

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

VISTAPRINT LIMITED, ) ICDR CASE NO. 01-14-0000-6505  
 )  
 Claimant, )  
 )  
 and )  
 )  
 INTERNET CORPORATION FOR ASSIGNED )  
 NAMES AND NUMBERS, )  
 )  
 Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO CLAIMANT VISTAPRINT LIMITED'S  
SECOND ADDITIONAL SUBMISSION IN SUPPORT OF REQUEST FOR  
INDEPENDENT REVIEW PROCESS**

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## INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its response (“Second Additional Response”) to the brief submitted by claimant Vistaprint Limited (“Vistaprint”) on 24 April 2015 (“Second Additional Submission”).<sup>1</sup>

2. With this Independent Review Process (“IRP”) Vistaprint is seeking to challenge an Expert Determination that Vistaprint’s applications to operate .WEBS (“Applications”) were “confusingly similar” to the applications from other entities for .WEB. IRP panels, however, are tasked solely with determining whether ICANN’s Board violated ICANN’s Articles or Bylaws. Vistaprint failed to identify any such violation in its IRP Request. In fact, the sole Board action that Vistaprint identified is the Board Governance Committee’s (“BGC’s”) rejection of Vistaprint’s Reconsideration Request, which sought reconsideration of the Expert Determination. In its response to Vistaprint’s IRP Request (“IRP Response”), ICANN discussed the BGC’s determination in detail, demonstrating that nothing about the BGC’s handling of the Reconsideration Request violated ICANN’s Articles or Bylaws.<sup>2</sup>

3. The parties then filed a supplemental round of papers, with Vistaprint’s supplemental submission filed on 2 March 2015 (the “First Additional Submission”) and ICANN’s response filed on 2 April 2015 (the “First Additional Response”). In its First Additional Response, ICANN noted that the IRP Panel in *Booking.com v. ICANN* (“*Booking.com*”) recently issued a declaration (the “*Booking.com* Final Declaration”) in ICANN’s favor,<sup>3</sup> the reasoning of which applies equally to Vistaprint’s claims.<sup>4</sup>

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<sup>1</sup> Vistaprint submitted two sets of numbered exhibits with its IRP Request and Additional Submissions: (1) “Annexes”; and (2) “Reference Materials”. Citations to “Cl. Ex. Annex- \_\_\_” refer to exhibits submitted in Claimant Vistaprint’s Annex, citations to “Cl. Ex. RM-\_\_\_” refer to exhibits submitted in Claimant Vistaprint’s Reference Materials. Citations to “Resp. Ex. \_\_\_” refer to exhibits submitted by ICANN with its 2 April 2015 submission.

<sup>2</sup> IRP Response, ¶¶ 45-69.

<sup>3</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, (“*Booking.com* Final Declaration”), Resp. Ex. 1.

<sup>4</sup> ICANN’s First Additional Response, ¶¶ 7, 28.

4. Vistaprint then asked the Panel for what it describes as “the opportunity . . . to discuss the Booking.com IRP Declaration (RM 38) and the post-hearing materials and communications in that matter.”<sup>5</sup> The Panel granted that request via Procedural Order No. 2, which specified that “Claimant’s supplemental submission shall be *limited to discussion of the Booking.com IRP Declaration and the post-hearing material and communications* that were exchanged between the parties and the IRP panel in the Booking.com IRP.”<sup>6</sup> Vistaprint’s Second Additional Submission, however, barely references *Booking.com* at all, and instead comprises a transparent attempt to elaborate on the arguments it has already briefed for this Panel in its two prior submissions.

5. In one paragraph, Vistaprint asserts that ICANN is “selective about the information it publishes” publicly on its website, and contends a series of emails it submits as Reference Materials 34-37 should have been posted on the *Booking.com* page of ICANN’s website, given that similar materials are sometimes posted by ICANN.<sup>7</sup> Yet Vistaprint cites no Article or Bylaws provision requiring that every email from an IRP claimant be publicly posted, and none exists.

6. As for the five substantive arguments contained in Vistaprint’s Second Additional Submission, none withstand scrutiny. First, Vistaprint argues (again) that the entire string confusion objection procedure is fundamentally flawed, and Vistaprint insists that argument is timely.<sup>8</sup> As ICANN explained in its First Additional Response, the string confusion objection procedures were created in full compliance with ICANN’s Articles and Bylaws. Moreover, Vistaprint’s wholesale challenge to the objection procedures is time-barred, by a few years.

7. Second, Vistaprint appears to argue that the ICANN Board’s discretion is not unlimited.<sup>9</sup> ICANN takes no issue with this proposition. But it is not relevant to this IRP. Instead,

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<sup>5</sup> Vistaprint’s Second Additional Submission, ¶ 1.

<sup>6</sup> See Vistaprint IRP Procedural Order No. 2, at 3, *available at* <https://www.icann.org/en/system/files/files/procedural-order-2-19apr15-en.pdf> (emphasis added).

<sup>7</sup> Vistaprint’s Second Additional Submission, ¶ 1.

<sup>8</sup> *Id.* ¶¶ 8-12.

<sup>9</sup> *Id.* ¶¶ 13-17.

what Vistaprint must demonstrate in these IRP proceedings is that ICANN’s exercise of its discretion violated ICANN’s Bylaws or Articles. This, Vistaprint has not done.

8. Third, Vistaprint notes that the ICANN Board’s discretion is subject to review by an IRP Panel, and contends (again) that the purported decision “not to intervene” in an expert determination is an example of an ICANN Board action subject to IRP review.<sup>10</sup> But as ICANN detailed in its First Additional Response, ICANN’s Board did intervene by reviewing and considering Vistaprint’s Reconsideration Request, and there is nothing in ICANN’s Articles or Bylaws that requires the Board to do anything more with respect to the Expert Determination.<sup>11</sup>

9. Fourth, Vistaprint asserts (again) that IRP panels in general have the power to order the ICANN Board to undertake specific actions, which Vistaprint here proposes would be the “rejection” of the contested expert determination.<sup>12</sup> As ICANN explained in its First Additional Response, a grant of affirmative relief goes well beyond the IRP Panel’s authority.<sup>13</sup>

10. Fifth, Vistaprint argues (again) that IRP Panel declarations are binding on ICANN.<sup>14</sup> As ICANN has already explained,<sup>15</sup> the Bylaws charge an IRP panel only with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”<sup>16</sup> The Board is then obligated to “review[]”<sup>17</sup> and “consider” an IRP panel’s declaration at the Board’s next meeting “[w]here feasible.”<sup>18</sup> IRP panel declarations are not binding on ICANN.

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<sup>10</sup> *Id.* ¶¶ 18-23.

<sup>11</sup> First Additional Response, ¶¶ 11-18.

<sup>12</sup> Vistaprint’s Second Additional Submission, ¶¶ 24-26.

<sup>13</sup> ICANN’s First Additional Response, ¶¶ 32-33; Bylaws, Art. IV, §§ 3.4, 3.11(c).

<sup>14</sup> Vistaprint’s Second Additional Submission, ¶¶ 27-34.

<sup>15</sup> ICANN’s First Additional Response, ¶¶ 34-41.

<sup>16</sup> Bylaws, Art. IV, § 3.4. The IRP Panel has questioned whether the selection of the word “declare” suggests binding force. This term, standing alone, cannot conceivably be read to require a binding decision, particularly in the face of the voluminous evidence in the drafting history showing that the contrary was presupposed.

<sup>17</sup> Bylaws, Art. IV, § 3.11.d.

<sup>18</sup> *Id.* at Art. IV, § 3.21. Moreover, for the period during which the Board is reviewing and considering the IRP Panel’s declaration, the Panel may merely “recommend,” as opposed to “order,” that the Board stay any action or decision “until such time as the Board reviews and acts upon the opinion of the IRP.” *Id.* at Art. IV, § 3.11.d.

11. In sum, despite improperly using its Second Additional Submission to elaborate on arguments it has already raised, which is not consistent with what this Panel expressly ordered,<sup>19</sup> Vistaprint still has not demonstrated a basis for independent review, and its request should be denied.

## ARGUMENT

### I. ICANN HAS POSTED ALL FORMAL IRP DOCUMENTATION AND CORRESPONDENCE.

12. After faulting ICANN for its decision not to post on its own website post-hearing email correspondence in *Booking.com*, and requesting the authority to provide its Second Additional Submission to address that email correspondence, *Vistaprint refers to those materials in only one paragraph* in its entire Second Additional Submission.<sup>20</sup> But in that paragraph, Vistaprint points to no rule (let alone an Article or Bylaws provision) requiring ICANN to publicly post emails to or from an IRP claimant. As such, the allegation that ICANN has not comprehensively posted all such correspondence is not a matter that could even potentially be remedied via an IRP.

13. Further, Vistaprint has not even attempted to demonstrate any relevance between the post-hearing email correspondence in *Booking.com* and this IRP. And in any event, given the fact that Vistaprint's counsel also serves as counsel for *Booking.com*, Vistaprint has had access to all of the *Booking.com* post-hearing communications. Thus, it is unclear how Vistaprint is harmed if a few pieces of email correspondence in another IRP proceeding that its counsel has access to are not posted on ICANN's website.

### II. VISTAPRINT'S WHOLESALE CHALLENGE TO THE GUIDEBOOK'S OBJECTION PROCEDURES ARE FRIVOLOUS AND TIME BARRED.

14. In its First Additional Submission, Vistaprint argued for the first time that the string confusion objection procedures in the Guidebook are inherently flawed. ICANN explained in its

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<sup>19</sup> Procedural Order No. 2, ¶ 6.ii, available at <https://www.icann.org/en/system/files/files/procedural-order-2-19apr15-en.pdf>.

<sup>20</sup> Vistaprint's Second Additional Submission, ¶ 1.

First Additional Response that the time for Vistaprint to assert such an argument has long passed (and it is wholly unsupported in any event).<sup>21</sup>

15. As detailed in the Board’s June 2011 Rationales for the Approval of the Launch of the New gTLD Program, the dispute resolution procedures, including those for string confusion, were adopted by the ICANN Board only after years of rigorous policy development that included extensive analysis by ICANN, as well as input from legal and arbitration experts from various jurisdictions, numerous ICANN constituents and Internet stakeholders, and community members from around the world, all in compliance with ICANN’s Articles and Bylaws.<sup>22</sup> The current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts.<sup>23</sup> Despite having ample opportunity to do so, Vistaprint did not object to these aspects of the Guidebook when the Guidebook was implemented.<sup>24</sup>

16. In its First Additional Response, ICANN noted that the IRP Panel in *Booking.com* found, “the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process . . . Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.”<sup>25</sup> While the Guidebook process at issue in this case is different—the string confusion objection process rather than the string similarity review process—the *Booking.com* Panel’s reasoning applies equally.

17. Vistaprint now raises two arguments as to why its challenge to the string confusion process might be timely, contrary to the finding reached in *Booking.com*. First, Vistaprint argues that “neither the string similarity review process nor the string confusion objection [process] had been

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<sup>21</sup> ICANN’s First Additional Response, ¶¶ 19-29.

<sup>22</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (“ICANN Board Rationales”), Resp. Ex. 5, at 66-67.

<sup>23</sup> See Guidebook, Cl. Ex. RM-5, Preamble.

<sup>24</sup> Bylaws, Art. IV, § 3.3 (30-day limitation period for IRP claims).

<sup>25</sup> *Booking.com.com* Final Declaration, Resp. Ex. 1, ¶ 129

established and implemented in their entirety at the time the Guidebook was adopted.”<sup>26</sup> The string similarity review process is not at issue in this IRP. Further, Vistaprint does not identify any string confusion objection procedures that were adopted after the release of the current version of the Guidebook, in June 2012.<sup>27</sup> Since no such procedures are identified (because none exist), it cannot be argued that the ICANN Board did anything to violate the Articles or Bylaws in this regard.

18. Second, Vistaprint argues that to timely object to the string confusion process it would have had to “reveal that it was contemplating making an application for a new gTLD.”<sup>28</sup> But the only harm Vistaprint alleges as potentially flowing from that revelation is the submission of “opportunistic applications seeking to extract monetary value from an application by Vistaprint by applying for a TLD corresponding to” Vistaprint products.<sup>29</sup> One of ICANN’s core values is fostering “a competitive environment.”<sup>30</sup> As such, Vistaprint’s fears that other potential applicants might have guessed what gTLD(s) Vistaprint might apply for and then maybe apply for the same string, does not constitute a valid reason to disregard the unambiguous 30-day IRP filing deadline.

19. In sum, as the *Booking.com* Final Declaration confirms, the time for Vistaprint to object to the string confusion objection procedures has long since passed.

### **III. THE ICANN BOARD EXERCISED ITS DISCRETION IN ACCORDANCE WITH THE ARTICLES AND BYLAWS.**

20. Vistaprint next portrays ICANN’s First Additional Response as contending that the ICANN Board enjoys unfettered discretion in its conduct.<sup>31</sup> Not so. All ICANN has asserted is the

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<sup>26</sup> Vistaprint’s Second Additional Submission, ¶ 9.

<sup>27</sup> Furthermore, the terms and conditions for the Applications provide that “ICANN reserves the right to make reasonable updates and changes to [the Guidebook] and to the application process,” and that new gTLD applications “will be subject to any such updates and changes.” New gTLD Application Terms and Conditions, ¶ 14, *available at* <http://newgtlds.icann.org/en/applicants/agb/terms>. Vistaprint was therefore on notice that the string confusion objection procedures might be updated or augmented, and the Guidebook itself confirms that “ICANN reserves the right to make reasonable updates and changes to the Applicant Guidebook . . . at any time . . . .” Guidebook, Cl. Ex. RM-5, § 1.2.11.

<sup>28</sup> Vistaprint’s Second Additional Submission, ¶ 10.

<sup>29</sup> *Id.*

<sup>30</sup> Bylaws, Art. I, § 2.5.

<sup>31</sup> Vistaprint’s Second Additional Submission, ¶¶ 13-17.



unremarkable point that Vistaprint has the burden in this IRP proceeding of demonstrating that the ICANN Board’s exercise of its discretion to act or not act violated an Article or Bylaws provision.<sup>32</sup>

In fact, ICANN cited the *Booking.com* Final Declaration for its finding that an IRP Panel is tasked solely with determining whether the Board acted “without conflict of interest and with due care” and in a manner “consistent with the Articles of Incorporation or Bylaws [or] the Guidebook.”<sup>33</sup>

21. As discussed in ICANN’s First Additional Response, Vistaprint has identified no Article or Bylaws provision violated by the ICANN Board in exercising its independent judgment to intervene with respect to certain inconsistent expert determinations on string confusion objections unrelated to this matter, but not with respect to the single Expert Determination regarding .WEB/.WEBS.<sup>34</sup> As the *Booking.com* IRP Panel found, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>35</sup>

22. In short, the extent of the Board’s discretion as a general matter is irrelevant to the Panel’s task here, which is to declare whether or not Vistaprint has identified any Articles or Bylaws violation. Vistaprint has not.

#### **IV. VISTAPRINT’S DISAGREEMENT WITH THE ICANN BOARD’S DETERMINATION NOT TO INTERVENE WITH RESPECT TO THE MERITS OF THE EXPERT DETERMINATION IS NOT A BASIS FOR AN IRP.**

23. Vistaprint proceeds to reiterate its objection to the Board’s exercise of its independent judgment in determining not to intervene with respect to the Expert Determination, as the Board did with respect to expert determinations from string confusion objection proceedings having no bearing

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<sup>32</sup> Bylaws, Art. IV, § 3.2 (independent review is available only to a person “materially affected by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”).

<sup>33</sup> *Booking.com* Final Declaration, Resp. Ex. 1, ¶ 108; *see also* Bylaws, Art. IV, §§ 3.2, 3.4.

<sup>34</sup> First Additional Response ¶¶ 11-18.

<sup>35</sup> *Booking.com* Final Determination, Resp. Ex. 1, ¶ 138.

on this matter. Those sets of strings include: (1) .COM/.CAM, (2) .CAR/.CARS, and (3) .SHOP/.通販 (online shopping in Japanese).<sup>36</sup> Vistaprint acknowledges that the IRP Panel allowed it to submit its Second Additional Submission only “to discuss the Booking.com IRP Declaration (RM 38) and the post-hearing material and communications in that matter.”<sup>37</sup> Yet Vistaprint does not tie its arguments with respect to the alleged discrimination to the *Booking.com* IRP in any fashion. Instead, it simply regurgitates the same arguments it raised in its First Additional Submission.

24. As ICANN has previously explained,<sup>38</sup> unlike .WEB/.WEBS, the strings at issue in this matter, the string confusion objections for the COM/.CAM, .CAR/.CARS, and .SHOP/.通販 strings resulted in several, inconsistent expert determinations by different expert panels. For example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert overruled a separate string confusion objection asserting precisely the same thing. As the *Booking.com* IRP Panel found, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>39</sup>

25. In sum, Vistaprint’s third argument does not relate to *Booking.com*,<sup>40</sup> which is all that Vistaprint was entitled to argue about in its Second Additional Submission, and does not offer any new arguments that require a further response from ICANN, other than that already provided in previous submissions.<sup>41</sup>

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<sup>36</sup> Vistaprint’s Second Additional Submission, ¶¶ 18-23.

<sup>37</sup> *Id.*, ¶ 1.

<sup>38</sup> ICANN’s First Additional Response, ¶¶ 14-18.

<sup>39</sup> *Booking.com* Final Determination, Resp. Ex. 1, ¶ 138.

<sup>40</sup> Vistaprint’s Second Additional Submission, ¶¶ 18-23.

<sup>41</sup> See ICANN’s First Additional Response, ¶¶ 14-18.

## V. IRP PANELS CANNOT GRANT AFFIRMATIVE RELIEF.

26. In its fourth argument, Vistaprint renews its request that this IRP Panel issue a declaration requiring ICANN to “reject the determination that .WEBS and .WEB are confusingly similar . . . and also disregard the resulting contention set[,]” or in the alternative to “organize a new independent and impartial [SCO] string confusion objection procedure[.]”<sup>42</sup> Again, Vistaprint does not link this argument to the Booking.com Final Declaration or correspondence in any way.

27. As ICANN has already explained<sup>43</sup>, an IRP panel is limited to “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.<sup>44</sup> This IRP Panel simply does not have the authority to award affirmative relief or to require ICANN to undertake specific conduct.<sup>45</sup>

28. Vistaprint offers only one new variation as to its demand for a declaration requiring specific relief: it asks that this *IRP Panel itself* adjudicate its string confusion objection.<sup>46</sup> To take Vistaprint’s suggestion would contravene the Guidebook, the Bylaws and the new gTLD Program itself in multiple ways, as the Guidebook sets out distinct procedures for the appointment of string confusion expert panelists<sup>47</sup> whereas the Bylaws set forth different procedures for the constitution of IRP panels.<sup>48</sup>

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<sup>42</sup> See IRP Request, ¶ 84 (requesting a declaration from the IRP Panel “[r]equiring that ICANN reject the determination that .WEBS and .WEB are confusingly similar and disregard the resulting contention set” and “[r]equiring that ICANN organize[] a new independent and impartial string confusion objection procedure between Vistaprint and [Objector] Web.com.”).

<sup>43</sup> See ICANN’s First Additional Response, ¶¶ 32-33.

<sup>44</sup> Bylaws, Art. IV, § 3.4 and § 3.11(c).

<sup>45</sup> Indeed, the IRP Panel in the first IRP ever constituted under ICANN’s Bylaws found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, (“*ICM IRP Panel Declaration*”), Cl. Ex. RM-21, ¶ 133; see also *Booking.com* Final Declaration, Resp. Ex. 1, ¶ 104 (“The jurisdiction and authority of an IRP panel is expressly prescribed—and expressly limited—by the ICANN Bylaws.”)

<sup>46</sup> Vistaprint’s Second Additional Submission, ¶ 26.

<sup>47</sup> Guidebook, Cl. Ex. RM-5, § 3.4.4.

<sup>48</sup> Bylaws, Art. IV, §3. 6.

## VI. THE PANEL'S DECLARATION IS NOT BINDING ON ICANN.

29. Again without tying its argument to *Booking.com* at all, Vistaprint again argues that this IRP Panel's declaration is binding on ICANN's Board.<sup>49</sup> Vistaprint is incorrect. While the *Booking.com* Final Declaration did not directly address whether an IRP Panel may issue a binding declaration, it implicitly acknowledged it cannot: "A panel such as ours can *only declare* whether, on the facts as we find them, the challenged actions of ICANN are or are not inconsistent with ICANN's Articles of Incorporation and Bylaws."<sup>50</sup> Another IRP panel reached the same conclusion.<sup>51</sup> The Bylaws charge an IRP panel only with "declaring whether the Board has acted consistently with the provisions of [the] Articles of Incorporation and Bylaws."<sup>52</sup> The Board is then obligated to "review[]"<sup>53</sup> and "consider" an IRP panel's declaration at the Board's next meeting "where feasible."<sup>54</sup> If the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

### CONCLUSION

ICANN's conduct with respect to Vistaprint's Applications for .WEBS was fully consistent with ICANN's Articles and Bylaws. Accordingly, Vistaprint's IRP Request should be denied.

Respectfully submitted,

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Dated: May 1, 2015

<sup>49</sup> Vistaprint's Second Additional Submission ¶¶ 27-34; see Vistaprint's First Additional Submission, ¶ 37.

<sup>50</sup> *Booking.com* Final Determination, Resp. Ex. 1, ¶ 153 (emphasis added).

<sup>51</sup> See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ("ICM IRP Panel Declaration"), Cl. Ex. RM-21, ¶ 133.

<sup>52</sup> Bylaws, Art. IV, § 3.4.

<sup>53</sup> *Id.* at § 3.11.d.

<sup>54</sup> *Id.* at Art. IV, § 3.21.