

July 30, 2015

Six Key Takeaways from ICANN 53 in Buenos Aires

By [Brian J. Winterfeldt](#), [Phillip V. Marano](#) and [Griffin M. Barnett](#)

The 53rd international meeting of the Internet Corporation for Assigned Names and Numbers (ICANN) formally concluded on Thursday, June 25, 2015, in Buenos Aires, Argentina. As always, the ICANN community discussed several high-profile topics during the meeting, all of which are relevant to registry operators, new generic top-level domain (gTLD) applicants and brand owners alike, including: the Internet Assigned Numbers Authority (IANA) stewardship transition and ICANN accountability issues; new gTLD subsequent rounds; privacy and proxy service accreditation issues; ICANN contractual compliance issues; geographic names issues; and possible uses for new gTLD auction funds. Our new gTLD team has closely examined developments at the meeting and distilled the following high-level takeaways on these subjects, which have continued to blossom and garner further attention since the meeting.

1. Community Work on the IANA Stewardship Transition Has Concluded While Community Work on ICANN Accountability Continues

As anticipated, the IANA Stewardship Transition and ICANN Accountability again dominated community discussions during ICANN 53 in Buenos Aires.

The IANA Stewardship Transition Community Working Group's Proposal Was Completed and Stands One Step Closer to US Government Approval

As you may recall, the Cross-Community Working Group on the Naming Related Functions of the IANA Stewardship Transition (CWG-IANA) provided its second draft transition proposal for community review and feedback in April 2015, collected public comments until May 20, 2015, considered community input, and provided a further revised "final" [transition proposal](#) for approval by the CWG-IANA's chartering organizations on June 11, 2015.

The final proposal incorporates the following key elements:

- A Post-Transition IANA (PTI) that preserves the current IANA structure, but reorganizes it as a legal entity separate from ICANN itself to enable functional separability in the event ICANN is ever disapproved from serving as the IANA operator;
- A lightweight PTI Board comprised of directors selected by ICANN with mandatory minimum oversight powers of IANA, and which would be subject to ICANN accountability mechanisms;

For more information, or if you have any questions, please contact your Katten attorney or the following member of Katten's **Intellectual Property practice**.

Brian J. Winterfeldt
+1.202.625.3562
brian.winterfeldt@kattenlaw.com

- A new IANA contract and Statement of Work that would outline IANA and ICANN's legal relationship and obligations vis-à-vis the operation of the IANA functions (the IANA contract would draw largely from the current contract between IANA and the National Telecommunications and Information Administration (NTIA));
- An IANA Function Review (IFR) that would periodically review the operational performance of IANA, as well as a Special IANA Function Review that could be used to conduct an ad hoc review under certain circumstances;
- A Customer Standing Committee (CSC) comprised primarily of representatives of the direct customers of IANA, namely TLD registry operators, who would flag any performance issues experienced on a day-to-day basis and work with IANA to resolve the issues or escalate them through various escalation mechanisms; and
- A separation process in the event ICANN is deemed unfit or unable to operate IANA and a framework for transitioning the IANA functions to another operator.

Although the community continued to nitpick certain aspects of the proposal during the Buenos Aires meeting, including most notably the recommendation that no new oversight function over changes to the root zone and associated WHOIS database would be implemented to replace the NTIA post-transition, the proposal was ultimately approved by the Generic Names Supporting Organization (GNSO) Council during its public meeting on Wednesday June 24, 2015. In view of this approval, and approval by the other chartering organizations of the CWG-IANA, the naming-related functions proposal has been submitted to the IANA Coordination Group (ICG) for review and synthesis with the two other transition proposals from the Internet protocols and numbers communities. The ICG is expected to produce a unified transition proposal for community review, sign-off by the ICANN Board, and ultimately, submission to the NTIA for its final review and approval, assuming the proposal satisfies the NTIA's IANA transition criteria.

Although much of the heavy lifting by the community with respect to the transition plan has now been complete, the CWG-IANA will remain intact to continue to work with the ICG and in conjunction with the other community efforts to ensure proper integration and implementation of the IANA transition proposal. We expect the IANA transition to remain a high priority for the ICANN community in the months ahead.

Progress Continues Within the ICANN Accountability Cross-Community Working Group Toward an “Empowered Supporting Organization and Advisory Committee” Model

In parallel with the IANA transition activities outlined above, the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) continues to develop a set of recommendations for improving ICANN's accountability architecture. Although the community voiced overall support for the set of recommendations, indicating that they would improve ICANN's current accountability environment, a number of themes developed in the wake of the publication of the CCWG's initial draft proposal and during the Buenos Aires meeting, including:

- A call for additional attention to community accountability (“who watches the watchers?”) and accountability of ICANN staff and senior management in addition to the ICANN Board, which had been the primary focus of the accountability recommendations in the initial proposal;
- A host of concerns with the proposed “membership model” and concomitant Supporting Organization (SO) and Advisory Committee (AC) voting system. More specifically, concerns were raised about the proposal's recommendation that each SO and AC obtain legal personhood by becoming unincorporated associations, citing jurisdictional and liability issues, and in addition, Security and Stability Advisory Committee (SSAC) and Root Server System Advisory Committee (RSSAC) indicated a preference to remain purely advisory and not participate as voting members of any SO/AC membership group. The At-Large Advisory Committee (ALAC) voiced a similar view that it may prefer to not participate as a voting group, and the Government Advisory Committee (GAC) indicated the practical difficulties it would have voting with any cohesive consensus voice in such a system; and
- Practical difficulties in proposing that ICANN fund certain mechanisms through which the community could arbitrate or litigate against ICANN, including possible legal ethics and conflict of interest issues.

As a result of these concerns, the CCWG has already begun to rework the membership model proposal into an alternative “empowered SO/AC” model that did not require each SO and AC to immediately obtain legal personhood, and began to

consider adjustments to the proposed voting scheme, among addressing other more minor issues. The CCWG continues to further refine and flesh out its recommendations at a rapid pace, and plans to meet in Paris, France July 17–18, 2015, to work face to face as it prepares a revised draft proposal. A second draft proposal is expected to be published for further community feedback by the end of July 2015.

As participants in the ICANN community, all stakeholders—including brand owners, new gTLD applicants and registry operators—have an interest in improving ICANN accountability and ensuring a smooth IANA transition along with appropriate safeguards, as those with first-hand experience navigating the current environment, rife with inconsistent, non-transparent and un-appealable decisions, can attest.

2. Planning for Subsequent New gTLD Rounds Has Begun, and It Impacts .BRAND TLDs, Trademark Rights Protection Mechanisms and Legal Rights Challenges Against Applications

Planning for a subsequent round of new gTLDs also received significant attention during ICANN 53, as the GNSO Council voted to approve the production by ICANN staff of an Issue Report as a precursor to launching a Policy Development Process (PDP) to revisit a host of issues the community identified as in need of possible re-tooling. These issues were primarily generated in previous discussions by the GNSO's Discussion Group on New gTLD Subsequent Rounds, which has concluded in light of delivering its final report to the Council in advance of the motion for the Issue Report, and included key items such as the following:

- Consideration of different types of gTLDs (such as .BRAND, geographic, open generic) with different tailored application, evaluation, and operation procedures and rules;
- Consideration of Rights Protection Mechanisms (RPMs) and Public Interest Commitments, and possible tweaks thereto;
- Consideration of possible changes to string contention, objection, and dispute processes and rules, including legal rights objections available to trademark owners; and
- Consideration of mechanisms to improve participation and support applications from developing countries and regions.

Of course, any PDP on this matter will not be limited only to the issues flagged by the Discussion Group, and the PDP will be open to participation and contributions from anyone in the community. Brand owners, including in particular potential future .BRAND applicants, should plan to participate actively in such a PDP to ensure any changes in new gTLD policy are favorable, or at least do not undo any positive ground procured in connection with the 2012 round of new gTLDs. The Issue Report is expected to be published within the next few months, and will outline the substantive policy issues to be considered by the PDP Working Group as well as proposing structural mechanisms for approaching the task.

Of course, these efforts were accompanied by significant concern within the community that any subsequent new gTLD round would be premature, in light of the ongoing rollout of the 2012 round and the host of issues that have accompanied it, and the need to conduct significant substantive data-driven review of this round before launching any additional rounds. The community is gearing up for these reviews, including a review of the new gTLD program as a whole, several reviews of new gTLD and legacy RPMs, and a Competition, Consumer Choice and Consumer Trust (CCT) review to study the impact of new gTLDs on Internet users and the Domain Name System and Internet ecosystem.

3. Policy Work on Privacy and Proxy Service Accreditation Pressed Forward Despite Controversy, Although Consensus in Certain Areas Will Likely Prove Impossible

Since the publication of the Privacy and Proxy Service Accreditation Issues (PPSAI) PDP Working Group's Initial Report on May 4, 2015, there has been a surprising amount of ICANN and broader Internet community attention to the subject of privacy and proxy services. The publication of the Initial Report triggered several publicity campaigns to "save domain privacy," in a somewhat hyperbolic reaction to a number of recommendations of the Working Group—none of which actually propose prohibiting privacy or proxy services in general. However, some of the recommendations, including a proposed framework for handling requests from intellectual property owners to disclose the identity of beneficial registrants of domain names registered through a privacy or proxy service, could alter the current status quo, which sets no minimum relay or response requirements for providers of such services. Most providers currently require an order from a court of competent jurisdiction,

or the initiation of an otherwise binding legal action (such as a UDRP proceeding) before they are willing to reveal a customer's identity.

Members of the registrar community—often also the providers of the privacy and proxy services—continue to push back on any recommendations that could affect their bottom lines, including anything perceived as restricting who can use proxy or privacy services, increasing the likelihood of forcing a provider to reveal a customer's identity and contact information and thereby potentially losing the customer's business, or anything else that would result in additional costs in providing the services, such as mandatory escalation mechanisms.

In addition, although not comprising a part of the Working Group's consensus recommendations, several members proposed a minority position that privacy and proxy services should not be available to registrants using their domain names in connection with commercial financial transactions. Proponents argue that consumers have the right to know with whom they are conducting business online, just as many jurisdictions require clear identification and contact information for businesses in the offline brick-and-mortar context. On the other hand, opposition to this view cite the complex distinctions that would need to be drawn as to what would constitute such a use (raising the troublesome examples of charitable donations or political fundraising) and the disproportionate affect this scheme could have on small and home-based businesses. The PPSAI Working Group will press forward, with its first post-Buenos Aires task to consider the more than 20,000 public comments submitted in response to its Initial Report (the vast majority being template petition letters driven by service providers through the various aforementioned "save domain privacy" campaigns) and then to determine how to move forward in revising its Initial Report and recommendations.

4. ICANN Continued to Take Flak for Lax Contractual Compliance

Public Interest Commitments Received Continued Attention for Restricted-Access TLDs

Many within the intellectual property and broader business community continue to press ICANN to ensure compliance with new gTLD registry operators' Public Interest Commitments (PICs), as reflected in their registry agreements. These PICs obligate the registry operator, among other things, to pass through to registrants a prohibition against committing intellectual property violations and other kinds of abuse such as phishing, malware and fraud. Of particular concern recently have been industry-specific "open with restrictions" TLDs, such as .BANK and .PHARMACY, that are particularly susceptible to fraud. Fortunately certain TLDs like .BANK have implemented appropriate eligibility criteria and certification requirements, although many TLDs still only require mere representation of eligibility. This is a somewhat heightened risk, as many registry operators of such strings do not, themselves, have any nexus to the specific industry they are targeting.

Members of the Intellectual Property Constituency (IPC) built on this theme, pointing out that it is part of the broader issue of ICANN contractual compliance. More specifically, these stakeholders called on ICANN to step up compliance efforts across the board, noting that the entire community has a stake in the contracts and their adequate enforcement, even if they are not themselves parties to the contracts, and the contracts explicitly disclaim third-party beneficiaries. A lack of contractual enforcement by ICANN undermines the multi-stakeholder system in the domain name ecosphere, which is rooted entirely in contracts, and renders toothless the intellectual property protections enshrined in the various contracts such as Section 3.18 of the 2013 Registrar Accreditation Agreement (obligating registrars to investigate and respond appropriately to complaints of infringement or other abuse) and Registry Agreement Specification 11, Section 3(a) which obligates registry operators to include in their registry-registrar agreements provisions prohibiting intellectual property infringement.

Ambiguity Persisted on Enforcement of the 2013 Registrar Accreditation Agreement as to Intellectual Property Infringement

Members of the IPC, particularly those representing content industries, continue to press ICANN to clarify and provide additional transparency surrounding its interpretation of certain provisions of the 2013 Registrar Accreditation Agreement (RAA). Specifically, Section 3.18 obligates registrars to investigate and respond appropriately to complaints of intellectual property infringement or other abuse involving a domain name under their management. Members implored ICANN to enforce its contracts meaningfully, although ICANN made it clear that there are differences of opinion as between ICANN and the community as to how and what they must enforce. In this context, there are clear differences of opinion in terms of

interpreting the provision in Section 3.18 obligating registrars to “investigate and respond appropriately” to complaints of abuse, and the appropriate source materials for clarifying the meaning and enforcement approach as to this provision. That said, during its meeting with the IPC, ICANN Compliance demonstrated a willingness to go further in bridging these gaps, suggesting it would explore frameworks for providing interpretive guidance on contract provisions, including minimum standards for investigating and responding to complaints, keeping in mind the various kinds of abuse complaints and the accompanying need for flexible standards that can be tailored to the kinds of supporting evidence that would supplement such varied complaints.

5. Geographic Names Issues Remain in the Governmental Advisory Committee’s Spotlight

GAC Argentina Proposal on the Use of Geographic Names Still Refuses to Die

Although there was no separate session on this subject in Buenos Aires for broad community discussion, the GAC Representative of Argentina presented to the full GAC the progress of the GAC’s Working Group on Protection of Geographic Names, which hopes to prevent “misuse” of country, region and community names. GAC member reactions to the presentation were mostly negative, with the United Kingdom, Norway, United States and Germany raising concerns regarding the document’s imprecise and overreaching nature, and the Netherlands stressing that “protection” should not mean “block” or “reserve” in all cases. Argentina urged GAC colleagues to send feedback to the Working Group.

These public interventions by GAC members signify the first notable public opposition within the GAC and represent a significant step toward defeating the proposal, particularly seeing as it has consistently been met with strong opposition within the broader community, including the IPC and gTLD registries. Ultimately, the ICANN Board will likely need to tell minority proponents within the GAC unequivocally that this proposal should not move forward, before it will actually die.

Polar Opposite Views on Use of Country and Territory Names as TLDs Threaten to Prevent Consensus

The Cross-Community Working Group on the Use of Country and Territory Names as TLDs (CWG-CTN) continued its work, with an overlapping remit as the GAC Working Group on Protection of Geographic Names. Unsurprisingly, the CWG continued to decry the lack of coordination between the two groups and continued to strategize as to how to improve participation by, or at least dialogue with, GAC Working Group members in the CWG-CTN.

More substantively, the CWG-CTN discussed whether or not to preserve the historical distinction between two letter country-code Top Level Domains (ccTLDs) versus three-letter and longer gTLDs. Some proposed technical solutions (such as displaying an indicator of a government resource in-browser), others argued for the general preservation of two letter TLDs as being ccTLDs and ineligible for use as gTLDs to avoid user confusion, while still others highlighted the blurring of this distinction in the form of such commercialized ccTLDs like .TV, .PW, .CO, among others, and therefore the preservation of historical distinction, in and of itself, as an insufficient basis for continuing to preserve that distinction. Further, it was not clear that end-users make this distinction at all, as between ccTLDs and their connection to a particular jurisdiction versus gTLDs and their more general commercial operation.

In addition, many participants raised the point that all two-letter TLDs should be preserved for the use by sovereign governments as each country and territory’s designated “corner of the Internet” while the generic space already has significant flexibility insofar as any string beyond two letters, accounting for certain three letter restrictions, could theoretically be adopted as a gTLD. Of course, this argument ignores two other key potential uses for two letter TLDs: generic two letter words, many of which overlap with country codes (e.g. MY, IT, ME (currently assigned as ccTLDs) and GO, OR, IF (currently unassigned as ccTLDs but reserved for possible future allocation), as well as two-letter trademarks (e.g. VW, HP). Free expression and trademark rights are grounded in national and, in certain cases, international law, whereas the reservation of two-letter strings as solely for use as ccTLDs is not grounded in any such law. It was originally adopted from the International Organization for Standardization as an established and convenient naming methodology by the original administrator of the domain name system, Jon Postel. Although this debate proved helpful in fleshing out opposing views, the CWG-CTN may be reaching a point of attrition with polar views on the matter between ccTLD representatives on the one hand, and gTLD representatives—including a number of IPC members—on the other.

Governments Continued to Hide the Ball on the Release of Country and Territory Names at the Second Level in New gTLDs, Although Nearly All Will Require Governmental Approval

The GAC recapped its current progress in developing a “clear and simple” mechanism to identify country and territory names that require national governmental approval prior to release as second-level domain names. At the conclusion of ICANN 53, approximately half of all GAC representatives had completed a template questionnaire indicating whether or not all TLDs, or just .BRAND TLDs, require notification and approval to release country and territory names. ICANN policy staff expressed confusion with the wide variety of responses submitted by GAC nations, explained the simple nature of the questionnaire form, and suggested that the deadline for GAC members to submit responses be extended to mid-July 2015. In particular, the GAC agreed to limit the “country” column in the questionnaire to only one word (as opposed to, for example, all three terms SWITZERLAND, SWISS, and SWISS CONFEDERATION), while leaving room to provide citations to sources extending rights to additional terms or languages.

Ultimately, the GAC public discussion did not shed any light on the reality that a surprising majority of national governments will require prior approval for the release of country names at the second level in all TLDs, a development that may be particularly disappointing to .BRAND TLD applicants whose new gTLD plans had included use of such names. Indeed, it appears that many representatives did not distinguish between open TLDs and .BRAND TLDs, and will require prior approval simply for the sake of exercising the power to do so.

Release of Two-Letter Names at the Second Level in New gTLDs Now Hinges Upon Governmental Rationale for Objection and Registry Operator Measures to Mitigate Potential Confusion

According to the Global Domains Division, ICANN has processed more than 150 of nearly 500 registry operator requests to release two-character domain names, which were temporarily reserved by the Applicant Guidebook. While ICANN has released about 210,000 combinations of two-letter domain names, it has withheld all two-character names to which national governments objected.

ICANN is now finalizing a process to request that concerned governments provide rationales for their objections, and for registry operators to provide solutions to potential issues of confusion between individual domain name registrants and national governmental authorities. ICANN will decide whether to release the reserved two-character names based on these communications. Some of the two-letter combinations that continue to be withheld in light of government objections include MY, IN and IT, among a number of others, some forming common two-letter English words, often with no rationale for objection provided by the relevant government, other than the combination corresponds to the country’s designated two-letter ccTLD.

6. Community Began to Coalesce Thinking on Use of New gTLD Auction Funds

ICANN dedicated an entire “high-interest topic session” to this subject during ICANN 53. In the session, SO and AC leaders first discussed the possible process for determining how to apportion these new gTLD auction proceeds. The GNSO has already proposed convening a Cross-Community Working Group (CWG) to develop recommendations on how to apportion these funds. Community trust in this model has already been demonstrated through its use in connection with the IANA stewardship transition and enhancing ICANN accountability CWGs, and there was significant community buy-in to the CWG concept in connection with developing auction proceeds recommendations. In addition, community leaders expect participation and input from members of the Board in the context of an open and transparent CWG, noting in particular the fiduciary interest of the Board in the appropriation of organizational funds.

Discussion also took place as to the question of whether auction funds must be earmarked for purposes directly related to new gTLD applicants, the new gTLD program in general, or could be apportioned for purposes with no specific relation to the new gTLD program. The idea that funds should be apportioned to supporting substantially reduced-cost applications for new gTLDs from underserved or underdeveloped regions was repeated several times during the discussion, although others argued that barriers to applications from these regions should be a matter for ICANN to solve separately from the use of new gTLD auction proceeds in view of the funds that have already been set aside for this purpose but upon which significant barriers to access were put in place.

Although many comments focused on identifying specific uses, other commenters highlighted that it is far too premature to be discussing uses, and the focus now should be on designing an appropriate procedure and avoiding devolution of the discussion on this issue into a “family squabble about inheritance.” In addition, while the ccTLD community has declined to participate in a CWG regarding new gTLD auction proceeds, it has committed to providing knowledge resources in light of past experience of ccTLDs in handling similar auction proceeds scenarios in the ccTLD space. To that end, later during the Buenos Aires meeting, a session was held that provided several ccTLD operators to present to the community how they have used excess funds in connection with such programs as charitable contributions, trusts, and other projects.

Brand owners have continued to discuss internally how best to apportion these auction funds, with many suggesting a variety of initiatives revolving around consumer protection, including anti-cybersquatting programs, consumer outreach programs and even a reimbursement fund for brand owners who have been forced to file numerous URS or UDRP proceedings in connection with new gTLD registrations.

ICANN 54 will be held October 18–22, 2015, in Dublin, Ireland. We will continue to provide updates regarding key ICANN topics as the Dublin meeting approaches.

We hope you find this summary and analysis of key takeaways from ICANN 53 in Buenos Aires to be helpful and informative. If you have any questions regarding our analysis, or if you wish to discuss any of these or other ICANN advocacy matters in greater detail, please contact Brian Winterfeldt at +1.202.625.3562 or brian.winterfeldt@kattenlaw.com.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2015 Katten Muchin Rosenman LLP. All rights reserved.

*Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).
London: Katten Muchin Rosenman UK LLP.*