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International Law and the Global Public Interest: ICANN's Independent Objector as a Mechanism of Responsive Global Governance

Adamantia Rachovitsa*

Introduction

The Internet Corporation for Assigned Names and Numbers (ICANN) is the informal, privately run body that manages the Domain Name System (DNS) — the ‘directory’ that maps websites to numerical addresses, thus making the Internet user-friendly. ICANN recently decided to expand the top level of domain names by launching the new generic Top-Level Domain (gTLD) Programme, and it has already introduced more than 1,000 gTLDs into the DNS (for example, ‘.CHURCH’ and ‘.HEALTH’). This programme is expected to have a great impact on how Internet users search and experience the web. The highest-bidding Applicants who can substantiate their technical and financial capacity to operate a gTLD can run the registry of a new string. ICANN's core mission is to preserve the operational security and stability of the Internet while promoting competition and choice for Internet users. In pursuing its mission, ICANN fulfils a global public function by administering a scarce common good (domain names) and, therefore, it can be said that it exercises an element of public authority.¹ In addition, ICANN's regulatory activities impact State interests and the rights of individuals, private actors and communities as well as other concerns on a global level.

These two features of ICANN's operation — the public(-like) nature of its functions and the global ramifications of its decisions — raise accountability and legitimacy concerns. In order to address some of these concerns, ICANN decided to protect certain interests and rights within the new gTLD programme. It did so by providing the opportunity for third parties to submit an objection to gTLD applications on specific grounds: (a) string confusion objection; (b) legal rights objection; (c) community objection; and (d) limited public interest objection.

This chapter concerns the limited public interest (LPI) objection, according to which an applied-for gTLD string will not be registered if it is found to be contrary to generally accepted legal norms of morality and public order recognised under the principles of international law. The LPI objection is notable for three reasons. First, it aims to protect the interests of the global Internet community and not merely private interests; second, ICANN introduced an

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¹ M Hartwig, ‘ICANN – Governance by Technical Necessity’ in A von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010) 575, 602-604.

international legal standard to evaluate the applied-for strings; and third, a novel institution has been created to support the LPI objection: the Independent Objector (I.O.). The I.O. acts solely in the best interests of the public who use the Internet and is mandated to object highly objectionable gTLDs. Interestingly, Professor Alain Pellet served as the I.O. from 2012 to 2014. The chapter argues that the I.O. is a novel mechanism with the potential to enhance ICANN's responsiveness to the global public interest. Although international lawyers have now started to pay attention to Internet governance bodies when discussing global governance,² ICANN is very often excluded from these discussions due to its complexity and specificity.³ This contribution therefore offers a timely opportunity to address certain aspects of ICANN's work and draw some general insights on the feasibility and desirability of the LPI objection and the I.O. as means to remedy a gap in global governance.⁴ The analysis critically assesses how the I.O. has developed the LPI objection and evaluates the potential and limitations of international law for articulating and protecting the public interest at a global level.

1. The Limited Public Interest Objection and the Mandate of the Independent Objector

The LPI objection is a form of pre-emptive (*ax ante*) review of ICANN's decisions to register applied-for strings. The objection aims to protect the public interest in accordance with ICANN's commitment to take Internet users into account when making decisions concerning the global technical coordination of the DNS.⁵ The pre-emptive function of the LPI objection qualifies it both as an accountability mechanism (by providing for access to a non-judicial remedy)⁶ and as a procedural means to enhance ICANN's legitimacy (by giving any Internet user the opportunity to shape the final outcome of the decision-making process concerning the

² Eg S Cassese and others (eds), *Global Administrative Law: The Casebook* (IRPA, 2012); von Bogdandy and others (fn 1).

³ Eg E Benvenisti, *The Law of Global Governance* (Hague Academy of International Law, All-Pocket, 2014) 58.

⁴ RB Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211.

⁵ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 30 July 2014) Article I on Mission and Core Values, Section 2, [6] <<https://www.icann.org/resources/pages/bylaws-2012-02-25-en>> accessed 31 January 2017; Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers 2009, [3(a)] <<https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>> accessed 31 January 2017 (Affirmation of Commitments).

⁶ ICANN, however, does not include it in its accountability mechanisms. RH Weber, 'The Legitimacy and Accountability of the Internet's Governing Institutions' in I Brown (ed.), *Research Handbook on Governance of the Internet* (EE, 2013) 99, 100.

registration of strings).⁷ The fact that everybody has a right to challenge an applied-for string and submit an LPI objection brings to mind a *sui generis* public interest (quasi-)litigation.

In this context, the I.O. is an important component of the LPI objection procedure. The I.O.'s mandate is to file objections against 'highly objectionable' gTLD applications. The I.O. does not act on behalf of any particular persons or entities, but solely in the best interests of the public who use the global Internet.⁸ In light of this public-interest goal, the I.O. is restricted to filing the Limited Public Interest and Community objections only.⁹ The I.O. performs three main tasks: first, he or she reviews the submitted gTLD applications and determines whether an objection is warranted pursuant to public interest considerations (the initial evaluation); second, he or she drafts and files the objection with the International Centre of Expertise of the International Chamber of Commerce, which is the designated Dispute Resolution Service Provider for administering LPI disputes; and, finally, he or she takes part in the evaluation process with the expert panels.

The I.O. is selected by ICANN through an open and transparent process, although the AGB does not elaborate on this process. The selection criteria are equally vague, indicating that the I.O. must be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD Applicant.¹⁰ Professor Alain Pellet, an eminent public international lawyer, was appointed as the Independent Objector for the first round of the New gTLD programme in May 2012 and he served until January 2014.

The I.O. enjoys complete independence. ICANN does not have the authority to direct the I.O. or require him or her to file (or refrain from filing) an objection.¹¹ During the drafting of the AGB, certain States sitting on ICANN's Board of Directors did not warmly welcome the I.O.'s independence. They suggested that the I.O. should not be entitled to initiate an objection unless a community or government entity has expressed an interest in doing so,¹² or that the I.O. should only submit an objection if asked by ICANN's Governmental Advisory Committee or the At-Large Community.¹³ ICANN rejected these recommendations because they were not in keeping with the I.O.'s mandate to act in the public interest. Alain Pellet acknowledged in

⁷ J Morison and G Anthony, 'The Place of Public Interest' in G Anthony and others (eds), *Values in Global Administrative Law* (Hart Publishing, 2011) 215, 218-219.

⁸ Article 3.2.5, gTLD Applicant Guidebook, ICANN (4 June 2012) <<http://newgtlds.icann.org/en/applicants/agb>> accessed 31 January 2017 (AGB).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Rec. No. 10.1 (not supported by consensus) in the new gTLD Program Explanatory Memorandum, "'Limited Public Interest'" Objection (Morality and Public Order objection)' (12 November 2010) 27 <<https://archive.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf>> accessed 31 January 2017.

¹³ Rec. No. 10.2 (supported by consensus) ibid 29-30.

his final Report that ICANN had honoured the independence of the position and that he had fulfilled his mission without experiencing any pressure or influence.¹⁴ It should be noted that the I.O. is retained by ICANN as an independent consultant. Officially, the I.O. is not part of ICANN but an impartial, independent party entrusted with the protection of the global public interest.

2. The Role of International Law in Protecting the Global Public Interest

The decision to set up an objection procedure in defence of the public interest immediately raises the question of what the standard of review should be. In other words, when does an applied-for string become contrary to the global public interest? One option would have been for ICANN to establish a non-legal standard against which the merits of the procedure would be decided. The Court of Arbitration for Sport, for example, uses the ‘integrity of the game’ as the standard for assessing the legality of a measure under the statutes of the Union of European Football Associations.¹⁵ ICANN decided instead to assess the compatibility of a string against general norms of international law and, in particular, general principles of international law relating to public order and morality. It is therefore notable that an informal, private governance body should choose to be subjected to legal regulation and reviewed against a standard inspired by international law.¹⁶

The reason that ICANN formulated an *international* legal standard for public order and morality as a yardstick for evaluating the merits of the LPI objection was to exclude from this assessment any interests or concerns under domestic law (unless a link to international law could be demonstrated). In this way, international law is called upon to serve the specific needs of the gTLD programme’s implementation. Pellet noted in his final Report that ‘[w]here public international law historically addressed issues of well-defined and secure boundaries, it now has to face new issues in the context of the development of the Internet, where boundaries are precisely inappropriate’.¹⁷ This statement does not appear to cast doubt on international law’s suitability for addressing certain aspects of ICANN’s functioning, but rather to invite international law to rise to the challenge.

¹⁴ Report, 8.

¹⁵ *Arbitration CAS 98/200 AEK Athens and SK Slavia Prague v Union of European Football Associations (UEFA)*, Award of 20 August 1999 [22]-[32].

¹⁶ Benvenisti (fn 3) 249-252.

¹⁷ Report, 54.

International lawyers are actively involved in different stages of drafting and implementing the LPI objection. International law experts, practitioners and judges were consulted during the drafting process in order to create an international standard capable of accommodating morality and public order norms.¹⁸ The expert panels that decide the LPI objections are constituted of ‘eminent jurists of international reputation, with expertise in relevant fields as appropriate’.¹⁹ The panellists appointed by the International Chamber of Commerce have included senior public international lawyers and experts (academics and/or practitioners) in international dispute settlement, international commercial arbitration and intellectual property, such as Professors Crawford, Paulsson, Reinisch and Verdirame. Finally, it is difficult to ignore the fact that it was a renowned international lawyer, Alain Pellet, who was entrusted with the task of serving as the first I.O.

Turning to the scope of this international law standard, according to the AGB (Article 3.5.3), an LPI objection is warranted when an applied-for gTLD string is contrary to generally accepted legal norms of morality and public order recognised under the principles of international law. It is not clear whether Article 3.5.3 AGB mirrors Article 38(1)(c) ICJ Statute regarding general principles of law recognised by civilised nations. The AGB refers to both ‘generally accepted legal norms of morality and public order that are recognised under principles of international law’²⁰ and ‘general principles of international law for morality and public order’.²¹ Neither the I.O. nor the expert panels have clarified this issue. The AGB standard arguably includes, but it is not necessarily limited to, Article 38(1)(c) ICJ Statute. Given that international law experts had a strong presence in the preparatory work of the AGB, it is safe to say that, should the drafters have wished to refer only to general principles of law recognised by civilised nations, they would have done so. Consequently, the AGB standard concerns general principles of law as a source of public international law, as well as other pertinent, internationally recognised general principles of public order and morality.²²

¹⁸ New gTLD Program Explanatory Memorandum, ‘Morality and Public Order Objection Considerations in New gTLDs’ (29 October 2008) 3 <<http://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>> accessed 31 January 2017.

¹⁹ Article 3.4.4 and Article 13(b)(iii) AGB.

²⁰ P. 3.4 AGB.

²¹ P. 3.21 AGB

²² For instance, international public policy principles used in commercial and investment arbitration revolve around morality and public order concerns, such as the prohibition of slavery, piracy and genocide, the drug trade, terrorism, the protection of basic principles of human rights (eg denial of justice, due process) and *bonos mores*. See C Schreuer (2001) *The ICSID Convention: A Commentary* (CUP, 2001) 568–569, 586–590, 641. See A Rachovitsa, ‘General Principles of Public Order and Morality and the Domain Name System: Whither International Law?’ (2016) 63 NILR 23, 32–35.

Despite the ambiguity surrounding the content of ICANN's legal standard, general principles of law appear, in principle, to be an apt choice for the LPI objection. First, general principles of law are inherently open-textured, leaving ample room for specification.²³ This satisfied recurring calls during the drafting process to afford broad discretion to the expert panels.²⁴ Second, general principles of law are the source of public international law that is most receptive to moral influences and values, making them a suitable basis for discussing public order and morality.²⁵ The AGB does, however, limit the scope of the LPI objection by stipulating the specific grounds upon which an applied-for string can be judged contrary to generally accepted legal norms relating to morality and public order. These are:

- (a) incitement to, or promotion of, violent lawless action;
- (b) incitement to, or promotion of, discrimination based on race, colour, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognised under principles of international law;
- (c) incitement to, or promotion of, child pornography or other sexual abuse of children; or
- (d) a determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

Although these grounds are intended to be exhaustive, ground (d) opens up the scope for objection considerably. The expert panels have accepted that grounds other than (a), (b) and (c) can give rise to a valid LPI objection as long as a specific public order or morality norm qualifies as a general principle of international law.²⁶

It is debatable, however, whether this norm should relate only to particularly reprehensible kinds of behaviour, such as incitement to violent action or child pornography. Professor Reinisch argued that 'only a very limited set of particularly reprehensible behaviour

²³ J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, 2003) 128-129; R Kolb (2006) 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53 NILR 1, 7.

²⁴ New gTLD Program Explanatory Memorandum, 'Standards for Morality and Public Order Research' (30 May 2009) 3-5 <<https://archive.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>> accessed 31 January 2017.

²⁵ J Wouters and C Ryngaert, 'Impact on the process of the formation of customary international law', in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights on General International Law* (OUP, 2009) 111, 127-128; Kolb (fn 23); B Simma and P Alston 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988-1989) 12 Australian YbkIL 82, 105.

²⁶ *Professor Alain Pellet, Independent Objector (France) v Silver Glen, LLC (USA)*, Case No. EXP/411/ICANN/28, 26 November 2013 [33] (*Silver Glen*); *Professor Alain Pellet, Independent Objector (France) v Goose Fest, LLC (USA)*, Case No. EXP/417/ICANN/34, 16 December 2013 [94] (*Goose Fest*); *Professor Alain Pellet, Independent Objector (France) v Dothealth, LLC (USA)*, Case No. EXP/416/ICANN/33, 16 December 2013 [91] (*Dothealth*); *Professor Alain Pellet, Independent Objector (France) v Medistry, LLC (USA)*, Case No. EXP/414/ICANN/31, 19 December 2013 [98]-[102] (*Medistry*). See S Vezzani, 'ICANN's New Generic Top-level Domain Names Dispute Resolution Procedure Viewed against the Protection of the Public Interest of the Internet Community: Litigation regarding Health-related Strings' (2014) 13 *The Law and Practice of International Courts and Tribunals* 306, 321. All expert determinations are available <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/expert-determinations/>> accessed 31 January 2017..

is objectionable²⁷ and so the threshold for substantiating general principles of public order and morality is set at a high level. Expert panels have been divided on this front, with some sharing Reinisch's view and others being satisfied with a lower threshold.²⁸ The I.O.'s position is that an applied-for string does not have to concern particularly reprehensible behaviour to be objectionable. He has also recommended that the first three grounds be removed from this list, since they may mislead people into thinking that these are the only possible reasons for triggering an LPI objection.²⁹ Although this point does not lack merit, the enumeration of the first three grounds provides valuable guidance on the nature and gravity of the reasons for which a gTLD can be found contrary to general principles of international law in relation to public order and morality. More specifically, as far as the I.O.'s mandate is concerned, he/she may only file objections against *highly objectionable* gTLD applications. This qualification does not apply to other persons or entities submitting an LPI objection. Even though the question of whether a string is highly objectionable falls within the I.O.'s discretion and is not subject to review by the expert panels,³⁰ it appears that there is a high threshold for objections filed by the I.O. This issue will be revisited in the next Part in light of the I.O.'s practice.

3. Protecting the Global Public Interest in Practice

In the course of reviewing applied-for strings, the I.O. had to reach a decision on whether a string went against the interests of global Internet users. In doing so, he paid particular attention to public comments available either on ICANN's webpage or elsewhere in the public domain. The I.O. carried out his work transparently, by publishing his comments on any applications that could be seen as controversial. These comments aim to address public concerns and explain the reasons why the I.O. might lodge an objection or does not intend to do so. Alain Pellet did not hesitate to admit that he sometimes had to invent criteria by which a gTLD was contrary to the international public order.³¹ This is not surprising given the fact that he was the first to explore the contours of a novel institution, and the discretion accorded by the

²⁷ Dissenting Opinion by Professor August Reinisch relating to the Expert Determination of 11 December 2013 in *Professor Alain Pellet, Independent Objector (France) v Ruby Pike, LLC (USA)*, Case No. EXP/412/ICANN/29, 11 December 2013 (*Ruby Pike*) (12 December 2013) [18].

²⁸ Cf *Ruby Pike vis-à-vis the Silver Glen, Goose Fest and Dothealth cases*.

²⁹ Report, 35.

³⁰ *Professor Alain Pellet, Independent Objector (France) v Excellent First Limited (Cayman Islands)* (Consolidated with Cases No. EXP/395/ICANN/12 and EXP/400/ICANN/17) Case No. EXP/399/ICANN/16 [89]-[95].

³¹ Pellet's comment in A Chander, 'Challenges and Approaches to Effective Cyberspace Governance in a Multipolar World' (2013) 107 Proceedings of the Annual Meeting of the American Society of International Law - International Law in a Multipolar World 95, 109.

flexible standard of general principles of international law relating to public order and morality. Section 1 discusses the comments providing the public with an explanation of why the I.O. did not deem it necessary to object to an applied-for string. Section 2 addresses the instances where the I.O. decided that an LPI objection should be triggered.

3.1 Considerations Failing to Meet the Requirements for the Limited Public Interest Objection

3.1.1 State interests and questions of sovereign competence

The I.O. was receptive to considerations touching upon the exercise of sovereign competence, international cooperation and the risk of causing irreparable harm to the security and stability of States. ‘.GCC’ and ‘.ARMY’ were two of the few instances when, reviewing applied-for strings, the I.O. considered submitting an objection but decided not to in light of the specific circumstances. As far as ‘.GCC’ is concerned, the I.O. acknowledged that the creation and management of this string could have adverse effects on the mission of the international organisation *Gulf Cooperation Council*. However, an LPI objection was not deemed necessary, since a Legal Rights Objection would be more relevant and the Gulf Cooperation Council was better placed to file a Community Objection.³² ‘.ARMY’, and its relationship to the sovereign competence of raising and maintaining an armed force, brought to the fore fundamental principles of international law in relation to maintaining international peace and security, including the prohibition of the use of force, the right to self-defence and international humanitarian law.³³ The I.O. decided that the guarantees and safeguards provided by the Applicant were sufficient and, in any event, any particular State could file its own objection if its rights and interests were threatened. Finally, in the case of ‘.PERSIANGULF’, the I.O. held that an LPI objection was not warranted because there are no relevant binding international norms that could help settle the issue of the naming dispute (Persian Gulf or Arabian Gulf) over the body of water separating the Arabian Peninsula and the Islamic Republic of Iran.³⁴ These instances demonstrate that the global public interest includes public policy matters and aspects of the functioning of the State insofar as these are reflected in international law.

³² ‘.GCC’, I.O.’s General Comment. All General Comments on controversial applications are available at: <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/> accessed 31 January 2017.

³³ ‘.ARMY’, I.O.’s General Comment [1]-[5].

³⁴ ‘.PERSIANGULF’, I.O.’s General Comment [8].

3.1.2 Religious considerations

Internet users raised concerns online with regard to the applied-for strings ‘.ISLAM’, ‘.CHURCH’ and ‘.CATHOLIC’. The crux of the matter was that a private entity should not be authorised to run a gTLD that makes reference to a religion, due to the risk of excluding the diverse beliefs of different groups within a religious community. The I.O. adopted the same approach for all three strings.³⁵ Having acknowledged that religion is a sensitive issue, he maintained that a review of an applied-for string against the requirements of the LPI objection is limited to a consideration of those values that qualify as recognised general principles of international law relating to public order and morality. Consequently, specific religious and moral judgments that do not enjoy global consensus are not relevant.

The I.O.’s starting point in examining the relevant international law framework was that freedom of religion or belief is a fundamental principle protected by international law and universally enshrined in the Universal Declaration of Human Rights (UDHR)³⁶ and the ICCPR, and, at a regional level, in the European Convention on Human Rights (ECHR),³⁷ Inter-American Convention on Human Rights (IACHR)³⁸ and the African Charter on Human and Peoples’ Rights (ACHPR)³⁹ as well as a series of non-binding international instruments.⁴⁰ There followed a detailed discussion on religion and religious diversity from the perspective of the principle of non-discrimination.⁴¹ According to the general clauses contained in Article 2 ICCPR, Article 2 Convention on the Rights of the Child⁴² and Article 2 ICESCR, States have an obligation to respect the rights recognised in the respective documents and ensure that they can be exercised by all individuals without distinction on the ground of religion. On this basis, the I.O. concluded that an LPI objection to the launch of these gTLDs was not warranted. On the contrary, these gTLDs could encourage the promotion of the freedom of religion by creating and developing a new space for religious expression, thereby benefitting the relevant religious communities.⁴³

³⁵ ‘.ISLAM’, I.O.’s General Comment [2]; ‘.CHURCH’, I.O.’s General Comment; ‘.CATHOLIC’, I.O.’s General Comment.

³⁶ UNGA Res 217 A (III) (10 December 1948).

³⁷ (Concluded 4 November 1950; entered into force 3 September 1953) ETS 5.

³⁸ (Concluded 21 November 1969; entered into force 18 July 1978) OAS Treaty Series No 36.

³⁹ (Adopted 27 June 1981; entered into force 21 October 2001) 1520 UNTS 217.

⁴⁰ ‘.ISLAM’ Comment, [5]-[9]. The I.O. referred to the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the UNHRC Resolution on Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence Against Persons Based on Religion or Belief.

⁴¹ Ibid [11].

⁴² Convention on the Rights of the Child (adopted 20 November 1989; entered into force 2 September 1990) 1577 UNTS 3.

⁴³ Eg ‘.CHURCH’ Comment, [12]-[13].

3.1.3. *Public Morality and Cultural Values*

Many public comments were made online arguing that the applied-for strings ‘.ADULT’, ‘.HOT’, ‘.PORN’, ‘.SEX’ and ‘.SEXY’ would lead to an increase in pornographic material, including child pornography, and that they would pose a threat to family life, public morals and religious and cultural values. The I.O. acknowledged that the diffusion of pornographic material is a highly controversial issue,⁴⁴ but he opined that, with the exception of the protection of children from sexual exploitation,⁴⁵ there are no legal norms of morality and public order that are recognised under the fundamental principles of international law.⁴⁶ Understandings of international morality and of what is offensive differ over time and between societies, and it is therefore up to each State to make the appropriate choices, including filtering or preventing access to websites perceived to be immoral.⁴⁷ It was added that not only is there no evidence to support the claim that the launch of the controversial gLTDs would promote unlawful activities, but gLTDs explicitly linked to adult entertainment material could also make the identification of those websites easier for users who do not wish to avoid them.⁴⁸

‘.VODKA’ received criticism online too.⁴⁹ Comments claimed that the advertising, sale or consumption of alcohol is illegal in some countries and that the consumption of alcohol is perceived by many people as immoral and detrimental to public order. The I.O.’s view was that there is no global consensus with regard to this question. Although vodka and, in general, alcohol and its consumption may be controversial from a cultural or religious point of view,⁵⁰ there is no rule of international law that supports the prohibition of ‘.VODKA’.⁵¹ Consequently, the regulation of the trade and consumption of alcohol, and the advertising of alcohol-related activities, falls within domestic jurisdiction.

‘.WTF’ is one of the strings that attracted considerable attention.⁵² The word’s use is considered obscene, vulgar or offensive in many societies and similar terms are regularly

⁴⁴ ‘.ADULT’, I.O.’s General Comment [1]; ‘.HOT’, I.O.’s General Comment; ‘.PORN’, I.O.’s General Comment; ‘.SEX’, I.O.’s General Comment; ‘.SEXY’, I.O.’s General Comment.

⁴⁵ Provisions of key international instruments regarding the protection of children from sexual exploitation cited by the I.O. were: Article 34 CRC, Article 3 UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3 International Labour Organization’s Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, article 9(1) Council of Europe Convention on Cybercrime, Article 27 African Charter on the Rights and Welfare of the Child as well as a series of non-binding documents.

⁴⁶ ‘.ADULT’ Comment, [4]-[6].

⁴⁷ Ibid [2].

⁴⁸ Ibid [3].

⁴⁹ ‘.VODKA’, I.O.’s General Comment.

⁵⁰ Ibid [1].

⁵¹ Ibid [4], [9].

⁵² ‘.WTF’, I.O.’s General Comment.

censored. The question was framed in terms of whether the gTLD is, first, contrary to international morality and, second, harmful to children. Similar concerns were also raised by States including Australia, which issued an early warning against the application for ‘.WTF’. The I.O.’s starting point was that freedom of expression, including the freedom of speech, opinion, expression and access to information, is recognised by fundamental principles of international law.⁵³ Universal instruments for human rights (Article 19 ICCPR; Article 19 UDHR) and regional human rights treaties (Article 10 ECHR; Article 13 IACHR; Article 9 ACHPR) protect the right to freedom of expression and prescribe limitations thereto on the grounds of public order and morality.⁵⁴ Nevertheless, the I.O. noted that, despite the fact that the word ‘wtf’ is undoubtedly a contemporary slang term, there is no existing international legal norm that imposes such a value judgment.

Particular attention was devoted to the question of whether the launch of this gTLD would be harmful to children.⁵⁵ Article 13 CRC accords children the right to freedom of expression. The exercise of this right may be subject to certain restrictions, but only such as are provided by law and necessary on the grounds of public order, health or morals. Moreover, Article 17 (e) CRC calls on member States to recognise the important function performed by the mass media and to ensure that children have access to information and material from a diversity of national and international sources, especially those aimed at the promotion of their social, spiritual and moral wellbeing and physical and mental health. State Parties must encourage the development of appropriate guidelines to protect children from information and material injurious to their wellbeing, bearing in mind the provisions of Articles 13 and 18. The I.O. was of the view that an LPI objection would be warranted only if a gTLD promoted child pornography, racial discrimination or incitement to such acts. Although this position may seem to set a high threshold, it should be borne in mind that the I.O.’s mandate is to ascertain whether there are international established norms (general principles) precluding a string’s registration. This does not mean that there are no other grounds that can be invoked from the perspective of national law and practice in order to justify a restriction to Article 13 CRC on the child’s right to freedom of expression; these grounds, however, are not necessarily general principles of international law relating to public order and morality.

Pellet’s decision not to object to ‘.WTF’ was received enthusiastically by a large part of the Internet community. Milton Mueller, the leading Internet governance expert, wrote a short

⁵³ Ibid [3].

⁵⁴ Ibid [4]-[7].

⁵⁵ Ibid [9]-[11].

commentary in 2013 entitled ‘on second thought, let’s NOT kill all the lawyers’.⁵⁶ Mueller noted that the choice not to object to ‘.WTF’ ‘is a wonderful example of how global internet governance needs to be based on law, not on “public policy”’. This view reflects growing concerns about clashes within ICANN regarding acceptable semantic content, and States’ attempts to legitimise arbitrary and vague public order claims at the expense of freedom of expression online. Therefore, in the case of ‘.WTF’, the application of general principles of international law relating to public order and morality, as the standard of assessment in deciding whether a string should be registered, dismissed such concerns.

Finally, many Internet users strongly disapproved of ‘.GAY’ and ‘.LGBT’. The debate revolved around the claim that homosexuality is perceived by certain societies as a threat to public morals and religious and cultural values. The I.O. accepted that homosexuality is a contested issue from a cultural and/or religious perspective,⁵⁷ but underlined that the great differences in opinion among States and societies regarding the definition of what is offensive or morally sound have precluded the establishment of internationally accepted norms.⁵⁸

Of particular interest is the fact that the I.O. did not restrict himself to ascertaining that there was no pertinent international norm prohibiting the string, but went on to argue that submitting an LPI objection would be incompatible with States’ obligation not to discriminate on the grounds of sexual orientation or gender identity. This obligation, according to the I.O., is a *statu nascendi* norm at the international level. The I.O. invoked judgments of national courts from South Africa, Colombia, Hong Kong and the European Court of Human Rights (ECtHR) that have challenged religious or moral arguments in relation to LGBT issues.⁵⁹ He also noted a trend for international law to increasingly address LGBT rights,⁶⁰ with a particular focus on States’ obligation under the principle of non-discrimination, as enshrined in Article 2 UDHR, Article 2 ICCPR, Article 2 CRC and Article 2 ICESCR, to respect the rights recognised in these instruments and to ensure that all individuals are able to exercise them without distinction.⁶¹ Monitoring bodies have interpreted the application of the principle of non-discrimination in human rights treaties as including sexual orientation and gender identity among the prohibited

⁵⁶ M Mueller, ‘On Second Thought, Let’s NOT Kill All the Lawyers’ (12 February 2013) <<http://www.internetgovernance.org/2013/02/12/on-second-thought-lets-not-kill-all-the-lawyers/>> accessed 31 January 2017.

⁵⁷ ‘.GAY’, I.O.’s General Comment; ‘.LGBT’, I.O.’s General Comment.

⁵⁸ ‘.GAY’ Comment [2]-[5].

⁵⁹ Ibid [6]-[9].

⁶⁰ Ibid [10].

⁶¹ Ibid [11]-[20].

grounds of discrimination.⁶² Lengthy quotations were cited from reports by the UN Secretary General and the 2011 UN High Commissioner for Human Rights, reaffirming the applicability of international human rights law to LGBT persons.

The I.O.'s lengthy discussion on whether an international norm prohibiting discrimination against LGBT persons exists was not necessary for deciding whether an LPI objection was warranted. The review of an applied-for string entails an assessment of whether general principles of international law relating to public order and morality *dictate its non-registerability*. Perhaps the I.O. thought he should add that international law is moving in the opposite direction to the comments received objecting to the registration of 'GAY' and 'LGBT'. Furthermore, the I.O.'s conclusion that developments in international law give rise to an emerging international *statu nascendi* norm regarding the prohibition of discrimination on the grounds of sexual orientation or gender identity is rather premature. One could say, rather, that there is currently a trend in international law that is heading in this direction. The I.O. did not give sufficient evidence to substantiate his conclusion. References to the judgments of national courts are few and 'cherry-picked'. Many of the sources discussed are non-binding documents, such as UN Reports and the views of UN monitoring bodies. More importantly, the existing trend was described by reference to materials that support it, omitting State practice from those countries of the Arab region, Asia and Africa that dismiss or actively oppose it.

To summarise, three points should be highlighted from the aspects of the I.O.'s practice discussed thus far. First, in most of his comments, the I.O. referred to *fundamental* principles of international law as the standard for reviewing the applied-for strings. For the sake of clarity and legal certainty, it would have been welcome if the I.O. had insisted on referring to the legal standard set by the AGB, namely, general principles of international law relating to public order and morality. Although the standard itself affords a degree of creativity, the concept of 'fundamental principles' is broader than that of 'general principles' and may be quite different.

Second, one would have expected a more rigorous examination of certain legal questions, given the methodological difficulties in ascertaining the (non)existence of a general principle.⁶³ Although the I.O.'s comments were made in the context of an initial review of an

⁶² The I.O. referred to the UN Committee CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010) UN Doc CEDAW/C/GC/28 [18]; UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) [8.7]; UN Committee ICESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* (2 July 2009) UN Doc E/C.12/GC/20 [32].

⁶³ J Ellis 'General Principles and Comparative Law' (2011) 22 EJIL 949, 950; T Buergenthal, 'International Judges and International Law' in D Terris, CP Romano and L Swigart, *The International Judge - An Introduction to the Men and Women Who Decide the World's Cases* (OUP, 2007) 102, 113.

applied-for string — and not a judicial decision requiring detailed legal reasoning — one overarching issue deserved more careful consideration. In most of his comments, the I.O. made sure to substantiate his position on the basis of widely ratified treaties of universal scope (ICCPR, CRC) or instruments reflecting global consensus (UDHR). This is in line with the practice of the AGB, which, in its non-exhaustive list of treaties and documents that reflect general principles of international law relating to public order and morality, refers to instruments of universal scope. The I.O. also made extensive reference to regional human rights treaties (ECHR, IACHR, ACHPR) and other regional treaties (EU Treaty). One cannot fail to notice the striking absence of the Revised Arab Charter from the I.O.'s sources and analysis.⁶⁴ Nor will the reader find any references to (admittedly non-binding) human rights documents originating in the Asian region, which is especially striking since the I.O. did not hesitate to refer to non-binding instruments in other instances. The outcome of the I.O.'s inquiry would not (necessarily) have been different in these cases had he taken these additional instruments into account. Nevertheless, when discussing the formation of global consensus, one should not leave any room for doubt regarding the selection of the materials and sources consulted. This does not imply that regional developments should not be discussed, but rather that this should be done in a representative and balanced fashion. It is worth noting that the majority of Internet users are based in Asia, the Middle East and Africa. The I.O.'s decisions need to be, and *appear to be*, persuasive to a global audience. The importance of a positive *perception* of the gTLD programme has been underscored by the I.O. himself.⁶⁵ The language of international law, and how it is employed, has important implications for understandings of what constitutes the global public interest.

Third, it is possible to identify principles of international law aimed at protecting specific values common to international society, such as the prohibition of genocide, slavery, torture or the sexual exploitation of children. However, international perspectives on morality regarding sexual, religious or cultural issues are far from uniform. In the absence of a consensus among States, it is difficult to discern whether relevant international norms have been crystallised. In these cases (eg '.CHURCH', 'ADULT', 'WTF', '.VODKA'), the applied-for strings were not objectionable, and it falls within the competence of each State, society and religious or cultural group to set their own policies.⁶⁶ In instances in which the applied-for string

⁶⁴ League of Arab States, Revised Arab Charter on Human Rights (adopted 22 May 2004; entered into force 15 March 2008) reprinted in 12 (2005) Int'l Hum. Rts. Rep. 893.

⁶⁵ Report, 54.

⁶⁶ Report, 34.

related to State functions associated with core principles of international law (‘.ARMY’, ‘.GCC’), the I.O. was willing to consider the string objectionable. This brings the consensual nature of international law to the fore and highlights the inherent limitations of an international law standard for capturing, accommodating and protecting public interest considerations that do not revolve around State interests. Public interest considerations usually reflect States’ interests.⁶⁷ Consequently, the question is whether, and if so to what extent, the concept of public interest accommodates the rights and interests of individuals and communities on a global level if they are not associated with the State. There is an ongoing discussion about what ICANN means when it states that the outcomes of its decision-making process must reflect the public interest. From ICANN’s perspective, it shall ensure that its decisions are made in the public interest and not merely in the interests of specific stakeholders. Yet this does not shed much light on who the stakeholders are and what interests should be considered relevant. It is unlikely that ICANN intends to elaborate on the concept of public interest, since, among other reasons, this would set off heated, interest-based negotiations.⁶⁸ These concerns have been the topic of lively debate in the Internet Governance Forum, the multi-stakeholder platform under the auspices of the UN that facilitates the discussion of public policy issues pertaining to the Internet, but there are no easy answers.⁶⁹ Therefore, the I.O. and the expert panels have been burdened with this task. The AGB offers some guidance on established legal forms encapsulating public order and moral considerations by providing a non-exhaustive list of instruments that reflect general principles of international law. The list includes international treaties and documents which are either human rights-related⁷⁰ or human rights-oriented.⁷¹ Therefore, the LPI objection and the standard of general principles of international law relating to public order and morality are designed to include and sustain other considerations besides public policy issues. It is unclear, however, whether considerations other than human rights can be accommodated by the standard and, consequently, whether the LPI objection is responsive

⁶⁷ UNGA Res. 70/125, 1 February 2016, UN Doc. A/RES/70/125 [56], [59]; Affirmation of Commitments [9.1 (b)].

⁶⁸ R Abdul Rahim in The Global ‘Public Interest’ in Critical Internet Resources Workshop (11 November 2015) <<http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2991-2015-11-11-ws-52-the-global-public-interest-in-critical-internet-resources-workshop-room-1-finished>> accessed 31 January 2017.

⁶⁹ The Global ‘Public Interest’ in Critical Internet Resources Workshop (fn 70); Morison and Anthony (fn 7).

⁷⁰ Eg International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979; entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁷¹ Eg Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926; entered into force 9 March 1927) 60 LNTS 254; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990; entered into force 1 July 2003) 2220 UNTS 3.

to these.

3.2 Instances in which the Limited Public Interest Objection was Warranted

It should be noted from the outset that the expert panels have not thus far decided any LPI objections brought by individuals or entities.⁷² A handful of LPI objections were filed, but the proceedings were terminated before the panels issued their determinations. Consequently, the remedy of the LPI objection, despite the fact that anyone has a right to avail themselves of it, is not being used. This only reinforces the significance of the I.O.'s role in raising LPI objections when reviewing gTLDs. More specifically, the I.O. has filed eleven LPI objections against gTLD applications put before the expert panels in the International Chamber of Commerce. The strings under review were '.BROKER', '.HEALTH' and a series of health-related strings ('.HEALTHCARE', '.HOSPITAL', '.MED'). Since the I.O. raised almost identical arguments in these cases, reference will be made to just one of them ('.HEALTH').⁷³

The main thrust of the I.O.'s objection was that '.HEALTH', taken together with the Applicant's intended purpose, was contrary to the right to health. The entity seeking to operate '.HEALTH' must demonstrate an awareness of its duty to manage the gTLD in such a way that the right to health is fully respected. In this instance, since the Applicant had not sought the effective involvement of private and public actors and had not indicated any awareness of its duty to provide access to reliable and trustworthy health-related information, it was argued that '.HEALTH' was objectionable and should not be registered.⁷⁴

The I.O.'s arguments to substantiate these points were unconvincing. First, he argued that the right to health is a general principle of international law relating to public order and morality.⁷⁵ He inferred this from the fact that the right to health is included in the ICESCR and other universal and regional treaties⁷⁶ including the World Health Organization (WHO) and the International Health Regulations, which are binding on 194 States.⁷⁷ However, treaty commitments entered into by States do not strictly qualify as substantial evidence to support

⁷² Details <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/pending-cases/>> accessed 31 January 2017.

⁷³ LPI Objection ('.HEALTH') submitted by the I.O. in *Dothealth* case <<http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/health-lpi-dothealth-llc/>> accessed 31 January 2017 (I.O.'s LPI Objection).

⁷⁴ *Ibid* [25].

⁷⁵ *Ibid* [10]-[15].

⁷⁶ Mention was made of Article 5 (e)(iv) International Convention on the Elimination of Racial Discrimination; Articles 11 (1)(f) and 12 CEDAW; Article 24 CRC; Article 25 International Convention on the Rights of Persons with Disabilities; Article 11 European Social Charter; Article 16 ACHPR; and Article 10 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

⁷⁷ I.O.'s LPI Objection [14].

this claim.

Further, the I.O. contended that States and private parties have a positive obligation under the right to health to provide access to reliable health-related information. The I.O. relied heavily on General Comment No. 14 on the right to health issued by the CESCR Committee. The Committee has indeed argued that the right to access health facilities, goods and services includes the right to seek, receive and impart health-related information.⁷⁸ The General Comment, even if widely regarded as authoritative, is not a binding interpretation of Article 12 ICESCR. Most importantly, there is nothing to suggest that the informational aspect of the right to access health-related services entails a right to receive or have access to *reliable and trustworthy* information. The ICESCR Committee in its General Comment merely referred to States' obligation not to deliberately withhold or misrepresent information vital to health protection or treatment,⁷⁹ and not to an (alleged) duty to actively ensure access to reliable information (and, hence, to censor incorrect information).

The I.O. also invoked the case law of the ECtHR regarding access to information,⁸⁰ but the Court's pronouncements were taken out of context. The ECtHR has a well-developed case law concerning the positive obligation under the right to family and private life to provide access to *environmental* information only.⁸¹ The scope of positive obligations is, therefore, context-specific, and they do not impose duties on non-State actors. Moreover, an (alleged) European approach to the right to access information is not a sufficient basis from which to draw conclusions applicable at a global level. General principles of law relating to public order and morality are supposed to define norms with a universal reach. Even if the case law of the ECtHR were pertinent to the circumstances at hand, it would not be sufficient to establish the existence and content of a general principle. Finally, the UN Guiding Principles on Business and Human Rights regarding the duties of private actors, to which the I.O. referred, are devoid of any binding effect since they merely set voluntary standards for businesses.⁸²

Overall, Alain Pellet pursued a far-reaching construal of the standard of general principles of international law relating to public order and morality in his discussions with the expert panels. It might be said that he welcomed the opportunity to progressively develop

⁷⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: 'The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', UN Doc. E/C.12/2000/4 (11 August 2000), [12(b)] (General Comment No. 14).

⁷⁹ Ibid [50].

⁸⁰ I.O.'s LPI Objection [18].

⁸¹ DJ Harris and others, *Law of the European Convention on Human Rights* (OUP, 2009) 447.

⁸² Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (by J. Ruggie) (21 March 2011) UN Doc. A/HRC/17/31.

international law in this area, with the intention of fulfilling, as he saw fit, certain needs in the process of implementing the gTLD programme. Surprisingly, three expert panels accepted the I.O.'s arguments that the right to health should be regarded as a general principle of international law relating to public order and morality.⁸³ The panel in *Ruby Pike* went so far as to hold that '.HOSPITAL' should not be registered.⁸⁴ A crucial point that Pellet underlined in his objections is that, if the assessment conducted by the expert panels is limited to the wording of the string itself, the LPI argument would be rendered almost moot.⁸⁵ The AGB instructs the panels to conduct their analysis and evaluation on the basis of the applied-for string itself, and, *only if needed*, to use the intended purpose of the gTLD as stated in the application as additional context. Pellet insisted that a proper assessment of the compatibility of a proposed string with public order and morality cannot be completed without taking into account the context of its application, including the likely effects of the operation of the string on the Internet community.⁸⁶ This is the underlying rationale for objecting health-related gTLDs, although the strings themselves do not fall within the 'highly objectionable' category. Acknowledging that, as the AGB currently stands, it is not possible for the panels to exceed their competence, he recommended in his final Report that the AGB should explicitly ask the panels to conduct their analysis based on the applied-for string itself *and* its intended purpose as stated in the application.⁸⁷

The broad construal of general principles of international law relating to public order and morality as including the safety and welfare of society, taken together with the suggestion that the string and its additional context be considered on an equal footing when evaluating gTLDs, illustrates that the I.O. favoured a broad conception of public order.⁸⁸ There is no doubt that an international law standard reflects and expresses public interest considerations, such as public health or public safety. Yet the I.O. and the three expert panels that endorsed his approach construed the standard of general principles very broadly and, accordingly, lowered the threshold for triggering the LPI objection substantially. It is doubtful, however, whether Mueller would approve of Pellet's approach to health-related strings with the same enthusiasm

⁸³ Eg consolidated objections: *Professor Alain Pellet, Independent Objector (France) v Charleston Road Registry INC (USA)*, Case No. EXP/415/ICANN/32, 19 December 2013 [111] (*Charleston*); *Professor Alain Pellet, Independent Objector (France) v Hexap SAS (France)*, Case No. EXP/410/ICANN/27, 19 December 2013 [120] (*Hepax SAS*); *Medistry* [116]; *Ruby Pike* [86]-[87]; cf *Silver Glen* [40]; *Goose Fest* [103].

⁸⁴ *Ruby Pike* [91].

⁸⁵ Report, 35-36.

⁸⁶ *Professor Alain Pellet, Independent Objector (France) v Afilias Limited (Ireland)*, Case No. EXP/409/ICANN/26, 6 November 2013 [57] (*Afilias*).

⁸⁷ Report, 38. The expert panel in *Afilias* [57] also sided with the I.O.

⁸⁸ Report, 34-35, 37.

that he showed in the case of the ‘.WTF’ string.

A final point concerns the reason that the I.O. framed his objections to health and health-related strings as being predominantly an issue of international human rights law. His arguments were based on the right to health and the corresponding obligations imposed on States and private actors. The I.O. could, alternatively, have framed the protection of the health of Internet users and their access to reliable information as a matter of public health. As discussed earlier, the overarching goal of protecting the global public interest and the design of the LPI objection, as well as the standard of general principles relating to public order and morality, can accommodate issues pertaining to both State policies and human rights considerations.⁸⁹ One possible reason is that the I.O. did not consider arguments related to national policies convincing, even though he did have great difficulty, in the cases of ‘.GCC’ and ‘.ARMY’, linking public policy matters to general principles of international law relating to public order. Arguably, however, the main reason that Pellet chose to present his arguments in the context of human rights law is that the AGB outlines a human rights-like framework for assessing LPI objections. The AGB establishes freedom of expression as the rule and, accordingly, objections to applied-for strings can be accepted on the basis that they would impede or restrict this right. This is not to say that the AGB has endorsed the approach of human rights law, but rather that the AGB reflects the norm created by the technical infrastructure of the Internet — that is, the free flow of information. Within this framework, public health considerations can be considered only as legitimate and necessary restrictions on the right to freedom of expression.⁹⁰ In contrast, framing the objections at hand as a matter that predominantly concerns the human right to health adds a different dimension, allowing freedom of expression and the right to health to be read together in an altogether different way.⁹¹

3.3 Enhancing Accountability and Legal Certainty in the Context of the Limited Public Interest Objection Procedure

This last section briefly highlights three constructive recommendations that Alain Pellet addressed to ICANN. The recommendations aim to mitigate arbitrariness, enhance legal certainty and promote public trust in the LPI-objection process.

⁸⁹ It is also possible that a specific question, including the right to health, can be analysed from both perspectives.

⁹⁰ It seems that expert panels have already tackled this issue: *Charleston Road* [100]–[103]; *Hexap SAS* [109]–[112]; *Medistry* [107]–[108].

⁹¹ For detailed analysis see Rachovitsa (fn 22) 40-47.

3.3.1 *The Non-binding Status of Expert Determinations on ICANN*

Section 3.4.6 of the AGB states that ‘the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process’. Consequently, ICANN has not committed itself to following the Expert Panels’ determinations. Pellet highlighted this, calling it a ‘rather unfortunate situation which paves the way for allegations of arbitrary decisions’.⁹²

3.3.2 *Creating an Appeal Mechanism*

Currently, the gTLD dispute-resolution procedure does not include an appeal process. Pellet strongly emphasised that an appeal process should be provided by the AGB, that this procedure should continue to be a matter for arbitrators and that they alone should have the final say. Certain Applicants have used the reconsideration request process as a substitute for an appeal process.⁹³ The fact that ICANN’s Board Governance Committee accepted one of these requests and annulled an expert determination was unfortunate, since the Committee lacks the competence to review an expert determination. As Pellet warned, this is a worrisome precedent that undermines legal certainty and may have adverse effects on the public’s positive perception of the gTLD programme.⁹⁴

3.3.3 *Safeguarding the Independent Objector’s Independence*

The independence and impartiality of the I.O. was questioned by Applicants in specific cases heard by the expert panels. The Applicants claimed that the I.O. was biased towards health law and had a conflict of interests because he had served as counsel for the World Health Organization before the International Court of Justice.⁹⁵ The I.O. denied these allegations and the expert panels dismissed them as well. In response to this, Alain Pellet made a series of recommendations concerning the future implementation of the role of the Independent Objector. The AGB states that the various codes of ethics for judges and international arbitrators allow the I.O. the discretion to declare and maintain his/her independence without providing

⁹² Report, 31.

⁹³ The reconsideration request process a procedure intended for any person or entity that has been materially affected by any ICANN staff action or inaction. <<https://www.icann.org/resources/pages/accountability/reconsideration-en>> accessed 31 January 2017.

⁹⁴ Ibid, 14-15, 31-33.

⁹⁵ I.O.’s Additional Written Statement regarding the *Silver Glen* case [5] <<http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/healthcare-lpi-silver-glen-llc/>> accessed 31 January 2017.

any further details. Pellet suggested that ICANN should expressly state in the rules applicable in the future that if the independence and integrity of the I.O. is challenged, the issue should be decided by the expert panels involved in the case in which it is raised.⁹⁶ In the scenario where a challenge to the I.O.'s independence is accepted by the expert panel, or when the I.O. recuses him/herself, ICANN should either provide for an alternate I.O. or supply a list of substitutes to which the expert panel may turn.⁹⁷

Conclusions and Recommendations

The creation of the LPI objection procedure, as a means of pre-emptively reviewing ICANN's decisions to register applied-for strings, is an interesting development that merits attention alongside other accountability-enhancing practices in global governance. Assessing the decisions of an informal global body against global public interest requirements supports the idea of giving due regard to general interests beyond those of specific stakeholders or the functional interests of ICANN.⁹⁸ The establishment of an independent third-party — the Independent Objector — who is mandated to object strings if necessary is novel. The significance of the I.O.'s role is strengthened by the fact that other individuals and entities have not seemed keen to use the LPI objection thus far.

Assessing an ICANN decision against an international legal standard enhances legal accountability and legal certainty. The active involvement of international lawyers in formulating and developing the standard of general principles of international law relating to public order and morality evidences the increasing role of international law in the LPI objection. General principles of international law relating to public order and morality provide a standard that is conducive to extra-legal considerations. That said, it is difficult, in practice, to establish a global consensus on issues pertaining to moral, religious and public order values. In this sense, the international quality of the standard tends to exclude domestic law and policy concerns, unless these are reflected in international law. International law serves the aim of avoiding an arbitrary conception of the public interest and keeps the development of the domain name system free, as far as possible, from content-based limitations.

⁹⁶ Report, 15.

⁹⁷ Ibid.

⁹⁸ G Palombella, 'Global Legislation and Its Discontents' in R Liivoja and J Petman (eds), *International Law-Making – Essays in Honour of Jan Klabbers* (Routledge, 2014) 57, 59.

On the basis of the I.O.'s practice, a few notes and recommendations need to be made with a view to improving the future implementation of this mechanism.

1. In his/her comments and submissions, the I.O should examine the legal issues more rigorously, especially with respect to the material and sources consulted. This would not only benefit the methodology used to ascertain the existence and content of a general principle of international law relating to public order and morality, but would also underscore the legitimacy of the I.O. and the relevance of international law. The language and techniques of international law have much to offer in terms of effectively addressing the global audience of Internet users and persuading different stakeholders.
2. The extent to which general principles of international law relating to public order and morality accommodate and articulate the global public interest is unclear, and perhaps one could call it a work-in-progress. The examples discussed above demonstrate that international law can easily articulate the global public interest when it comes to public policy matters and aspects of the functioning of the State, entrenched as it is in international affairs. In addition, the standard of general principles of public order and morality allows for the protection of certain human rights considerations. The AGB emphasises this aspect, even though it sets a high threshold for successfully challenging an applied-for string. Consequently, not all human rights issues are valid grounds for finding a string objectionable. It remains to be seen in the future implementation of the LPI objection procedure whether general principles can give expression to other meaningful public interest concerns.⁹⁹ The I.O. and other interested parties from the Internet community have an important role to play in upholding the relevance of the LPI objection to ICANN's functioning.
3. The foregoing discussion revealed that the I.O. did not rigidly follow the guidelines of the AGB to the letter. His submissions concerning the health and health-related strings illustrate that, in his view, a string does not need to concern a particularly reprehensible kind of behaviour to be objectionable. He also pursued a far-reaching construal of the concept of 'general principles of international law relating to public order and morality', by including general concerns of social safety and welfare. On the other hand, the I.O. was very reluctant to acknowledge controversial religious or moral concerns as

⁹⁹ For a brief overview of the question of whether international law is properly equipped to handle developments introduced by global governance bodies, see RA Wessel, 'Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors' in MA Heldeweg and others (eds), *Regulating Technological Innovation* (Palgrave, 2011) 77, 89.

principles generally accepted in international law that could qualify as grounds to challenge gTLDs. It seems that Pellet attempted to make the LPI objection more receptive to considerations of general concern to Internet users (eg health). This brings the LPI objection closer to being a mechanism for addressing external public interest concerns, rather than one that merely excludes national public policy issues. It is doubtful, however, whether the LPI objection, as drafted, can sustain Pellet's approach. ICANN could, however, accept that the LPI objection will develop in this direction in practice, even though, in his final Report, Pellet divulged his impression that ICANN cared little about his work.¹⁰⁰

¹⁰⁰ Report, 8