiring lower fees.[195]

CONCLUSION

In summary, ICANN's recent decision to open up TLDs to generic names spurred investors and organizations to register their generic names. If approved, those names will join ccTLDs and the twenty-two existing generic names in the domain name system and could dramatically change the naming system of the Internet. But because of the original structure of the domain naming system, sovereign entities that are not included in international lists were never assigned ccTLDs. This has the implications of divesting indigenous tribes economic opportunities to TLDs of their own. It further increases the potential of outside organizations registering names that infringe on a tribe's intellectual property rights. And most fundamentally, it has the potential to violence a tribe's recognition and sovereignty in a world increasingly dominated by Web presence and online identities.

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193 *Id.*

194 *Id.*

195 WIPO *FAQs*, *supra* note 191. WIPO reports that resolving cases involving up to five domain names with a single panelist costs $1,500; three panelists costs $4,000. For six to ten domain names, resolution runs around $2,000 for a sole panelist and $5,000 for three panelists. *Id.*

And yet, the bureaucratic organizations that exercise rights to include and exclude sovereigns on their lists do not have property rights to the Internet; no one does.[196] The inequitable results and the system itself are not obvious forms of "racism" in the sense that Americans see it today.[197] It is not clearly attributed to the dominant class's ideas of biological inferiority based on phenotypes.[198] Instead, in the United States, it is more directly traced to subjugations based on legal status and the perceived threat that Indian nations pose to U.S. claims to land and resources. As Professor Fletcher noted, "covert colonialism of the federal bureaucracy is not easily discoverable, nor can it easily be prevented by amendment of relevant statutes."[199] Through the systematic structuring of domain name assignments, international entities—with the United States having a large voice in the process—now exercise covert colonialism in the globalized and technical world.

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196 MUELLER, *supra* note 9, at 5 (Despite the need to create a type of governance, "[t]he Internet's structure was so distributed, and the organizations that built it were so diverse and so informal, [] that no single group, not even the U.S. government, possessed the legitimacy and authority to pull it all together on its own.").

197 JUAN F. PEREA ET AL., *supra* note 129, *Defining Racism* at 19; BROWN, *supra* note 185, at 3–4 (As Derrick Bell explained, "[A]ll our institutions of education and information—political and civil, religious and creative—either knowingly or unknowingly 'provide the public rationale to justify, explain, legitimize or tolerate racism'").

198 BROWN, *supra* note 185, at 4 (quoting Professor Richard Delgado explaining the difference between substantive and procedural racism, which is much subtler: "Procedural racism puts racial-justice claims on the back burner and makes sure they stay there").

199 Fletcher, *supra* note 130, at 310.