

EN

ANNUAL REPORT

FY
09



Creating Dialogue . . . Affirming Fairness.



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Letter from the Ombudsman



The Internet Corporation for Assigned Names and Numbers

30 June 2009

To the Chairman and the Board of Directors of ICANN,

I have the great pleasure of submitting to you the fifth annual report of the Office of the Ombudsman.

The Office continues to receive complaints and contacts on a regular basis from members of the ICANN community. Dealing with these issues, and the associated case management remains the priority of my Office. The Office maintains its roles in outreach, involvement in peer Ombudsman activities and research.

The ICANN Office of the Ombudsman continues to distinguish itself as a Centre of Excellence in Online Dispute Resolution, Ombudsmanship and, more recently, in Ombudsman evaluation. I firmly believe that the Office of the Ombudsman continues to add to the strength of ICANN's Accountability and Transparency, and that it is a vital link in providing private, confidential, cost free, timely and expert dispute resolution for community members in their disagreements with the Internet Corporation for Assigned Names and Numbers.

This annual report will document the key activities of the Ombudsman. This year's report will also provide a review of the first five years of operations.

Finally, I would like to express my continued appreciation to the members of the ICANN Board of Directors, the ICANN community and supporting organizations, and to the ICANN staff for the continued cooperation and assistance provided during the past year.

With best regards,

Frank Fowlie
Ombudsman

The Year in Review



Dr. Frank Fowlie,
ICANN Ombudsman

2008-2009 was an active year for the Office of the Ombudsman. The number of overall complaints brought to the attention of the Office dipped slightly, with 96 intakes. However, the number of complaints within my jurisdiction rose to 31. This is a 90 percent increase over the previous year's number of jurisdictional complaints (n=17). This means that while the overall number of complaints is smaller, the actual number of issues requiring the intervention of the Ombudsman has risen. The tables in the annual report analyze this shift in complaints received by my Office.

In 2008–2009 my Office provided four formal investigation reports to the Board of Directors. These reports made eight separate recommendations for individual or systemic redress or for improvements to ICANN's administrative systems and processes. I also provided two informal reports to the institution and to complainants. One was a preliminary report, and the investigation into the subject matter of the complaint continues into FY 2009–2010.

The ICANN bylaws and the Office of the Ombudsman Framework provide that the Ombudsman may make reports and recommendations to the Board of Directors, and that the Board, where feasible, should consider the recommendations and respond to the Ombudsman. Generally, there are three possible responses: accept and implement the recommendations; reject the recommendations and provide reasons for the rejection; or accept the recommendations and take further steps to improve fair administrative practices.

At the end of 2008–2009 these eight recommendations and a further three recommendations dating from February 2007 remain before the Board for consideration. I am hopeful that in 2009–2010 the Office of the Ombudsman and the Board will continue to improve communications to ensure the timely handling of Ombudsman recommendations.

In 2008–2009 Peter Dengate Thrush, Chairman of the Board of Directors, instituted an Ombudsman Support Committee. The Committee consists of the Chairman, the Chair of the Board Finance Committee, the Chief Operating Officer and the Chief Financial Officer. This committee's formation ensures that the Ombudsman, as an independent officer of the organization, receives adequate administrative support and budget planning assistance. I believe that this is a very positive step forward in the delicate balancing act of keeping the Office of the Ombudsman independent while keeping it well supported and in alignment with ICANN's overall direction.

The ICANN Office of the Ombudsman continues to be a field leader in developing ombudsman evaluations. In 2008–2009 I gave presentations on Ombudsman evaluations to the Forum of Canadian Ombudsman, the United States Ombudsman Association and the International Ombudsman Association.

I attended three ICANN meetings, three Ombudsman conferences, the 8th International Forum on Online Dispute Resolution, and taught at the International Ombudsman Association "Ombudsman 101" training sessions and gave lectures at several universities and conferences. I participated in a total of 22 outreach or training events.

In November 2008 I was awarded the degree of Doctor of Conflict Resolution from the Faculty of Law, La Trobe University in Melbourne, Australia. My research dealt with developing evaluation blueprints for Ombudsman offices, using the ICANN Office of the Ombudsman as the test case. The research can be found on the Ombudsman website at: <http://www.icann.org/ombudsman/program.html>. I believe that the ICANN Office of the Ombudsman is the most evaluated ombudsman operation in existence. The results of these evaluations inform us that the Office is well formulated and functioning well.

I spent 110 days on travel status between ICANN's Marina del Rey headquarters and other responsibilities. In the five years of the Office's operations I have been on travel status a total of 654 days. Most of the correspondence to my Office was responded to within 24 hours, or 48 hours if I was traveling. In 2008–2009, the Ombudsman Office operated with the services of Mr. Herb Wayne, MALT, as adjunct Ombudsman. The adjunct covered intakes while I was on leave and assisted with the review and editing of reports, among other duties.

I was unable to attend the June 2009 ICANN meeting at Sydney, as a family member had been hospitalized with terminal cancer at that time. Adjunct Ombudsman Herb Wayne was able to substitute for me on short notice and more than capably managed the physical office at the meeting. He conducted several interviews and gathered information on an ongoing investigation. This effective management of an adjunct program ensures that someone is always available to fulfill the Ombudsman role and to provide service to the community.

The Year in Review (cont.)

Based on this very positive experience, together with strong feedback from the community for Mr. Waye's performance as the Adjunct, and in anticipation of an increase in jurisdictional complaints and activities for the Office of the Ombudsman due to the rollout of the New gTLD Program, I recommend that Mr. Waye's commitment to ICANN be increased from 0.1 FTE to at least 0.5 FTE in the coming year.

The Ombudsman's Annual Report was delivered in six languages. On four occasions, translation services were provided to complainants who corresponded with the Ombudsman in a language other than English or French. During the fiscal year the Board of Directors approved the Ombudsman Framework as the Office's operational blueprint.

In 2008–2009 I was pleased to note that ICANN, its staff and volunteers continue to deal with potential conflicts on a proactive basis. During the year I was contacted by members of the organization wishing to identify conflicts and to proactively explore methods to bring community members in dispute to my Office to resolve matters at the lowest possible conflict temperature.

All of this was accomplished on time and under budget, and as a sole practitioner office.

Comments Regarding Independence and Standards

The American Bar Association (ABA), in its 2004 "Standards for the Establishment and Operation of Ombuds Offices," indicates that an Ombudsman must meet several criteria to ensure independence. The ABA bases its standards on the United States Ombudsman Association Standards.¹ One criterion applies to the present contractual arrangement between ICANN and the incumbent. To provide the greatest independence, an Ombudsman must have a long fixed-term contract with the possibility of renewal. A second standard requires that the Ombudsman have a high fixed salary. This long fixed-term and high fixed salary limit the possibility of a misperception that the Office of the Ombudsman's independence and discretion to criticize the organization is fettered because the Ombudsman is before the governing body for renewal or salary negotiation.

I recommend that the Board of Directors consider a contractual term of four to five years for the Ombudsman, with the possibility of renewal, and a salary that is consistent with ICANN executive management and relevant Ombudsman offices in the nongovernmental sector.²

¹ **The USOA Standards state: The Ombudsman has a fixed, long term of office and may be reappointed.** A long term of office at least a year more than the term of the legislative body members with the longer term removes the Ombudsman from political winds of the moment. The possibility of being reappointed moderates any tendency of the Ombudsman to make pronouncements that extend beyond the facts and law discovered in investigations.

The Ombudsman has a high, fixed salary. Ombudsmen investigate and make recommendations to the highest officials of the government. They are paid at a level commensurate with that responsibility. Pay is often equated with judges, justices of supreme courts, or heads of ministries or government agencies. The salary is fixed so that the pay for an Ombudsman may not be reduced while the person is in office, preventing punishment of an Ombudsman whose reports may have been politically difficult or unpopular. The salary of an Ombudsman may only be reduced if all government officials' salaries are being reduced.

² **The ICANN website for the Evolution and Reform Committee¹¹ contains the following:** As noted in its 15 July 2002 Status Report, the ICANN Committee on Evolution and Reform has asked Becky Burr to provide recommendations for implementing several specific aspects of the Blueprint dealing with accountability. These include suggestions for the charter of the Office of Ombudsman, the independent review arbitration process for alleged bylaw violations, and appropriate modifications of the Reconsideration Policy of ICANN.

The Ombudsman must be a respected, senior person known for his or her judgment, integrity and persuasiveness. The ICANN Ombudsman is a full-time position, with salary and benefits commensurate with senior ICANN management.

The 2008 ICANN Annual Report further states: Commitment to continued payment in the salary span of 50th to 75th percentile of for-profit market place of companies of a similar size and complexity to ICANN (the actual salary within this band determined by the individual's experience and talent and market position).



ICANN Ombudsman Dr. Frank Fowlie with ICANN Staff members Cheryl Smith and Alex Kulik at the ICANN Meeting – Cairo, Egypt.



ICANN Ombudsman Dr. Frank Fowlie at the IX International Ombudsman Institute World Conference, and the 200th Anniversary of the Swedish Parliamentary Ombudsman at Stockholm with: Tursunbek Akun, Ombudsman of the Kyrgyz Republic (Back row – centre); Diane Callan of the IOI Secretariat – University of Alberta, Canada (back row – right); and Michael Mills, Ombudsman for the City of Portland (front row – centre); and their family members

Ombudsman Activities

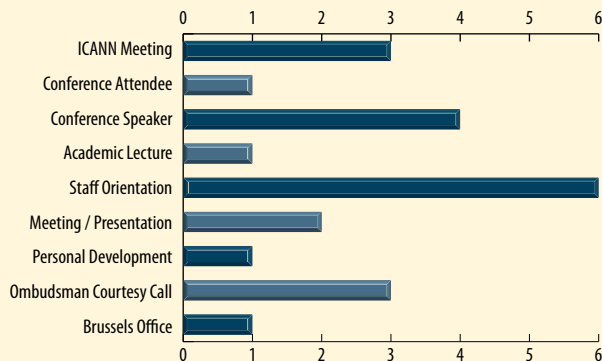
OMBUDSMAN ACTIVITIES Reception, Referral and Investigation of Complaints

The charts and graphs in this annual report provide information about the volume of contacts, the country of origin, the classification of the complaints and resolutions. These charts and tables also provide a five-year overview of Ombudsman activities.

Outreach, Consumer Education and Peer Activities

My definition of outreach includes speaking to groups, hospitality, training events and peer Ombudsman activity. My overall goal with outreach is threefold: to inform the ICANN community about the existence and activities of the Office of the Ombudsman; to professionalize the Office through continual learning activities; and to enforce a constant message among ICANN and stakeholder communities, government officials, users and stakeholders, and my peer Ombudsman community that this Office of the Ombudsman is deserving of its reputation as a Centre of Excellence for online dispute resolution and Ombudsmanship in general. My overriding goal is that all see the Office as a center of excellence offering professionalism and good, fair service.

Outreach Activity by Type – 2008/2009



During FY 2008–2009 I maintained membership in the Forum of Canadian Ombudsman, the United States Ombudsman Association, the International Ombudsman Association and the International Ombudsman Institute, and continued as a Fellow in the National Centre for Technology and Dispute Resolution. I made presentations to individuals, organizations, conferences and academic institutions ranging from the International Ombudsman Association to the International Forum on Online Dispute Resolution, and provided orientations to new ICANN employees. Adjunct Ombudsman Herb Wayne took specialized training with the Harvard Program on Negotiation.

Finally, I note with great pleasure that the ICANN Office of the Ombudsman continues its relationship with Pepperdine

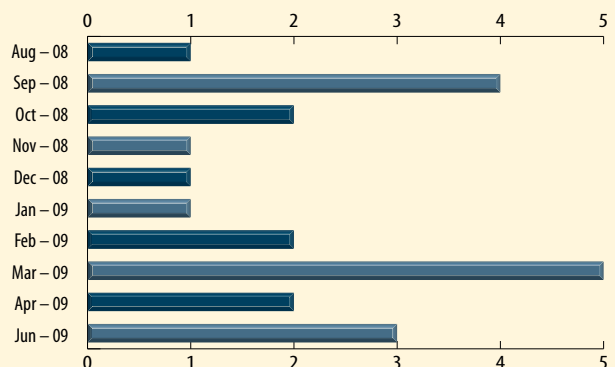
University in Malibu, California (Masters of Conflict Resolution) to provide externship and practicum opportunities for students. The Pepperdine externs were involved in two projects. One conducted an evaluation of subsequent Online Dispute Resolution activity conducted by persons sponsored to attend the 7th International Forum on Online Dispute Resolution, www.odrfourm2008.org. This evaluation meets the requirements of the Canadian International Development Agency (CIDA) which provided ICANN with a \$50,000 sponsorship grant for the Forum. The evaluation continues into FY 2009–2010.

In the second project a team of four externs conducted a summative or final evaluation of the Office of the Ombudsman consistent with its Results Based Management Accountability Framework. The summative evaluation is discussed in the Evaluation and Recommendations section of this report.

The Office of the Ombudsman also had the great pleasure of providing a practicum placement to a Sri Lankan doctoral student at La Trobe University. The opportunity to participate in an ICANN meeting offer a strong capacity-building role for his future involvement with the Domain Name System, and for conflict resolution in his homeland. Thank you to our externs: Chinthaka, Doug, Ben, Jason, Maya and Rob. I trust that you enjoyed your Ombudsman experience as much as we enjoyed having you participate! We wish you well in your chosen careers.

The tables in the annual report outline the outreach activities in which I participated.

Monthly Outreach Activity – 2008/2009



Ombudsman Activities (cont.)

2007-2008 Outreach Activities: Total activities – 22

| Date | Event | Location | Activity |
|-----------|--|-------------------------------|-------------------------|
| 1-Aug-08 | Staff Orientation | United States of America | Staff Orientation |
| 8-Sep-08 | Courtesy Call Alberta Ombudsman | Canada | Ombudsman Courtesy Call |
| 18-Sep-08 | Staff Orientation | United States of America | Staff Orientation |
| 24-Sep-08 | Program on Negotiaion | United States of America | Personal Development |
| 29-Sep-08 | USOA Annual Meeting | United States of America | Conference Speaker |
| 13-Oct-08 | Cyberweek | Canada | Meeting / Presentation |
| 27-Oct-08 | International Ombudsman Association Ombudsman 101 | Canada | Conference Speaker |
| 1-Nov-08 | ICANN Meeting Cairo | Egypt, Arab Republic of | ICANN Meeting |
| 1-Dec-08 | University Discussion Group | United States of America | Meeting / Presentation |
| 14-Jan-09 | Staff Orientation | United States of America | Staff Orientation |
| 4-Feb-09 | Pepperdine University Extern Orientation | United States of America | Academic Lecture |
| 5-Feb-09 | Ombudsman Evaluation | United States of America | Conference Speaker |
| 1-Mar-09 | ICANN Meeting | Mexico, United Mexican States | ICANN Meeting |
| 1-Mar-09 | Staff Orientation | Mexico, United Mexican States | Staff Orientation |
| 16-Mar-09 | Work Visit to ICANN Brussels | Belgium, Kingdom of | Brussels Office |
| 19-Mar-09 | Meeting with EU Parliamentary Ombudsman | Belgium, Kingdom of | Ombudsman Courtesy Call |
| 25-Mar-09 | Orientation | United States of America | Staff Orientation |
| 14-Apr-09 | Executive Director Sport ADR Canada | Canada | Ombudsman Courtesy Call |
| 23-Apr-09 | Staff Orientation | United States of America | Staff Orientation |
| 2-Jun-09 | 8th International Forum on Online Dispute Resolution | Israel, State of | Conference Speaker |
| 7-Jun-09 | International Ombudsman Institute 200th Anniversary of the First Swedish Ombudsman | Sweden, Kingdom of | Conference Attendee |
| 20-Jun-09 | ICANN Sydney Australia | Australia, Commonwealth of | ICANN Meeting |

Outreach by month – 5 years

| | | | | | | | |
|--------|---|--------|---|--------|--------|--------|---|
| | | | | | Jun-08 | 2 | |
| Dec-04 | 9 | Jan-06 | 4 | Apr-07 | 3 | Aug-08 | 1 |
| Feb-05 | 5 | Mar-06 | 5 | May-07 | 2 | Sep-08 | 4 |
| Mar-05 | 3 | Apr-06 | 2 | Jun-07 | 1 | Oct-08 | 2 |
| Apr-05 | 2 | May-06 | 2 | Jul-07 | 1 | Nov-08 | 1 |
| May-05 | 2 | Jun-06 | 2 | Sep-07 | 2 | Dec-08 | 1 |
| Jun-05 | 1 | Jul-06 | 2 | Oct-07 | 2 | Jan-09 | 1 |
| Jul-05 | 7 | Aug-06 | 1 | Nov-07 | 2 | Feb-09 | 2 |
| Aug-05 | 1 | Sep-06 | 2 | Dec-07 | 1 | Mar-09 | 5 |
| Sep-05 | 2 | Oct-06 | 3 | Jan-08 | 2 | Apr-09 | 2 |
| Oct-05 | 3 | Dec-06 | 1 | Feb-08 | 3 | Jun-09 | 3 |
| Nov-05 | 2 | Feb-07 | 3 | Apr-08 | 4 | Sep-09 | 3 |
| Dec-05 | 4 | Mar-07 | 2 | May-08 | 2 | Oct-09 | 1 |

Statement on Respectful Online Communication

The Statement on Respectful Online Communication was published in the 2006–2007 annual report. However, my office continues to receive complaints which, at their core, deal with the hurt feelings that arise when members of the community feel that they are the victims of disrespectful communication. I am republishing the Statement to remind the community of positive ways of conducting online dialogue. I encourage the Board of Directors to incorporate a reference to the Statement in the ICANN Code of Conduct.

I view disrespectful and disruptive communication as a pressing issue at this stage of the organization's development. Without due consideration for the positions, interests, culture, language and needs of others, disrespectful communication will continue. I am continually surprised by incidents of inappropriate communication and conduct which result in hurt feelings and subsequent complaints to my office. I have made recommendations to the Board of Directors concerning civility and acceptable behavior which has occurred between ICANN participants and who have subsequently complained to my Office, and I await the Board's feedback on these recommendations.

In 2008–2009 the Office of the Ombudsman, the At-Large Advisory Committee Chair and ICANN Human Resources collaborated with outside experts to develop an online training program on Conflict Resolution through a Cultural Lens. We expect this program to be available to the ICANN community and staff in late 2009. Our desire is that an online training course in cross-cultural capacity-building will reduce incidents of inappropriate conduct.



Drafted jointly and agreed to by consensus April 20, 2007 at the 5th International Forum on Online Dispute Resolution in Liverpool, England – held in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific.

While information and communications technologies (ICT) enable unprecedented interactions between individuals around the world, they also introduce some dynamics that can degrade dialogue.

ICT enables people to communicate immediately and anonymously, often without moderation, and in some circumstances this encourages behavior (such as threats or insults) that most individuals would never engage in face-to-face.

This behavior may make people feel unwelcome, disrespected, or harassed in their online interactions. Ultimately, individuals may be dissuaded by these dynamics from participating, which undermines the vibrancy of our global conversation.

As a result, we encourage individuals to:

- *Communicate online with respect*
- *Listen carefully to others in order to understand their perspectives*
- *Take responsibility for their words and actions*
- *Keep criticism constructive*
- *Respect diversity and be tolerant of differences*

We embrace full and open communication and recognize the unique opportunity for expression in the online environment. We support freedom of speech and reject censorship. These principles are not intended to address what ideas can be expressed, but rather the tone with which communications take place.

Office of the Ombudsman Evaluation and Recommendations

The Office of the Ombudsman conducts reviews and evaluation in accordance with the Results Based Management Accountability Framework or RMAF, <http://www.icann.org/ombudsman/documents/rmaf-08feb05.pdf>. The RMAF outlines evaluation questions and criteria which provide information about the Office's operations. In the past four annual reports I addressed the ongoing evaluation questions and criteria. At this point I will report on the summative or final evaluation, which will complete the evaluation cycle.

On November 1, 2009, the Office of the Ombudsman will be in operation five years. This fifth annual report is the ideal opportunity to report on the final evaluation for the Office. The evaluation was conducted as a two-step process, with Pepperdine externs conducting a review based on the blueprint developed in my doctoral dissertation. The results were verified and commented upon by an independent third-party expert who has previous understanding of the ICANN Ombudsman framework.

1. Are resources sufficient for the Office of the Ombudsman to carry out its mandate?

The March 2007 One World Trust Report on ICANN Accountability and Transparency commented as follows on Ombudsman resources:

The Ombudsman plays an important role within ICANN as an informal alternative dispute resolution mechanism. Since its formation, it has reduced the number of complaints handled through the formal complaint channels of the Reconsideration Committee. As the Ombudsman's office continues to reach out to the community and raises awareness of the function within the ICANN community, there is the distinct possibility that the number of complaints it has to handle will increase. The office's user group is the entire Internet community, yet it is currently staffed by a single full time Ombudsman and an adjunct Ombudsman that provides holiday cover. To ensure the continued effectiveness of the office, ICANN should continue to support the Ombudsman through the adjunct Ombudsman and also consider recruiting an additional full time member staff to provide administrative support to the office.

Recommendation 4.3: *ICANN should consider strengthening the capacity of the Ombudsman's office by recruiting full time administrative support for the Ombudsman.*

As reported in the Year in Review section, positive steps were taken in FY 2008–2009 with the creation of the Ombudsman Support Committee and with the Adjunct Ombudsman program. I recommend that the Office of the Ombudsman and the Board of Directors strengthen the Office's capacity by increasing the Adjunct Ombudsman's services to at least 0.5 FTE.

In 2008–2009 the financial resources for the Office of the Ombudsman were sufficient to meet its mandate and the Office finished the fiscal year with a surplus.

2. To what extent has the Ombudsman established effective working relationships?

The Office of the Ombudsman establishes relationships in four spheres: the ICANN community, complainants, the ICANN organization (Board members and liaisons, staff, members of supporting organizations), and the peer community of ombudsmen, dispute resolution professionals and academics. There is documented analysis of two of these spheres, the ICANN organization and the complainants. The ICANN community and the peer community are evidenced anecdotally.

The Pepperdine Extern Summative Evaluation report states:

The information gathered demonstrates that participants... find the Ombudsman to be a crucial function within ICANN; whose contribution to the overall effort made to enhance the relationship between ICANN and its community is with no doubt very significant. All three groups conveyed their appreciation to the work done by the Office of the Ombudsman, and consider the Office to be an essential part of ICANN.

I am pleased that action was taken on recommendations made in last year's annual report, and that the Office of the Ombudsman has easy to find and accessible office space at ICANN meetings.

Peer relationships appear to be well established, with the Ombudsman remaining active in several Ombudsman groups, the National Centre for Technology and Dispute Resolution and the International Forum on Online Dispute Resolution.

3. Are the ICANN staff and Board dealing with identified issues in a timely manner?

In 2008–2009 the Office of the Ombudsman had superb cooperation from staff and supporting structures in dealing with conflict resolution issues. The registrar liaison team and the contractual compliance team both provided steady performance in handling registrant issues referred from my office. More than 85 percent of the jurisdictional issues were resolved with the cooperation of the complainants and the organization using alternative dispute resolution techniques.

As reported in the Year in Review section, at the end of the fiscal year 11 recommendations were before the Board of Directors for consideration.

The Pepperdine Extern Summative Evaluation report states:

Conclusions regarding effectiveness based upon the implementation of recommendations by the office of the Ombudsman are mixed. On the one hand the Office is imbued only with the power of moral suasion. Thus, having effected some change is a sign that the office is effective in its program delivery. Additionally, as was stated before, Board anecdotal evidence seems to indicate that the board does in fact take the Office's recommendations very seriously. Thus, this criterion tends to show that the working relationship between the Office and the Board is effective.

The following is from page 75 of the Independent Review of the ALAC, at <http://www.icann.org/en/reviews/alac/final-draft-13jun08.pdf>

7.6 Ombudsman procedures

The WCL Review Team was made aware of two public reports published following investigations by the Ombudsman during late 2006 and early 2007. The first investigation followed an appeal against voting procedures, and the second related to the rejection of an application for ALS status.

In both cases the Ombudsman found that certain aspects of ALAC procedure were unsatisfactory and made several recommendations. In particular he stressed the need for the ALAC to act more uniformly and promptly regarding ALS applications. These recommendations resulted in a number of procedural changes and also some changes to the ICANN bylaws. Based on input from submitters, we believe these investigations and subsequent reports created a degree of tension between some members of the ALAC and the Ombudsman.

In addition, we have been unable to ascertain whether the second report has been closed, with all issues finalized. We note that the ICANN Board discussed this report during a teleconference in June 2007, however we have been unable to locate subsequent documentation.

Recommendation

If there are any outstanding issues relating to Ombudsman report 06-317, the Board should review all recommendations to ensure they have been resolved.

I note the independent reviewers' recommendation and comment that ICANN has yet to respond to recommendations I made in February 2007 <http://www.icann.org/ombudsman/documents/report-15feb07.pdf>. I am, however, aware that the ALAC approved the applicant organization as an ALS.

My report at the Paris meeting public forum stated:

Today, I want to discuss the need for an accountability loop between the role and function of the Ombudsman and the organization it serves.

It is said that an Ombudsman is:

... an independent, objective investigator of people's complaints against government agencies and other organizations, both public and private sectors. After a fair, thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.

United States Supreme Court Justice Louis Brandeis has said "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

In these two comments, one sees the basis of a relationship between the ombudsman, the organization or the state. The ombudsman acts as the electric light through the recommendation reporting process. He shines light on the dark areas of systemic or individual unfairness. Once the light has illuminated issues which require redress, it becomes the responsibility of the organization to act upon the ombudsman's recommendations, or to reject them. Most ombudsman statutes provide timelines by which the state or organization must respond to the ombudsman and provide information as to how the recommendations have been implemented to redress unfairness, or to provide reasons why the recommendations may not be practical.

Evaluation and Recommendations (cont.)

This process of recommendation making, and reply from the entity which has been the subject of an ombudsman enquiry ensures to the community served by the entity and its ombudsman that issues of concern are fairly dealt with.

In February 2007, I made a set of 12 recommendations to the ICANN Board of Directors <http://www.icann.org/ombudsman/documents/report->, outlining what I believed to be were important steps for systemic improvements, following a detailed enquiry regarding voting practices with the ALAC. I am disappointed that, as of June 3, 2008, my Office has not been informed as to what actions the Board or ALAC has taken to implement these recommendations. I am aware that one of recommendations has been implemented, as the applicant I viewed as being unfairly treated has been given status as an At Large Structure. Mr. Chairman, I do hope that ICANN will respond to my recommendations in due course.

During 2008–2009 I received a full set of responses from Cheryl Langdon-Orr of ALAC concerning nine of the 12 recommendations <http://www.icann.org/ombudsman/alac-response-ombudsman-28oct08-en.pdf>. This closes the accountability loop for that set of issues and I am pleased that all recommendations were acted upon. I thank ALAC for its work.

4. Has there been a change in behavior on the part of ICANN or a complainant to avoid litigation?

The Pepperdine Extern Summative Evaluation report states:

Conclusion:

Given that litigation and mediation can be costly ventures and the fact that a mediator would have to be found for every dispute that arises, the Ombudsman is a far more effective means of dealing with disputes arising out of claimed procedural unfairness at ICANN. Furthermore, 18.4 percent stated that they would do nothing, indicating that without the Ombudsman, their complaints would not be heard, effectively precluding ICANN from seeking greater stakeholder satisfaction.

Additionally, this could ferment resentment towards ICANN as an organization and consequently frustrate its goals further. Indeed, there would likely be a rise in angry tenor on the Blogosphere if the Office were to disappear. Thus, the Office of the Ombudsman is effective in acting as a receptive place for

complainants to voice their concerns and additionally relevant to ICANN's goals.

Given that the survey shows that close to a majority of individuals would seek litigation for a resolution of their issues, when coupled with knowledge of the aforementioned times of crisis that regularly visit ICANN, the Ombudsman seems a focal point for complainants; drawing them away from litigation to the ADR services provided by the Office. It would seem then, then without the office of the ombudsman, many of the complaints would find their way to the litigation department, drawing away their resources and soaking up there time to the detriment of ICANN when dealing with legitimate legal problems.

5. Has the Ombudsman been cost effective in delivering the program? – Actual or potential improvements, efficiencies, or cost savings in ICANN program delivery or administration.

The Office of the Ombudsman has acted on complaints, made referrals, provided self-help information and made recommendations as part of the alternative dispute resolution (ADR) processes. In the long run these efforts provide for a more efficient overall operation through the availability of a professional ADR service that allows the staff, the supporting organizations and the Board to focus on their core work rather than on dispute resolution. The number of requests for reconsideration has dropped. The recommendations from the Office of the Ombudsman provide for the lowering of conflict temperature and the improvement of services or processes.

The flexibility of the Office to respond to a range of issues, languages, cultures and conflict styles, combined with a wide spectrum of conflict resolution, means that the Office offers responsive, timely and relevant solutions while reducing antagonistic relationships between the parties. I cannot imagine a more efficient manner of delivering this service to the organization and the community.

The Office of the Ombudsman adds to ICANN's overall conflict management system, which includes the Board Reconsideration Committee and the Independent Review Policy (IRP). Since the inception of the Office of the Ombudsman, the number of complaints to the Reconsideration Committee has dropped dramatically, with

only one matter being further escalated to the IRP in 2008. The Board Reconsideration Committee has been dissolved and its functions are now handled by the Board Governance Committee.

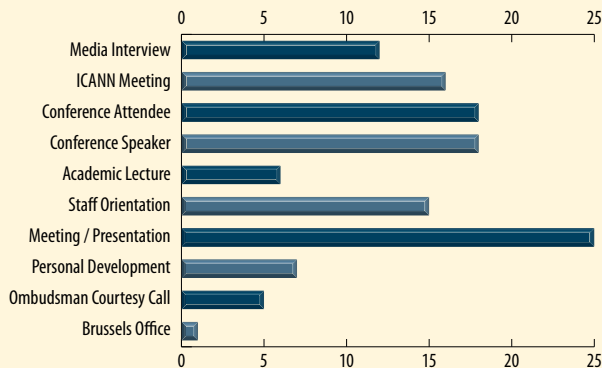
Recent estimates indicate that each dollar invested in an Ombudsman program results in downstream savings of \$9.50³ realized as avoided litigation costs, legal fees, staff time diverted from disputes, retention, training, and the like. It is nearly impossible to create a formula that measures the economic value of enhanced reputational or goodwill value per program dollar spent.

The Pepperdine Extern Summative Evaluation report states:

In the end the results are favorable to the Office. The Office has taken great steps to ensure fiscal efficiency in some areas, while in other areas greater efficiency could be sought, unless there are further compelling reasons why the circumstances causing the accrual of the aforementioned costs are necessary. Based on the foregoing, the Office of the Ombudsman adequately meets this criterion of the summative evaluation.

³ Zinsser presentation at IOA Annual Conference, Boston 2008

Outreach Activity by Type – 5 years



Cases by country – 2008/2009

| | |
|--|----|
| Argentina, Argentine Republic | 4 |
| Australia, Commonwealth of | 4 |
| Brazil, Federative Republic of | 2 |
| Canada | 4 |
| Cyprus, Republic of | 1 |
| Germany | 2 |
| India, Republic of | 2 |
| Israel, State of | 1 |
| Jordan, Hashemite Kingdom of | 1 |
| Kenya, Republic of | 1 |
| Kyrgyz Republic | 1 |
| Malaysia | 1 |
| Netherlands, Kingdom of the | 1 |
| New Zealand | 1 |
| Nigeria, Federal Republic of | 1 |
| South Africa, Republic of | 1 |
| Spain, Spanish State | 1 |
| Switzerland, Swiss Confederation | 6 |
| Thailand, Kingdom of | 1 |
| Egypt, Arab Republic of | 2 |
| United Kingdom of Great Britain & N. Ireland | 5 |
| United States of America | 53 |



Dr. Frank Fowlie and delegates to the 2008 International Forum on Online Dispute Resolution. The Office of the Ombudsman expresses its gratitude to the Canadian International Development Agency (CIDA) for its generous contribution in funding delegates from developing states. (l-r Morenike Obi-Farinde – Nigeria, Sher Shah Khan – Pakistan, Ayo Kusamotu – Nigeria, Chittu Nagarajan – India, Tumaini Anthony Minja – Tanzania, Deepak Pillai – Malaysia, Dr. Frank Fowlie)

Case Studies

These case studies reflect on the first five years of operations of the Office of the Ombudsman and demonstrate the various closing categories found in the Ombudsman Framework.

Resolved

The Office of the Ombudsman had received and investigated several complaints regarding an ICANN supporting structure. The structure had in place a voting procedure for applicants to gain membership from the unit which required two thirds of the members to vote in favor of the motion. Balloting on several occasions was marked with a large number of members not voting, and with those who did vote, unanimously being in favor of the motion. However, due to the voting rules, the benefit was rejected. I found that the lack of voting participation by the members to be an unfairness; recommended that the applicants be granted the benefit; further recommended reforms to the processing and approval of applications. The unit accepted and acted upon my recommendations and I closed the file as resolved. However, as of the end of the 2008–2009 Fiscal Year, three recommendations on this issue remain before the Board of Directors for consideration. These recommendations were submitted in February 2007.

System Improvement

The Office of the Ombudsman not only looks at the impact of individual complaints, but also attempts to use individual cases to cure systemic weaknesses. At a recent ICANN meeting, several participants contacted the Office with concerns over the payment of per diem expenses. The Ombudsman worked with the complainants and appropriate ICANN staff to redress individual problems. The Ombudsman viewed this issue as meriting systemic improvement and recommended that a “lessons learned” session take place and that innovative means of paying individuals be explored. To date, these recommendations have not been accepted by ICANN.

Referrals

Many complaints received by the Office of an Ombudsman outside the jurisdiction of the Office. In these cases the Office assists complainants by referring them to the most helpful entity. Many complaints concern the relationship between registrants and registrars. These complaints are referred to either the registrar liaison team or the contractual compliance team for appropriate follow up. I wish to thank these teams for their continued service to individual registrants.

Self Help

Often complainants come to the Office of the Ombudsman for information necessary to resolve issues on their own. The Office routinely supplies information to community members on domain transfers and domain name disputes.

No Further Action Required

After an initial enquiry, the Office of the Ombudsman found these complaints to be within the Office’s jurisdiction, but that no further action was necessary. Following the announcement of the resignation of ICANN President in February 2009, community members complained that the announcement for the position vacancy had not been promptly placed on the ICANN job opportunities website. ICANN staff committed to do so and no further action from my office was required.

Decline Jurisdiction

A complainant contacted the Office of the Ombudsman after comments he posted to an ICANN blog were deleted by the blog owner. In my opinion, this issue was a continuation of an unusually persistent complaint. I therefore found the complaint to be trivial, vexatious, repetitive or abusive, and declined jurisdiction.

Unfounded

A member of the ICANN community complained to the Office of the Ombudsman that an expense claim relating to “miscellaneous expenses to attend an ICANN meeting” had been rejected by ICANN staff. The community member was an appointee to an ICANN committee and his travel to that meeting was directly related to the work of the committee. My office’s investigation revealed that the community member had failed to attend any of the committee’s meetings or vote on any issue. The Ombudsman obtained an independent legal opinion on the duty of an appointed committee member to participate and to be prepared to vote in discharging the duties of the appointment. The Office found that community member had failed to discharge the duties of the appointment and therefore the staff action was appropriate. The complaint was closed as unfounded.

Abandoned

A complainant contacted the Ombudsman concerning the particular actions of a staff member, saying that the staff member had acted unfairly and unprofessionally. The Ombudsman corresponded with the complainant over several weeks, but the complainant refused to provide any information about the allegations of unfair and unprofessional conduct. As it was impossible for the Ombudsman to gather sufficient information to begin an enquiry, the file was closed as abandoned.

Withdrawn

The Office of the Ombudsman received a complaint from a member of a supporting organization regarding the selection of a chairman for a working committee within that organization. The Office of the Ombudsman facilitated communication between executive members of the organization and the complainant. The complaint was subsequently withdrawn.

Complaint Is Escalated

On rare occasions complainants escalated their complaints to the former Board Reconsideration Committee. In one case a member of the Nominating Committee wished to resign from the committee, and then wished to seek the Nominating Committee appointment to one of the ICANN supporting organizations. The Office of the General Counsel advised the complainant that such action would be in violation of the bylaws, and was not permissible. The complainant felt this was an unfair opinion. The Office of the Ombudsman retained independent counsel, which advised that the opinion by the Office of the General Counsel was correct. I classified the complaint as unfounded.

The complainant took the same matter to the Board Reconsideration Committee, which found that the complainant was ineligible for appointment and dismissed the request for reconsideration.

Querulous Complainants

In 2004, The British Journal of Psychiatry published an article titled *Unusually Persistent Complainants*.⁴ The article aimed to “to investigate the unusually persistent complainants who lay waste to their own lives and place inordinate demands and stress on complaint organizations.” The report was based on lengthy study of complainants to a governmental ombudsman in Australia. The study defined behaviors and outlined some strategies for managing unusually persistent complainants.

Over the past five years I have experienced at least four querulous complainants contacting my Office. Of course, all complainants are most welcome to use the services of the Office, and in fact, my Office is likely the most important and appropriate point of contact for them.

However, these particular complainants show strikingly similar behaviors. First, by the time they contact my Office, many other officials and complaint or noncomplaint handlers had been informed of their core issue. Each complainant had previously been through an exhaustive communications process with other organizations such as registrars, and also with ICANN staff. In one example, when ICANN had a staff of 30, almost every staff member received an email with a demand for service. In another example, one complainant who attended an ICANN meeting spoke to at least 12 staff members or supporting organization officers about the same issue. The key behavior was that the complainant, while shotgunning their complaint, did not inform these officials that others had been contacted as well. Such behavior telegraphs that complainants are shopping for the official most likely to assist them.

Second, complainants always include escalation as an active part of the conversation. There are always threats of escalation if the demands for service are not met. In each case before my Office these threats were also extended to litigation, a demand for an independent review, or a threat to take the complaint to a professional body such

as the California Bar Association, or any supra body that supervises ombudsmen.

Third, a not surprising result of the first two behaviors is that the complainants had all brought forward issues which, at the end of the day, had nothing to do with ICANN. These issues were brought to ICANN after the querulous complainant had followed through on threats of escalation to another entity, usually a registrar, and that entity had failed to resolve the complaint satisfactorily. For example, one complainant came to ICANN because they were not satisfied with the form of the registrar’s receipt for payment for the registration of domain names.

Fourth, in the mind of the querulous complainant, the lack of satisfactory resolution by a complaint handler leads to complaints about the official on a personal level. In one case a complainant who had contacted the Office of the General Counsel during the shotgunning process developed a misdirected anger toward the attorney handling the matter, threatening a complaint to the Bar and to the attorney general. This approach is often combined with demeaning and abusive language, and can also lead to personalized attacks on blogs by the complainants. Again, these attacks focus on the complaint handler rather than the complaint issue.

Fifth, and very consistent with the results reported in the Lester study, is the volume and type of correspondence. In one case, I estimate that my Office exchanged more than 200 emails with the complainant, and that ICANN and those closely related to ICANN had 500 exchanges in total. Many of these exchanges and correspondences occurred at the executive level or with staff lawyers.

These correspondences are often made up of previous correspondences with others who had not satisfied the persistent complainant, and these are often annotated or highlighted to draw the attention of the next level of review to the deficient behavior of prior respondents.

Sixth, the nature of the complaint shifts from the core issue to the behavior of the previous or present complaint handlers. After a certain point the complainant becomes more focused on being vindicated through punishment of a complaint handler than by the actual resolution of the complaint. This means that the complainant may continue to draw attention to the complaint or to the perceived poor service by complaint handlers years after a matter is closed. The complainant may also shift their view entirely from the complaint to an overall criticism of the organization over the long term.

Handling querulous complainants in an appropriate and effective manner requires time, patience, skill and training. The Office of the Ombudsman is particularly well suited to handle these types of individuals. This also frees staff or volunteer members of the organization from involvement and allows them to concentrate on their primary work functions.

The effect of these querulous complainants, especially in a small organization, can be stressful and disruptive, and always increases cost and reduces productivity. It precludes complaint handlers from being able to devote time to their primary duties or legitimate complainants. I have roughly calculated that one of these complainants consumed some US\$10,000 of staff time in the space of two days. While it is entirely impossible to weigh all the factors, I roughly estimate that these four individuals may have cost ICANN over US\$100,000 in time and fees. Again, bear in mind that the issues they complain about have nothing to do with ICANN's actions.

The Office of the Ombudsman was able to corral and handle all four complaints. This greatly reduced the overall time that ICANN would have spent dealing with these persistent complainants, and ensured that they were handled in a systematic, fair and professional manner. This process allowed ICANN staff and volunteers to concentrate on their core activities, and focused conflict to an appropriate structure.

What the users of the Ombudsman services say:

I would like to extend to you my profound gratitude for assisting me in getting my domain transferred back to (me) the Rightful owner. Frank, great job on persevering, and not submitting to some generic and ineffectual hyperbole responding to this issue ... As far as I'm concerned, your actions are the personification of the term "ombudsman".

I was very pleasantly surprised at the prompt, personal interest taken in my issue. I had expected some kind of runaround, useless auto-advice, or a frustrating FAQ, and nothing more.

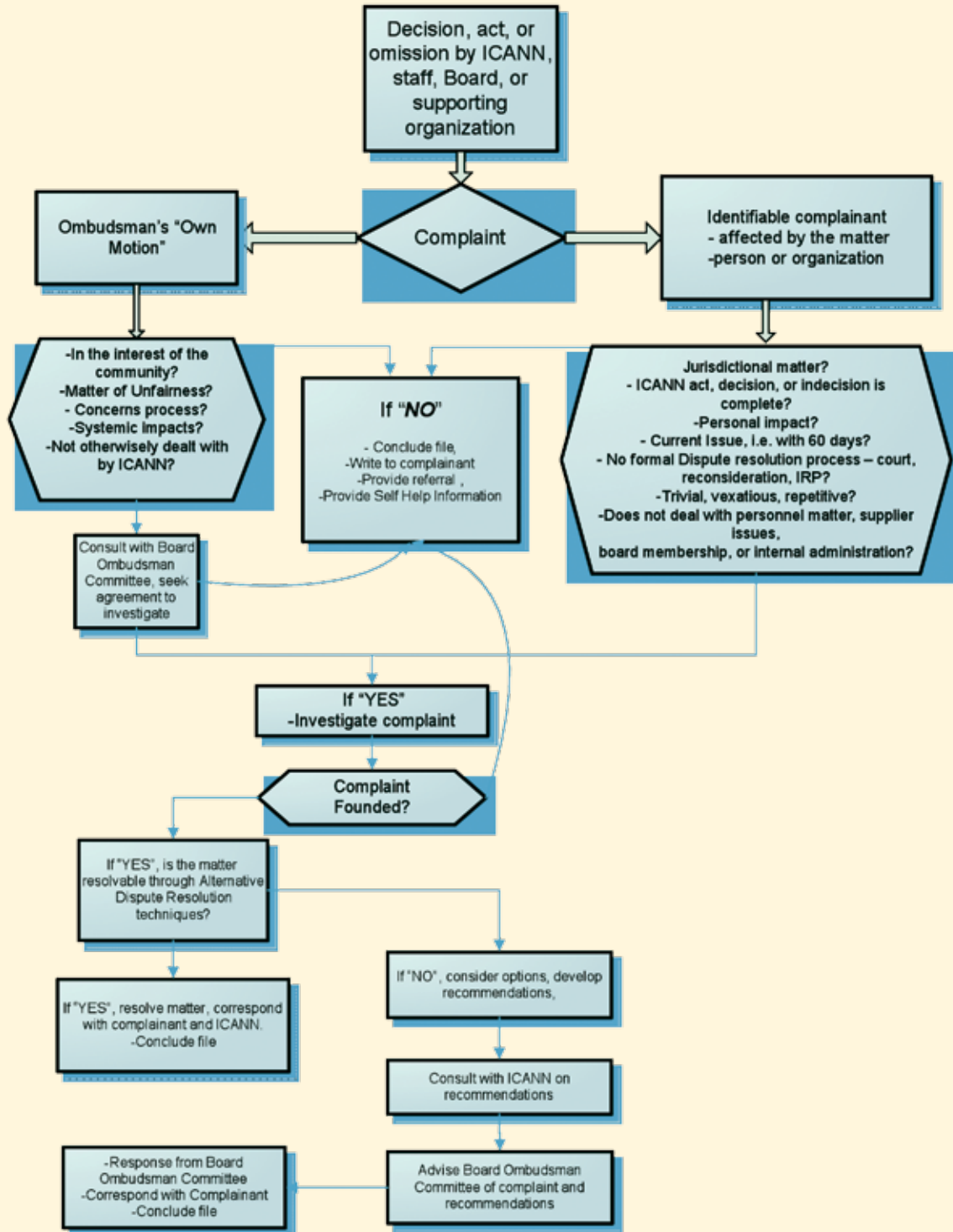
Well done! I finally withdrew my complaint, but ombudsman intervention was very important for the ALAC to take the necessary steps and move forward in its work. Thanks!!!



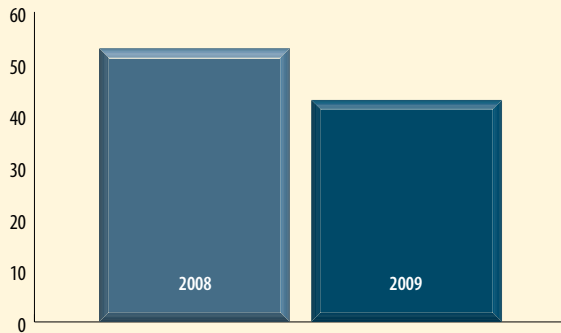
Dr. Frank Fowlie working with ODR Forum delegates from East Timor, Nigeria, and Pakistan.

⁴ Lester, Grant et al, Unusually Persistent Complainants, *British Journal of Psychiatry*, 2004, 184, pp.352–356.

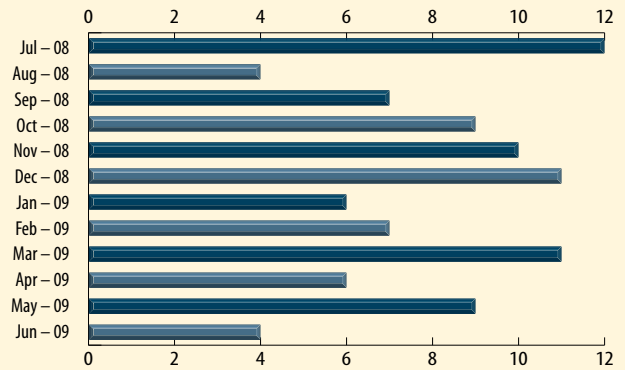
Ombudsman Process Model



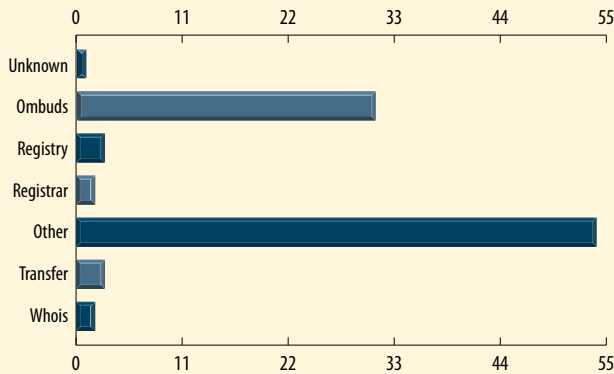
Complaints by year – 2008/2009



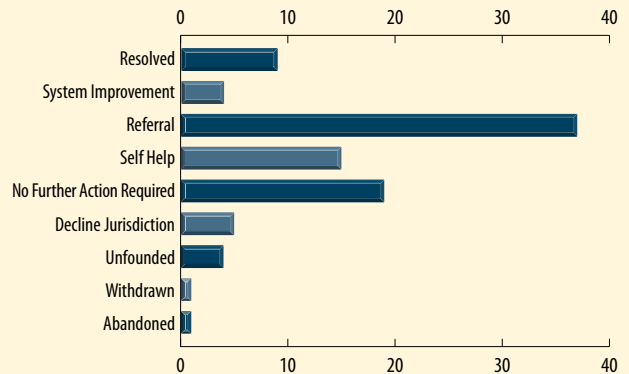
Cases by month – 2008/2009



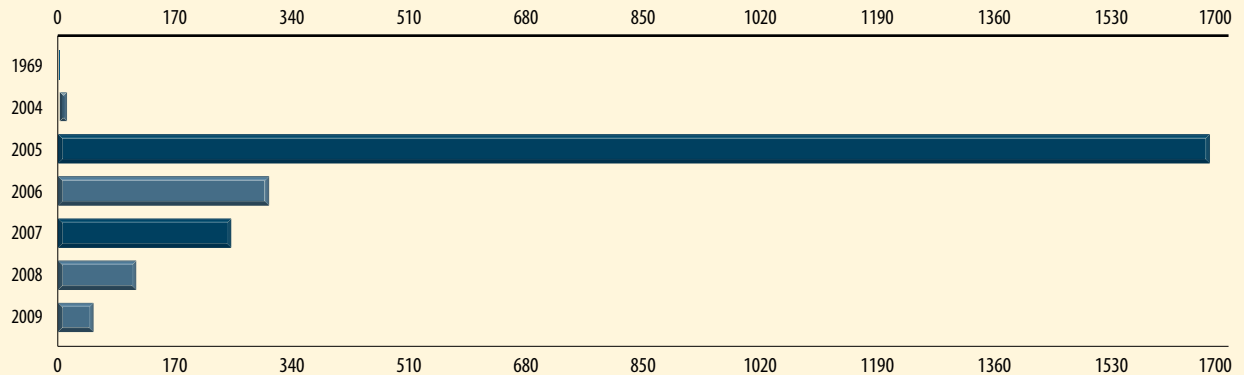
Cases by complaint type – 2008/2009



Complaint resolutions – 2008/2009



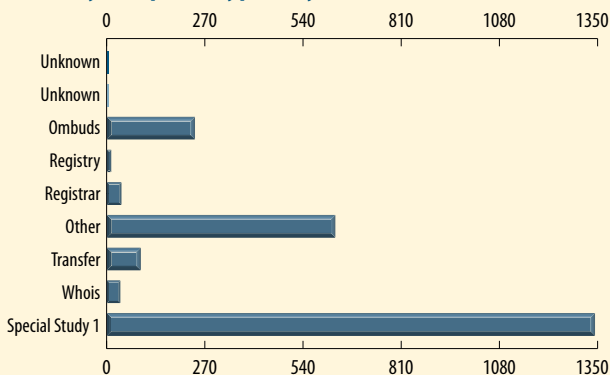
Cases by year of intake – 5 years



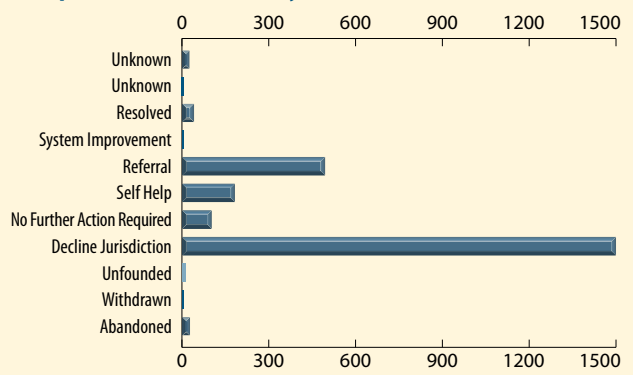
Complaint cases by country – 5 years

| | | | |
|---|------|--|---|
| United States of America | 1903 | Kenya, Republic of | 2 |
| United Kingdom of Great Britain & N. Ireland | 87 | Mexico, United Mexican States | 2 |
| Canada | 82 | Portugal, Portuguese Republic | 2 |
| Unknown | 48 | Viet Nam, Socialist Republic of | 2 |
| Australia, Commonwealth of | 47 | Bangladesh, People's Republic of | 1 |
| Germany | 19 | Armenia | 1 |
| Netherlands, Kingdom of the | 17 | Barbados | 1 |
| Brazil, Federative Republic of | 11 | Bermuda | 1 |
| South Africa, Republic of | 11 | Bolivia, Republic of | 1 |
| Switzerland, Swiss Confederation | 10 | Belize | 1 |
| France, French Republic | 9 | Taiwan, Province of China | 1 |
| India, Republic of | 9 | Colombia, Republic of | 1 |
| Argentina, Argentine Republic | 8 | Hrvatska (Croatia) | 1 |
| Greece, Hellenic Republic | 8 | Cyprus, Republic of | 1 |
| New Zealand | 8 | Czech Republic | 1 |
| Spain, Spanish State | 8 | Denmark, Kingdom of | 1 |
| Israel, State of | 7 | Ecuador, Republic of | 1 |
| Belgium, Kingdom of | 6 | Gibraltar | 1 |
| Namibia | 6 | Guatemala, Republic of | 1 |
| Thailand, Kingdom of | 6 | Indonesia, Republic of | 1 |
| Turkey, Republic of | 6 | Jordan, Hashemite Kingdom of | 1 |
| Ireland | 5 | Korea, Democratic People's Republic of | 1 |
| Malaysia | 5 | Kyrgyz Republic | 1 |
| Sweden, Kingdom of | 5 | Lebanon, Lebanese Republic | 1 |
| Austria, Republic of | 4 | Maldives, Republic of | 1 |
| Hong Kong, Special Administrative Region of China | 4 | Moldova, Republic of | 1 |
| Italy, Italian Republic | 4 | Nicaragua, Republic of | 1 |
| Japan | 3 | Nigeria, Federal Republic of | 1 |
| Malta, Republic of | 3 | Norway, Kingdom of | 1 |
| Pakistan, Islamic Republic of | 3 | Poland, Polish People's Republic | 1 |
| Panama, Republic of | 3 | Russian Federation | 1 |
| Macedonia, the former Yugoslav Republic of | 3 | Saudi Arabia, Kingdom of | 1 |
| Egypt, Arab Republic of | 3 | Slovenia | 1 |
| Costa Rica, Republic of | 2 | United Arab Emirates | 1 |
| Hungary, Hungarian People's Republic | 2 | Ukraine | 1 |
| Kazakhstan, Republic of | 2 | Uruguay, Eastern Republic of | 1 |

Cases by complaint type – 5 years



Complaint resolutions – 5 years



The Values of this office are:

Respect for Diversity The Office of the Ombudsman recognizes and honours the fact that members of the ICANN community come from across the face of the globe. This diversity means that the Office of the Ombudsman will respect that different cultures view disputes and conflicts through different lenses. The Ombudsman will always be open to learning about cultural differences in responding to disputes and conflict.

Excellence in Ombudsmanship The Office of the Ombudsman will strive to be a leader for modeling and promoting fairness, equality, clarity, innovation, and by providing assistance to ICANN and the community in developing an awareness of the Ombudsman role. The Ombudsman will also strive to ensure that ICANN's Office of the Ombudsman is well regarded as an institution of excellence in the peer community, such as The Ombudsman Association, the United States Ombudsman Association, and the Forum of Canadian Ombudsmen. I wish to develop deeper relationships with Ombudsman in other regions of the world in the future to reflect the global nature of ICANN's constituency.

Professionalism The Ombudsman, in conducting his or her duties, will maintain and exemplify the highest standards of professional conduct, and respect for human dignity.

Confidentiality All parties, both within the community and ICANN, bringing information to the attention of the Ombudsman should feel assured that the information will be held in confidence, except when it is necessary to help resolve the complaint.

Impartiality In each and every situation, the Office of the Ombudsman will receive information from the community with no predisposed idea as to the outcome of the Alternative Dispute Resolution process, and without favoring any party in the process.

Independence The Office of the Ombudsman, in order to remain an impartial officer, will be independent of the normal ICANN structures.



email ombudsman@icann.org

web <http://icannombudsman.org>



Marina del Rey | 4676 Admiralty Way, Suite 330 | Marina del Rey, CA 90292 | USA
T +1 310 823 9358 F +1 310 823 8649

Brussels | 6 Rond Point Schuman, Bt. 5 | 1040 Brussels | BELGIUM
T +32 2 234 7870 F +32 2 234 7848

Washington DC | International Square, 1875 I Street, NW, 5th Floor | Washington DC, 20001 | USA
T +1 202 429 2407 F +1 202 429 2714

Sydney | Level 2, 48 Hunter Street | Sydney, NSW 2000 | AUSTRALIA
T +61 2 8236 7900 F +61 2 8236 7913