

Weil, Gotshal & Manges LLP

1300 Eye Street NW, Suite 900
Washington, DC 20005-3314
+1 202 682 7000 tel
+1 202 857 0940 fax

BY E-MAIL

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Babak Barin
Barin Avocats
Contact Information Redacted

Marguerite C. Walter
Contact Information Redacted

Dr. Catherine Kessedjian
Contact Information Redacted

Hon. Richard C. Neal (Ret.)
JAMS
Contact Information Redacted

**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation
for Assigned Names and Numbers (ICANN) – Excerpts from ICM Memorial on the Merits**

Dear Mr. President and Members of the Panel:

Pursuant to the Panel's Procedural Order No. 2, we attach excerpts from the Claimant's submission in the *ICM Registry LLC v. ICANN*¹ Internal Review Process ("IRP").² DCA nonetheless maintains that the parties' submissions on procedural matters in *ICM v. ICANN* are not relevant to this proceeding

¹ ICM Registry LLC, v. ICANN, ICDR Case No. 50 117 T 00224 08.

² Ex. C-M 48.

because ICANN's Bylaws and the Supplementary Procedures have been amended since the *ICM* case was decided.³

Indeed, ICANN has amended its Bylaws and Supplementary Procedures several times since the *ICM* declaration, including on April 11, 2013, when the requirement for a standing IRP panel was added. Significantly, the version of the Bylaws that applies in this dispute includes new language describing IRP panel declarations as "final" and having "precedential value"⁴ and granting new, judicial-like powers to IRP panels such that IRP panel declarations have a *res judicata* effect.⁵ Given the crucial differences between the language in effect in the *ICM* IRP and now, the procedural arguments of the parties in that matter are not relevant to the Panel's decision on the procedural matters at issue in this dispute.

Furthermore, the waivers and releases that ICM agreed to in its 2004 sponsored top-level domain name ("sTLD") application did not deprive ICM of access to local courts, unlike the waivers and releases DCA was required to accept when it submitted its application for a new generic top-level domain name application ("gTLD") in 2012. The 2004 waivers released ICANN only from liability for misinterpretations of the information submitted by ICM in the application or by third parties in relation to ICM's application.⁶ In contrast, as a condition of applying for a gTLD, DCA unilaterally surrendered ***all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws.***⁷ As a result, the IRP is the *sole forum* in which DCA can seek

³ See DCA's Submission on Procedural Issues, paras. 36-43 (5 May 2014).

⁴ See ICANN Bylaws, Art. IV, § 3(21) [Amended Notice of IRP, Ex. C-10]; see also DCA's Submission on Procedural Issues, paras. 36-38 (5 May 2014).

⁵ See DCA's Submission on Procedural Issues, para. 31 (5 May 2014).

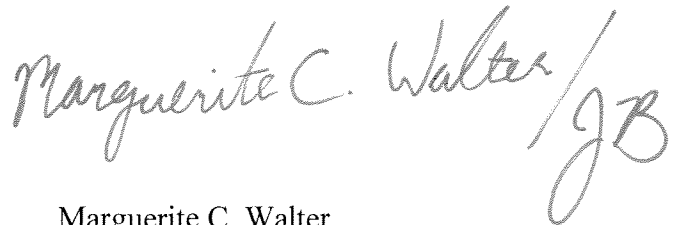
⁶ The version of the waivers and releases in the New sTLD Application in 2004 stated that, "By checking this box the applicant (or, if there are multiple applicants, each applicant) understands that difficulties encountered by ICANN in verifying, elaborating on, supplementing, analyzing, assessing, investigating, or otherwise evaluating any aspect within or related to this application may reflect negatively on the application. In consideration of the review of the application conducted on behalf of ICANN, the applicant (or, if there are multiple applicants, each applicant) hereby waives liability on the part of ICANN (including its officers, directors, employees, consultants, attorneys evaluators, attorneys, accountants, and agents, hereinafter jointly referred to as 'ICANN Affiliated Parties') for its (or their) actions or inaction in verifying the information provided in this application or in conducting any other aspect of its (or their) evaluation of this application. The applicant (or, if there are multiple applicants, each applicant) further waives liability and formally agrees to fully indemnify ICANN and the ICANN Affiliated Parties on the part of any third parties who provide information to ICANN or ICANN Affiliated Parties in connection with the application." ICANN, New sTLD Application (15 Dec. 2003), available at <http://archive.icann.org/en/tlds/new-stld-rfp/new-stld-application-partb-15dec03.htm>.

⁷ See DCA's Response on Procedural Issues, paras. 5-6 (20 May 2014). ICANN, on the other hand, waived none of these rights, creating an unconscionable inequality between the parties. See *id.* paras. 7, 14.

independent, third-party review of the actions of ICANN's Board of Directors.⁸ If the Panel were to determine that this IRP was non-binding, DCA would effectively be deprived of any remedy.

Finally, according to the terms of ICANN's Bylaws in effect between 2008 and 2010 and according to the *ICM* IRP Declaration itself, the *ICM* decision was *non-binding*.⁹ Accordingly, while the Panel certainly may refer to the *ICM* Declaration as a persuasive source, ICANN cannot now argue that a proceeding that was non-binding has precedential effect on this Panel.

Sincerely,

A handwritten signature in cursive script that reads "Marguerite C. Walter" followed by a large, stylized "JB" monogram.

Marguerite C. Walter

cc: Jeffrey LeVee

Enclosures

⁸ *See id.*

⁹ *ICM Registry LLC, v. ICANN*, ICDR Case No. 50 117 T 00224 08, p. 61 (19 Feb. 2010) [Ex. C-M-17].

**IN THE MATTER OF
AN INDEPENDENT REVIEW PROCESS
BEFORE THE
INTERNATIONAL CENTRE FOR
DISPUTE RESOLUTION**

ICM REGISTRY, LLC,)	
)	
Claimant,)	
)	
v.)	ICDR Case No. 50 117 T 00224 08
)	
INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

CLAIMANT’S MEMORIAL ON THE MERITS

CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
202.624.2500 (phone)
202.628.5116 (facsimile)

Counsel for Claimant

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its hopeful preparations for launch.⁶⁰⁵ More importantly, ICM has been wrongfully denied the opportunity to operate the proposed .XXX sTLD. In addition to the benefits the sTLD would have provided to the sponsored community and other stakeholders, the business plan approved by ICANN would have afforded substantial revenue and profit to ICM. Had ICM been allowed to enter into the registry agreement in a timely fashion, ICM would also have had a significant “first mover” advantage over any other registry operator who might register other adult content TLDs in the future, in that providers and consumers would already have become accustomed to .XXX. Although ICM can not completely recapture the benefits of this lost time, the establishment of the .XXX sTLD should not be delayed or denied any longer.

VII. THE PURPOSE OF THESE PROCEEDINGS AND THE ROLE OF THIS PANEL

277. As the Panel is aware, this is the first Independent Review Process brought under ICANN’s Bylaws. An explanation, therefore, is warranted of the purpose and nature of these proceedings, including of what ICM respectfully submits is the precise role and function of this Panel. This explanation is all the more important in light of ICANN’s gross misrepresentation of the process as some sort of summary procedure, resulting in a non-binding advisory opinion, to be followed by ICANN in its sole discretion. As demonstrated below, there is absolutely nothing in the language of the instruments applicable to this proceeding even remotely providing support for ICANN’s position.

278. As already discussed, there are several ICANN documents governing this proceeding. First, the ICANN *Articles of Incorporation* and the ICANN *Bylaws* set forth the basic substantive and procedural rules and guidelines in accordance with which ICANN must conduct its activities. Article IV, Section 3 of the Bylaws sets forth the basic provisions for

⁶⁰⁵ See *id.*

“independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”⁶⁰⁶ Second, the *ICDR International Arbitration Rules* and the *Supplementary Procedures* constitute the “operating rules and procedures” for the Independent Review Process. Under the terms of Article IV, Section 3 of the Bylaws, the ICDR International Arbitration Rules and the Supplementary Procedures “shall implement and be consistent with” Section 3 of the Bylaws.⁶⁰⁷

279. The plain language of these provisions requires the Panel to issue a final and binding declaration as to whether ICANN acted consistently with its Articles of Incorporation and Bylaws when it rejected ICM’s application to serve as the registry operator for the proposed .XXX sTLD. The plain language of these provisions further requires the Panel to reach its decision after having conducted a full review of ICANN’s actions. And, as discussed in greater detail below, the plain language of these provisions requires the Panel to assess whether ICANN carried out the actions at issue “consistent with relevant principles of international law and . . . local law.”

280. Ignoring these provisions, ICANN instead argues that the parties have convened this Panel simply to request its “advice” on whether the ICANN Board acted consistently with the ICANN Articles and Bylaws.⁶⁰⁸ ICANN further argues that in providing such “advice,” the Panel must afford the ICANN Board “a deferential standard of review.”⁶⁰⁹ Moreover, ICANN asserts that the Panel’s “advice” is “not binding” on the ICANN Board in any event. In other

⁶⁰⁶ Bylaws, Art. IV, § 3, para 1, Cl. Exh. 5.

⁶⁰⁷ *Id.* at Art. IV, § 3, para. 5; Supplementary Procedures, Cl. Exh. 12 (“These procedures supplement the International Centre for Dispute Resolution’s International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”).

⁶⁰⁸ ICANN Response at para. 3.

⁶⁰⁹ *Id.* at paras. 3, 8, 88.

words, if the Panel—having considered the Board’s actions under “a deferential standard of review”—nonetheless “advises” that the Board has not acted consistently with the Articles or Bylaws, the Board is entirely free to disregard that “advice” in favor of its own conclusions concerning its own conduct.⁶¹⁰

281. Unfortunately for ICANN, the words “advice,” “deferential standard of review,” and “not binding” do not appear in the Articles of Incorporation, the Bylaws, the ICDR International Arbitration Rules, the Supplementary Procedures, or any other relevant document. Nor do these documents include anything to suggest that this Panel is to employ a “deferential standard of review” in order to render “advice” that is “not binding” on ICANN.

282. To the contrary, the relevant provisions contained in the Bylaws, the ICDR International Arbitration Rules, and the Supplementary Procedures, use words such as “*independent review*,” “*international arbitration*,” “*arbitrators*,” “*declare*,” “*decide*,” and “*prevailing party*.” The ICDR International Arbitration Rules specifically provide for this Panel to issue an award that “*shall be final and binding on the parties*.” The Supplementary Procedures also state that the ICANN Board will review and then “*act[] upon the IRP declaration*.”⁶¹¹

283. In short, a review of these provisions unequivocally demonstrates that the Panel’s mandate here is to reach a final and binding declaration as to whether ICANN acted consistently with its Articles of Incorporation and Bylaws, based on a full review of ICANN’s actions.

⁶¹⁰ *Id.* ICANN’s self-congratulatory assertion that it nonetheless “takes the process quite seriously” is patronizing at best. *Id.* at para. 21. It is also belied by the frivolity of certain positions taken in its Response to ICM’s Request for Independent Review (such as the claim in note 1 of ICANN’s Response that international law has no place in this IRP, despite the fact that international law is specifically referenced in Article 4 of the Articles of Incorporation).

⁶¹¹ Supplementary Procedures para.. 6, Cl. Exh. 12; *see also* Bylaws, Art. IV, § 3, Cl. Exh. 5.

A. Senior ICANN Executives have Confirmed that the Independent Review Process Should be Conducted as and have the Effect of an Arbitration

284. Before considering the plain language of the provisions governing the Independent Review Process, it is instructive to consider the context in which these provisions were added to ICANN's governance structure. This context and the statements made by senior ICANN executives—at a different times—confirms that it has always been ICANN's intention that the Independent Review Process be conducted as and have the binding effect of an international arbitration.

285. The current provisions governing the Independent Review Process were added to the Bylaws in December 2002, partly as a result of both international and domestic concern regarding ICANN's lack of accountability.⁶¹² After ICANN was established, serious concerns were expressed in several quarters that ICANN had essentially been given plenary authority over a critical global resource, yet it had been set up to be accountable only to itself. In particular, its

⁶¹² Prior to the December 2002 revisions, the Bylaws in effect contained only vague provisions regarding reconsideration or review:

(a) Any person affected by an action of the Corporation may request review or reconsideration of that action by the Board. The Board shall adopt policies and procedures governing such review or reconsideration, which may include threshold standards or other requirements to protect against frivolous or non-substantive use of the reconsideration process.

(b) The Initial Board shall, following solicitation of input from the Advisory Committee on Independent Review and other interested parties and consideration of all such suggestions, adopt policies and procedures for independent third-party review of Board actions alleged by an affected party to have violated the Corporation's articles of incorporation or bylaws.

See, e.g., Archived Bylaws dated 12 February 2002, Art. III, § 4, *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-12feb02.htm> ("February 2002 Bylaws"), Cl. Exh. 202.

governance included no mechanism for any meaningful review of its decisions.⁶¹³ As Professor Goldsmith states in his Expert Report:

The mismatch between ICANN’s ostensible private status and its plenary government authority over one of the globe’s most important resources generated significant controversy at ICANN’s inception. The nub of the controversy was that ICANN’s extraordinary authority over the Internet was untempered by any form of administrative law or other checks and balances that usually accompany such large exercises of effective governmental power.⁶¹⁴

286. At a hearing on “ICANN Governance” in the U.S. Senate in June 2002, a number of Senators voiced similar concerns,⁶¹⁵ and Assistant of Secretary of Commerce Nancy Victory testified that for ICANN “to be effective, it must instill confidence and legitimacy in its operations ICANN’s processes must be revised to provide greater transparency and accountability for decision-making.”⁶¹⁶

287. At the same hearing, ICANN’s then-President, Stuart Lynn made it very clear that ICANN specifically intended to address these concerns. In prepared testimony, he announced that ICANN planned to “strengthen[] confidence in the fairness of ICANN decision-making through [] creating a workable mechanism for speedy independent review of ICANN Board actions by experienced **arbitrators**”⁶¹⁷ ICANN proceeded to formally amend its Bylaws in

⁶¹³ See, e.g., Weinberg at 226-27, Cl. Exh. 18.

⁶¹⁴ Goldsmith Expert Report at para. 7.

⁶¹⁵ *ICANN Governance, Hearing before the Senate Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science and Transportation*, 107th Cong. 2 (2002) (Opening Statement of Hon. Ron Wyden, U.S. Senator from Oregon), Cl. Exh. 203. Senator Ron Wyden stated that ICANN was “something of an experiment” when it began in 1998, and that there was now “a widespread feeling that changes [were] needed.” *Id.* at 2. Senator George Allen observed that “[a]s a private corporation ICANN is attempting to become the Internet’s governing body or global regulator.” *Id.* at 3. And Senator Conrad Burns asserted that ICANN’s operations had been “controversial and . . . shrouded in mystery.” *Id.* at 4.

⁶¹⁶ *Id.* at 7.

⁶¹⁷ *Id.* at 30.

December 2002⁶¹⁸ in order to include a number of mechanisms for accountability, including an Ombudsman,⁶¹⁹ a Board Committee on Reconsideration,⁶²⁰ and the current procedures for Independent Review.

288. Mr. Lynn’s articulation of ICANN’s understanding of the Independent Review Process was reaffirmed by ICANN’s current President, Paul Twomey, in the context of Congressional hearings in September 2006. In his testimony, Mr. Twomey noted that “ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws. In particular, after its decision-making processes at the board level, there is the ability for appeal to a review committee, and then, from there, to an independent review panel and independent arbitration.”⁶²¹ Dr. Twomey went on to characterize the Independent Review Process as the “*final method of accountability* . . . under the bylaws.”⁶²²

289. Mr Twomey’s testimony alone makes it clear that ICANN—at least until these proceedings—has consistently understood that the Independent Review Process is an arbitration, even though not specifically described using this nomenclature. It also makes it clear that it has

⁶¹⁸ See ICANN Archived Bylaws dated 15 December 2002, Arts. IV-V, available at <http://www.icann.org/en/general/bylaws.htm#I>, (“15 December 2002 Bylaws”), Cl. Exh. 204.

⁶¹⁹ The Ombudsman is to be appointed by the Board “to act as a neutral dispute resolution practitioner.” Bylaws Article V, §§ 1,2, Cl. Exh. 4. The Ombudsman has broad jurisdiction to conduct an “independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly,” but no real authority. *Id.* The Ombudsman must instead rely on “negotiation, facilitation, and ‘shuttle diplomacy.’” *Id.*

⁶²⁰ The mandate of this Committee is to review requests submitted by any person adversely affected by ICANN actions which either contradict established ICANN policies or which are taken without consideration of material information. *Id.* Although the Committee is expected to come to its own conclusion, not broker a solution through negotiation, like the Ombudsman, the decision of the Committee is not binding on the Board. *Id.*

⁶²¹ *Hearing Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 109th Cong. 19 (2006).

⁶²² *Id.*

always been ICANN’s intention that the outcome of the arbitral process should be final and binding. After all, it would hardly be possible to characterize any procedure short of yielding such an outcome as ICANN’s “final method of accountability.”

290. As described below, the foregoing analysis and conclusions are underscored by specific language included in ICANN’s Bylaws.

B. Specific Language in the Bylaws Confirms that the Independent Review Process is an Arbitration

291. The provisions applicable to the Independent Review Process are found in Article IV of the Bylaws, entitled “**ACCOUNTABILITY AND REVIEW.**” They are specifically set forth in Section 3 of Article IV. Paragraph 4 of Section 3 States as follows:

The IRP shall be operated by an *international arbitration provider* appointed from time to time by ICANN (“the IRP Provider”) using *arbitrators* under contract with or nominated by that provider.

292. Given that ICANN administers a global resource, and that ICANN could reasonably expect that potential claimants invoking the Independent Review Process might come from a variety of different countries and legal cultures, ICANN determined that the independent review process should be administered by an “*international arbitration provider*”⁶²³ – a term of art specifically chosen by ICANN, as opposed to the more generic term “dispute resolution service provider.” In this regard, as set forth in Section 3, Paragraph 4 of the Bylaws, ICANN appointed the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration

⁶²³ Moreover, when ICANN selected the ICDR, one of its most important requirements for an arbitration provider was that it be “an international arbitration provider with an appreciation for and understanding of applicable international law.” *Internet Operations Oversight, Hearing before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation*, 108th Cong. (31 July 2003) (statement of Mr. Paul Twomey, ICANN’s current President and CEO), Cl. Exh. 10.

Association (“AAA”).⁶²⁴ ICANN further determined that the Independent Review Process should be conducted by “arbitrators,” yet another term of art.

293. If any further confirmation is needed of ICANN’s intentions – ICM submits there should be none – it is provided by the fact that ICANN specifically elected that the Independent Review Process be “govern[ed]” by the ICDR’s International Arbitration Rules, as supplemented by certain additional rules included in the Supplementary Procedures, which were developed to include specific procedural requirements for the Independent Review Process contained in ICANN’s Bylaws.⁶²⁵ Any debate regarding the nature of these proceedings is extinguished by the fact that ICANN chose to apply the ICDR’s International Arbitration Rules, as opposed to its International Mediation Rules, or a set of *ad hoc* dispute resolution rules created from whole cloth and tailored to meet any special procedural requirements that ICANN may have wished to apply to the Independent Review Process, *e.g.*, that the outcome of the process should be non-binding.

294. In short, all of the available evidence, including authoritative statements made by senior ICANN executives, confirms that, in establishing the Independent Review Process, it was ICANN’s intention that the consistency of the Board’s conduct with ICANN’s Article and Bylaws be determined by arbitration. ICANN can neither explain away the separate statements

⁶²⁴ Resolutions Adopted at Special ICANN Board Meeting (19 April 2004), *available at* <http://www.icann.org/en/minutes/resolutions-19apr04.htm>, Cl. Exh. 205; ICANN Accountability and Review, *available at* http://www.icann.org/en/general/accountability_review.html, Cl. Exh. 206. *See also* the definitions included in the Supplementary Procedures, Definitions (“ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN’s Bylaws.”).

⁶²⁵ *See* Supplementary Procedures, Cl. Exh. 12 (“These procedures supplement the International Centre for Dispute Resolution’s International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”); *see also* Supplementary Procedures, Definitions (“INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR’s International Arbitration Rules that **will govern the process** in combination with the Supplementary Procedures.”) (Emphasis added.)

of two of its chief executive officers confirming this conclusion, nor deny the implications of its appointment of the ICDR as the dispute resolution service provider charged with administering the process.

295. The only question remaining, therefore, is whether the outcome of the Independent Review Process should be binding. As demonstrated below, all available evidence and argument confirms that it must.

C. The Panel's Purpose Is To Reach a Final and Binding Decision

296. ICANN's Bylaws providing for an Independent Review Process, along with the ICDR International Arbitration Rules and the Supplementary Procedures, which the Bylaws incorporate by reference, constitute ICANN's standing offer to arbitrate this dispute, which ICM accepted when it filed its Request for Independent Review Process.⁶²⁶ Those provisions unambiguously provide for a process that must result in a final and binding decision.

⁶²⁶ That a party's consent to arbitrate may be perfected when the other party initiates arbitration is well recognized in the realm of international arbitration, particularly, but not exclusively, in investor-state arbitration. *See, e.g.*, Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. – FILJ 232 (1995) (discussing “arbitration on the basis of a unilateral promise contained in an investment promotion law”); CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, 238 at para. 356 (2001) (observing that the “parties’ consent exists only to the extent that offer and acceptance coincide”); REDFERN & HUNTER at 7 (“there may be what might be called a ‘standing offer’ to arbitrate . . . ; a claimant may then take advantage of this offer by commencing arbitral proceedings.”). In addition, there are an increasing number of cases recognizing the validity of international arbitration clauses contained in article of incorporation and/or by laws. *See, e.g.*, *Laif X SPRL v. AXTEL, S.A. DE C.V.*, 390 F.3d 194 (2d Cir. 2004) (involving arbitration by Belgium limited partnership against Mexican corporation, brought pursuant to arbitration clause in the Mexican corporation's bylaws). *See also* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 191-92 (2009).

Federal and state courts in the United States have also enforced domestic arbitration provisions contained in articles of incorporation and bylaws. *See, e.g.*, *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 809 (7th Cir. 2003) (enforcing arbitration clause contained in organization's bylaws); *United States v. American Soc'y of Composers, Authors and Publishers*, 32 F.3d 727, 732 (2d Cir. 1994) (enforcing arbitration clause contained in articles of incorporation); *King v. Larsen Realty, Inc.*, 121 Cal. App. 3d 349, 358 (1981) (enforcing arbitration clause contained in organization's bylaws); 8 FLETCHER CYCLOPEDIA CORPORATIONS § 4187 (2008) (corporate bylaws containing arbitration provisions are generally upheld by United States courts). Indeed, the Uniform Arbitration Act (“UAA”), which has been adopted in whole or in part in nearly all of the United States, “is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements. Courts that have addressed whether arbitration provisions contained in the bylaws of corporate or other

(continued...)

297. If the Panel accepts – as ICM submits it must – that, in setting up the Independent Review Process, ICANN intended to establish a procedure by which the consistency of its actions with its Articles and Bylaws is to be determined by arbitration, then it must also accept, absent clear evidence to the contrary, that ICANN is bound by the outcome of that arbitral process. There is ample support for this contention, as discussed below, both as a matter of principle, and based on the language of the various rules applicable to these proceedings.

1. Arbitration is a Presumptively Binding Dispute Resolution Procedure

298. First, the term “arbitration” by itself means the binding resolution of a dispute. For example, *Black’s Law Dictionary* defines the term “arbitration” as follows:

A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. Also termed (redundantly) *binding arbitration*.⁶²⁷

299. Indeed, the binding nature of arbitration – whether in the international or domestic context – is one of its defining characteristics. As one prominent commentator has stated:

Arbitration is common in both international and domestic contexts. In each, it has several defining characteristics. First, arbitration is generally *consensual* – in most cases, the parties must agree to arbitrate their differences. Second, arbitrations are resolved by *non-governmental decision-makers* – arbitrators do not act as state judges or government agents, but are private persons ordinarily selected by the parties. Third, **arbitration produces a *binding award*, which is capable of enforcement through national courts – not a mediator’s or conciliator’s non-binding**

(continued ...)

associations are enforceable under the UAA have unanimously held that they are.” See *Uniform Arbitration Act*, 3 PEPPERDINE DISP. RESOL. L.J. 323, 344 (2003). See also Goldsmith Expert Report at paras. 17-19.

⁶²⁷ BLACK’S LAW DICTIONARY 112 (8th ed. 2004). Even non-legal dictionaries define arbitration as “the settlement of a dispute” (as opposed to the rendering of “advice”). See, e.g., OXFORD MODERN ENGLISH DICTIONARY 46 (1996).

recommendation. Finally, arbitration is comparatively *flexible*, as contrasted to most court procedures.⁶²⁸

300. As another leading treatise puts it:

[I]f the parties cannot resolve the dispute [on their own], the task of the arbitral tribunal is to resolve the dispute for them by making a decision, in the form of a written award. An arbitral tribunal does not have the powers or prerogatives of a court of law, but it has a similar function to that of the court in this respect, namely that *it is entrusted by the parties with the right and the obligation to reach a decision which will be binding upon them.*

The power to make binding decisions is of fundamental importance. It distinguishes arbitration as a method of resolving disputes from other procedures, such as mediation and conciliation, which aim to arrive at a negotiated settlement.⁶²⁹

301. Federal courts in the United States have similarly held that the “common incidents” of “classic arbitration” (for purposes of determining whether a proceeding constitutes arbitration under the Federal Arbitration Act (“FAA”)) include:

(i) an independent adjudicator, (ii) who applies substantive legal standards, (iii) considers evidence and argument (however formally or informally) from each party, and (iv) *renders a decision that purports to resolve the rights and duties of the parties*⁶³⁰

302. State courts in the United States – including the Supreme Court of California – have also held that the term “arbitration” by itself connotes a binding award. In *Moncharsh v. Heily & Blase*, the Supreme Court of California stated that even in the absence of a provision in

⁶²⁸ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1 (2d ed. 2001) (italics in original; boldface added).

⁶²⁹ REDFERN AND HUNTER at 12 (emphasis added); see also ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 412 (3d ed. 2006) (“The idea is that if the parties chose to submit their disputes to arbitration, *they should be bound by the results*, unless wholly unforeseeable corruption of the process has occurred.”) (emphasis added).

⁶³⁰ *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008) (emphasis added) (citing *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004)).

the arbitration agreement that specifically provides for the award to be “binding,” the very use of the term “arbitration” means that the award is binding.

[I]t is the general rule that parties to a private arbitration impliedly agree that the *arbitrator’s decision will be both binding and final*. Indeed, “*The very essence of the term ‘arbitration’ [in this context] connotes a binding award.*” (Blanton v. Womancare, Inc., 38 Cal. 3d at 402, (1985), citing Domke on Commercial Arbitration (rev ed. 1984 p. 1)

. . . . In the early years of this state, this court opined that, “*When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive*” (Montifori v. Engels (1853) 3 Cal. 431, 434). One commentator explains, “*Even in the absence of an explicit agreement, conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest.*” (Comment, Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality (1976) 23 UCLA L. Rev. 948-949⁶³¹

As another California court recently stated, “the term ‘arbitration’ connotes a binding award; thus a private agreement to arbitrate is generally interpreted to include an implied agreement [that] the arbitrator’s decision will be binding and final.”⁶³²

2. ICANN’s Documents Confirm that ICANN is Bound to Follow the Panel’s Declaration

303. The relevant ICANN documents provide ample grounds for the Panel to conclude that its determination in this proceeding is binding on ICANN; and for that matter on ICM.

304. First, pursuant to Section 3(8)(b) of the Bylaws, the Panel “shall have the authority to . . . *declare*” – not recommend or advise – “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” (Emphasis added). There

⁶³¹ *Moncharsh v. Heily & Blase*, 832 P.2d 899, 903 (Cal. 1992) (footnote omitted) (emphasis added).

⁶³² *Loeb v. Record*, 162 Cal. App. 4th 431, 443, 75 Cal. Rptr. 3d 551, 559 (2008) (citing *Moncharsh*, 832 P.2d at 899); *see also City of Lenexa v. C.L. Fairley Constr. Co.*, 777 P.2d 851, 857 (Kan. 1989) (emphasis added) (holding that an arbitration clause did not need to use the word “binding” because the use of the word “arbitration” impliedly required the arbitral panel to issue a binding decision: “The term ‘binding arbitration’ is redundant. Arbitration is, by definition, binding.”).

is more than sufficient authority to support the proposition that the term “declaration” connotes a final and binding decision.⁶³³ In contrast, the very next subparagraph of the Bylaws – Section 3(8)(c) – provides that the IRP “shall have the authority to . . . **recommend** that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.” The different formulations used in Sections 3(8)(b) and 3(8)(c) with respect to the Panel’s powers, confirms that the drafters of the Bylaws intended that the Panel not only have a range of powers, but also that it could make different pronouncements with different effect. Clearly, had they meant for the Panel’s views on whether the Board acted consistently with the Articles and Bylaws to constitute merely a nonbinding recommendation, they could have easily chosen the word “recommend,” as they did elsewhere.

305. Similarly, the ICDR Supplementary Procedures provide that the IRP is “*to decide* the issue(s) presented.” The word “decide” also connotes finality.⁶³⁴ The Supplementary Procedures also define the IRP’s Declaration as constituting the Panel’s “*decisions/opinions*.” Moreover, the Declaration is to be made “in writing . . . based on the documentation, supporting materials and arguments submitted by the parties.” Again, in an arbitral, judicial, or quasi-judicial context, these terms connote binding resolutions of the issue(s) presented. Thus, for example, a U.S. district court recently held that that an arbitration agreement – despite containing the phrase “mediation or arbitration” – provided only for arbitration (which, the court held, is by

⁶³³ Thus, for example, in *Advanced Bodycare Solutions v. Thione International*, the U.S. Court of Appeals for the Eleventh Circuit held that to constitute arbitration under the FAA, the proceeding must result in a binding decision, which it described as an “award” **declaring** the rights and duties of the parties.” *Advanced Bodycare*, 524 F.3d at 1239. Furthermore, many arbitration statutes, including, for example, the 1996 English Arbitration Act, provide for the arbitral panel to “make a **declaration** as to any matter to be determined in the proceedings.” The English Arbitration Act § 48(3) (1996).

⁶³⁴ That is true under standard dictionary definitions, *see, e.g.*, OXFORD MODERN ENGLISH DICTIONARY 253 (1996) (to decide means to “come to a resolution as a result of consideration”).

definition binding), because the agreement also included the words “for hearing and decision.”

According to the court,

“[t]hose words – ‘for hearing and *decision*’ – make it plain that the parties agreed to a dispute resolution mechanism that was binding rather than non-binding even though it is also true that the parties characterized the process as one involving ‘mediation or arbitration.’ *If the parties had truly envisioned an alternative that was merely advisory, they would not have used the words ‘for hearing and decision’ when defining the entire process.*”⁶³⁵

306. Moreover, both the Bylaws and the Supplemental Procedures provide that the Panel “*shall specifically designate the prevailing party.*”⁶³⁶ This provision is mandatory rather than precatory; the Panel is left with no discretion. It “shall” (*i.e.*, must) designate a prevailing party. But the term “prevailing party” requires a decision that affords actual relief – be it monetary, equitable, or declaratory.⁶³⁷ The United States Supreme Court’s holding in *Hewitt v. Helms* confirms this conclusion. In that case, the Court held that a plaintiff who secured a “judicial pronouncement” that his Constitutional rights had been violated – but who for other reasons was not entitled to monetary, equitable, or declaratory relief – was not a “prevailing party.” The Court stated that “[w]hatever the outer boundaries of that term [“prevailing party”] may be, [a plaintiff who obtains no actual relief] does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits before he can be said to prevail.”⁶³⁸ The Court explained further than an “advisory opinion” does not produce a

⁶³⁵ *Dobson Bros. Constr. Co. v. Ratliff, Inc.*, 2008 WL 5232915, at *1 (D. Neb. Dec. 12, 2008) (emphasis added); *see also Loeb v. Record*, 162 Cal. App. 4th at 443, 75 Cal. Rptr. 3d at 559. The term “award” in the context of arbitration has been defined as “a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.” BLACK’S LAW DICTIONARY at 147 (emphasis added).

⁶³⁶ Bylaws, Art. 4, § 3, para. 12, Cl. Exh. 5; Supplementary Procedures, § 8(b), Cl. Exh. 12.

⁶³⁷ *Black’s Law Dictionary* defines “prevailing party” as “a party in whose favor a judgment is rendered, regardless of the amount of damages awarded.” BLACK’S LAW DICTIONARY at 1154.

⁶³⁸ *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987).

“prevailing party.” To prevail, the plaintiff has to achieve “the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*”⁶³⁹

307. Thus, by virtue of the fact that the rules applicable to these proceedings require that the Panel “specifically designate the prevailing party,” and if the United States Supreme Court’s guidance is to be given some weight – and there is no reason why it should not – it would not be possible for the Panel to properly fulfill its mandate unless its determination has binding effect.

308. Finally, and by some measure most significantly, Article 27(1) of the ICDR International Arbitration Rules specifically provides that “[a]wards shall be made in writing, promptly by the tribunal, and *shall be final and binding on the parties.* The parties undertake to carry out any such award without delay.” There is no inconsistency between this provision of the ICDR International Arbitration Rules and any of the provisions of the Supplementary Procedures. Moreover, in fashioning and approving the Supplementary Procedures, ICANN chose not to modify, limit or opt out of the terms, application or effect of Article 27(1).⁶⁴⁰ Thus, there can be little argument that, pursuant to the procedural rules that ICANN agreed should apply to the Independent Review Process, the outcome of that process was intended by ICANN to be, and is binding on the parties.

309. In sum, based on all of the available evidence, including the plain and unambiguous terms of the Bylaws, the ICDR International Arbitration Rules, and the Supplementary Rules, ICM respectfully submits that there can be no question that the Panel’s mandate in these proceedings is to reach a “final and binding” declaration as to whether ICANN

⁶³⁹ *Id.* at 761 (emphasis in original).

⁶⁴⁰ The Supplemental Procedures “opt out” of the ICDR Rules in only one respect, specifically providing that “Article 37 [Emergency Measures of Protection] of the RULES will not apply.” *Id.* § 10, Cl. Exh. 12.

acted consistently with its Articles of Incorporation and Bylaws in its consideration and ultimate rejection of ICM's application to serve as registry operator for the proposed .XXX sTLD.

D. The Panel Must Conduct a Full Review of ICANN's Actions

310. As with ICANN's contention that the Panel's declaration is "nonbinding," ICANN's assertion that the Panel must afford the Board "a deferential standard of review" has no support in the instruments governing this proceeding.⁶⁴¹

311. The term "independent review" is not specifically defined in the Bylaws or other governing documents, because it does not need to be. The plain language of the term, combined with the context in which it is used and the well-established legal meaning of the term as a standard of review, require that the Panel conduct a full, non-deferential review of the Board's actions.

312. As discussed above, as a matter of plain language, the term "independent review" in itself connotes a review that is not deferential. The term "review" has been defined as "consideration, inspection, or reexamination of a subject or thing,"⁶⁴² while the term "Independent" has been given the meaning "not subject to the control or influence of another."⁶⁴³ Thus, an "independent review" consists of consideration, inspection, or reexamination of a subject or thing that is not subject to the control or influence of another.

313. Although "independent review" is not a term of common usage or general meaning within the context of international law or dispute resolution, it is a term that is frequently used in the federal and state courts of the United States. Not surprisingly, the term's

⁶⁴¹ ICANN Response, paras. 3, 8, 88.

⁶⁴² BLACK'S LAW DICTIONARY at 1345.

⁶⁴³ *Id.* at 785.

use by these courts is consistent with the plain-language meaning set forth above; that is, a plenary review that is not deferential.

314. The independent review standard has been used most prominently by the U.S. Supreme Court in cases involving protections under the U.S. Constitution, in particular, the freedom of expression guaranteed under the First Amendment. The independent review standard in the First Amendment context was first articulated by the Supreme Court in the landmark case of *New York Times v. Sullivan*. The standard imposes on the reviewing court “an obligation to ‘*make an independent examination of the whole record*’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”⁶⁴⁴

315. The U.S. Supreme Court has also used the independent review standard in other contexts, always making clear that independent review is *not* a deferential standard. For example, in holding that federal courts of appeal should conduct an independent review of a district court’s determination of state law, the Supreme Court has reversed a court of appeals for granting deference to the district court in making that determination. In *Salve Regina College v. Russel*, the Supreme Court concluded that:

a court of appeals should review *de novo* a district court’s determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. The obligations of responsible appellate jurisdiction implies the requisite authority to review independently a lower court’s determinations.⁶⁴⁵

316. Furthermore, under California law, the term “independent review” is also the equivalent of *de novo* review:

⁶⁴⁴ *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

⁶⁴⁵ *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *see also Miller v. Fenton*, 474 U.S. 104 (1985); *Haynes v. State of Washington*, 737 U.S. 503 (1963).

When an appellate court employs **independent (de novo)** review, it generally gives no special deference to the findings or conclusions of the court from which the appeal is taken. The appellate court uses its own independent judgment to resolve the issue or issues presented for consideration.

[...]

Independent review does mean . . . the appellate court is not constrained to give the lower court’s conclusion any particular weight. If the appellate court believes the lower court erred, it need find nothing more, subject to the independent requirement that the error be prejudicial. The appellate court need not find, for example, that the error is “clear” or “manifest.” It is enough that the appellate court disagrees with the lower tribunal’s conclusion, and the appellate court is thus free to substitute its judgment for that of the lower tribunal.⁶⁴⁶

California courts have therefore distinguished “independent review,” which is *de novo* review typically applied to questions of law, from the “deferential substantial-evidence standard,” which typically applies to the review of findings of fact.⁶⁴⁷ Mixed questions of law and fact are subject to independent review.⁶⁴⁸

317. Thus, the term “independent review” – according both to its plain language and the definition typically given to it in the courts of the United States – does not in any way, as ICANN argues, imply a “deferential standard of review.” Without any textual language or applicable law to support its position, ICANN instead argues that the Panel should employ a deferential standard of review because “[t]he ICANN Board is truly unique.”⁶⁴⁹ According to ICANN:

⁶⁴⁶ J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 468 (1994) (emphasis added).

⁶⁴⁷ *E.g.*, *People v. Parson*, 44 Cal. 4th 332, 345 (2008).

⁶⁴⁸ *E.g.*, *People v. Nesler*, 16 Cal. 4th 561 (1997) (finding that whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court’s independent determination).

⁶⁴⁹ ICANN’s Response at para. 85.

[T]he Board is comprised of fifteen volunteer members, drawn from various constituencies that are particularly active within the Internet community. Two-thirds of the members of the Board reside in countries other than the United States, further demonstrating ICANN's commitment to represent the interests of the international community. The Board is frequently called upon to make difficult decisions concerning new and complex issues that affect multiple constituencies, nations and economies, nearly always with little or no precedent on which to rely.⁶⁵⁰

318. ICM fails to understand how the alleged “uniqueness” of ICANN's Board constitutes any basis for a deferential standard of review of the Board's actions by this Panel. Indeed, the fact that ICANN's Board consists entirely of volunteers – who are asked to make “difficult decisions concerning new and complex issues that affect multiple constituencies, nations and economies, nearly with little or no precedent on which to rely” – argues strongly in favor for a higher level of review, not a more deferential one.

319. ICANN's reliance on the “business judgment rule” and the related doctrine of “judicial deference” under California law, as set forth in its Response to ICM's Request for Independent Review Process, is misplaced.⁶⁵¹ Invoking these doctrines, ICANN argues in its Response that “there must be a strong presumption that the Board's decisions are not at odds with the Bylaws or Articles” and that the Board's decisions “should not be questioned absent a showing of bad faith.”⁶⁵² But the business judgment rule and the judicial deference doctrine, as fashioned under California law, have no application whatsoever in this Independent Review Process. The business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. Similarly, the doctrine of judicial deference is designed to ensure that

⁶⁵⁰ *Id.*

⁶⁵¹ *See* ICANN's Response at paras. 91-93.

⁶⁵² *Id.* at para. 87.

courts do not interfere with the ordinary, day-to-day decisions of corporate boards, when those decisions are made in good faith, under fair procedures, on a non-discriminatory basis, and consistent with the corporation's governing instruments.⁶⁵³

320. At the risk of stating the obvious, this is not a court action seeking to impose individual liability on the ICANN board of directors. This is also not a court case asserting common law or statutory claims against ICANN. Nor is this a case where there is any danger of a court entering the boardroom without the invitation of the corporation and unduly interfering with the board's day-to-day decisions. Rather, this is an Independent Review Process – established under ICANN's Bylaws – with the specific purpose of declaring “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”⁶⁵⁴ As the California courts have explicitly stated, “the rule of judicial deference to board decision-making can be limited . . . by the association's governing documents.”⁶⁵⁵

321. That is precisely what ICANN has done by providing in its Bylaws for this Independent Review Process – *i.e.*, an “arbitration” by “independent” “arbitrators” – set up by ICANN itself in order to provide greater “accountability” and “transparency.” It is a process meant to establish – to quote again Dr. Twomey's testimony before Congress – a “*final method of accountability*.” The notion now advanced by ICANN – that this Panel should afford the Board a “deferential standard of review” and only “question” the Board's actions upon “a showing of bad faith” – is grossly at odds with that purpose, as well as with the plain meaning of “independent review” and the well-established meaning of that term as a standard of review.

⁶⁵³ These principles of California law are discussed at greater length, *infra* at 460-494, in the section of the memorial explaining why ICANN's actions were inconsistent with the Articles and Bylaws under relevant principles of California law.

⁶⁵⁴ ICANN Bylaws, Article IV, sec. 3, Cl. Exh. 4.

⁶⁵⁵ *Ritter & Ritter, Inc. v. Churchill Condominium Ass'n*, 166 Cal. App. 4th 103, 122 (Cal. App. 2008) (citing *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940 (Cal. 1999)).

322. There is no question that ICANN’s Articles of Incorporation and Bylaws establish appropriately high standards for ICANN’s conduct, as ICANN enjoys its sole power to administer one of the most critically important and extraordinarily technological valuable resources on earth. ICANN’s Independent Review Process was designed to provide a plenary and enforceable method to ensure that the Board’s decisions are consistent with those standards. That ICANN would now try to evade or eviscerate the protections that it included in its governing documents – and which it has widely trumpeted as among the hallmarks of its “accountability” and “transparency” – is unfortunately indicative of its conduct throughout its dealings with ICM. Once again, ICANN’s actual conduct fails to comport with its lofty words.

323. In sum, the Panel’s task in this Independent Review Process to make a final, binding decision as to whether ICANN’s administration of the 2004 round, and its consideration, approval and then rejection of ICM’s application were consistent with ICANN’s Articles and Bylaws—and to do so after a full, nondeferential review of ICANN’s actions.

VIII. THE APPLICABLE LAW OF THIS PROCEEDING

324. In conducting this Independent Review of ICANN’s actions, the Panel must examine the language of the Articles of Incorporation and Bylaws. Moreover, all of the provisions of these documents must be interpreted in light of Article IV of ICANN’s Articles of Incorporation, which provides that ICANN shall carry out its activities “*in conformity with relevant principles of international law and applicable conventions and local law . . .*.”⁶⁵⁶

325. As explained by Professor Goldsmith in his Expert Report, the original draft of ICANN’s Articles of Incorporation did not include any reference to international law.⁶⁵⁷ The

⁶⁵⁶ Articles of Incorporation, Art. 4, Cl. Exh. 4.

⁶⁵⁷ Goldsmith Expert Report at para. 8.

untimely attempts at intervention by both the GAC and certain elements in the U.S. government, essentially giving the GAC and the U.S. government a *de facto* veto over ICM's application. In doing so, ICANN ventured far outside the parameters of its governing documents, essentially ceding the discretionary authority that ICANN has been given to others.⁹¹⁸ Not only that, but ICANN effectively allowed others to make ICANN's decision based on "public policy" criteria far outside ICANN's mission.

502. Ultimately, all of the safeguards included in ICANN's constitutive documents – safeguards that were meant to provide objective and neutral decision-making based on documented policies; substantive and procedural fairness; openness and transparency; and non-discrimination – were set by the wayside in ICANN's treatment and rejection of ICM's application. ICANN simply abandoned its constitutive principles in order to ride the prevailing political winds. But again, without being tethered by these principles, ICANN will be more vulnerable than ever to being blown one way and then another by whatever political winds happen to be strongest at any given moment.

XI. RELIEF REQUESTED

For the foregoing reasons, ICM respectfully requests that the Panel declare as follows:

- a. The Panel's Declaration is binding on ICM and ICANN;
- b. Following ICANN's determination on 1 June 2005 that ICM's application to serve as registry operator for the .XXX sTLD ("ICM's application") met the criteria set forth in its 15 December 2003 RFP (the "RFP"), ICANN acted inconsistently with its Articles of Incorporation and Bylaws ("Articles and Bylaws") by:

⁹¹⁸ In the context of administrative law, it is an abuse of discretion to delegate decision-making authority to others who are not authorized to exercise it. *See, e.g., Idaho v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994) (reversing ICC when "[i]nstead of taking its own hard look, the Commission deferred to the scrutiny of others" and effectively "delegate[d] its responsibilities").

- i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;
 - ii. Rejecting ICM's proposed agreement to serve as registry operator for the .XXX sTLD on 10 May 2006;
 - iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;
 - iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth in its Board Resolution of 30 March 2007, none of which were based on criteria set forth in the RFP criteria; and
 - v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations, which was inconsistent with the two-step process that ICANN had established in announcing the RFP;
- c. ICANN continues to act inconsistently with its Articles and Bylaws by:
- i. Failing to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD and failing to recommend the addition of the .XXX sTLD to the root server;
 - ii. Maintaining that the Declaration of the Independent Review Panel is not binding on ICANN;
 - iii. Failing to pay ICM all costs incurred by ICM in connection with ICM's application, including attorneys' fees and costs;
- d. ICANN's failure to conclude an agreement to serve as registry operator for the .XXX sTLD and failing to add the .XXX sTLD to the root server within thirty days of this Declaration is inconsistent with its Articles and Bylaws;
- e. ICANN's actions and inactions as described herein breach its Articles and Bylaws under relevant principles of international law and California law;

f. ICANN's actions and inactions as described herein breach relevant principles of international law and California law;

g. ICM is the prevailing party in this Independent Review Process; and

h. ICANN is the party not prevailing in this Independent Review Process and shall therefore be responsible for bearing all costs of the IRP provider.

ICM also respectfully requests that the Panel make such other declarations, or grant such other relief, as the Panel may consider appropriate under the circumstances.

Respectfully submitted,

CROWELL & MORING LLP

By: /s/ Arif H. Ali

Arif H. Ali
Alexandre de Gramont
John L. Murino
Emily Howard
Ashley Riveira
Sobia Haque
Contact Information Redacted

Counsel for Claimant

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