

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AMAZON EU S.À R.L., ) ICDR CASE NO. 01-16-0000-7056  
)  
Claimant, )  
)  
and )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
Respondent. )  
\_\_\_\_\_)

**INDEX TO DOCUMENTS SUBMITTED**  
**WITH**  
**ICANN'S RESPONSE TO AMAZON'S REQUEST THAT**  
**THE PANEL HEAR LIVE WITNESS TESTIMONY**

<b><u>Respondent Exhibit</u></b>		<b><u>DESCRIPTION</u></b>
<b>R-39</b>	2013	<i>ICANN - 2013 Supplementary Procedures.</i>
<b>R-40</b>	25 Feb. 2016	<i>Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-504, Procedural Order No. 12.</i>
<b>R-41</b>	29 July 2010	<i>Becton, Dickinson &amp; Co. v. Tyco Healthcare Group, LP, 616 F.3d 1249 (2010).</i>
<b>R-42</b>	20 Dec. 2012	<i>ICANN Approved Board Resolution 2012.12.20.18.</i>
<b>R-43</b>	30 Sept. 2009	<i>ICANN Bylaws (as amended 30 September 2009).</i>
<b>R-44</b>	6 June 2008	<i>ICM Registry, LLC, v. ICANN, ICDR Case No. 50 117 T 00224 08, Request for Independent Review Process by ICM Registry, LLC.</i>
<b>R-45</b>	20 Oct. 2010	<i>Berkman Center for Internet &amp; Society, An Independent Review - Accountability and Transparency at ICANN.</i>

<b><u>Respondent Exhibit</u></b>		<b><u>DESCRIPTION</u></b>
<b>R-46</b>	31 Dec. 2010	Final Recommendations of the Accountability and Transparency Review Team, dated 31 December 2010.
<b>R-47</b>	Undated	<i>ICANN</i> Accountability Structures Expert Panel.
<b>R-48</b>	Oct. 2012	Report by Accountability Structures Expert Panel (ASEP).
<b>R-49</b>	11 April 2013	<i>ICANN</i> Approved Board Resolution 2013.04.11.06.
<b>R-50</b>	16 Nov. 2011	<i>Manwin Licensing International S.A.R.L. v. ICANN</i> , ICDR Case No. 50 117 T 0812 11, Request of Manwin Licensing International S.A.R.L. for Independent Review Proceedings.
<b>R-51</b>	20 April 2015	<i>DotConnectAfrica Trust v. ICANN</i> , ICDR Case No. 50 2013 001083, Third Declaration on the IRP Procedure.
<b>R-52</b>	1 June 2014	International Dispute Resolution Procedures Rules, as Amended and Effective June 1, 2014, Fee Schedule Amended and Effective July 1, 2016.
<b>R-53</b>	27 Apr. 2011	<i>AT&amp;T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).
<b>R-54</b>	Undated	Redfern and Hunter on International Arbitration, Blackaby & Partasides, Ch. 6 Conduct of the Proceedings, (5th Ed. 2009).
<b>R-55</b>	26 Aug. 2015	<i>Dot Registry, LLC v. ICANN</i> , ICDR Case No. 01-14-0001-504, Procedural Order No. 8.

**R-39**

**RESPONDENT'S EXHIBIT**

## Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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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.

### 1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

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.

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

## **2. Scope**

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

## **3. Number of Independent Review Panelists**

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

#### **4. Conduct of the Independent Review**

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

#### **5. Written Statements**

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

#### **6. Summary Dismissal**

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

## **7. Interim Measures of Protection**

An IRP PANEL may 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 IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

## **8. Standard of Review**

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

## **9. Declarations**

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

## **10. Form and Effect of an IRP Declaration**

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

## 11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

## 12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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**R-40**

**RESPONDENT'S EXHIBIT**

**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review

DOT REGISTRY, LLC,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

**PROCEDURAL ORDER NO. 12**

February 25, 2016

Independent Review Panel:

The Honorable Charles N. Brower

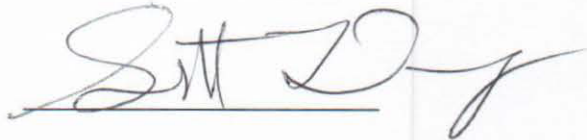
Mark Kantor

M. Scott Donahey, Chair

1. The Panel will conduct a one day hearing by video conference (the "Hearing") on Tuesday, March 29, 2016, beginning at 11:00 a.m. EST, and concluding no later than 7:00 p.m. EST. Panelists Brower and Kantor will be present at the Jones, Day Offices in Washington DC. Panelist Brower's assistant, Michael Daly, will also be present. Counsel for Claimant and representatives from Claimant will be present, and an attorney from Respondent's counsel may also be present. Panelist Donahey will be present at the Jones, Day offices in Los Angeles. Counsel for Respondent and representatives from Respondent will be present, and an attorney from Claimant's counsel may also be present.
2. There will be no live percipient or expert witness testimony of any kind permitted at the hearing, nor may a party attempt to produce new or additional evidence. Only the parties' prior written witness statements and documents previously produced and accepted will be considered by the Panel. The Panel will hear argument and ask questions of counsel.
3. Claimant will be given up to two and one-half hours, to be divided between an opening presentation and a closing presentation as Claimant sees fit. Respondent shall be given up to two and one-half hours to be divided between a rebuttal to Claimant's opening presentation and a sur-rebuttal as Respondent sees fit. A lunch break will be taken between 1:30 p.m. and 2:30 p.m. EST. The remaining two hours are set aside for questions from the Panel.
4. A stenographic transcript of the proceeding will be made, and a copy of the transcript will be made available to each of the Panelists.
5. The video conference facility will permit the Panelists to conduct "off the record" communications among the Panel members during the course of the proceedings.
6. Hard copies of all documents and PowerPoint presentations produced shall be made available to each of the Panelists on the day of the video conference hearing in the respective locations.
7. The Panel requests that in each party's presentation at the hearing, it address the burden of proof as to each subject to be addressed, including the three areas of focus set forth in the ICANN Bylaws, Article IV, Section 3, paragraph 4.
8. Following completion of the hearing, the Panel will determine whether it will entertain post-hearing written submissions, and, if any, what subjects it would like

such submissions to address. After considering the evidence adduced prior to the hearing, the parties' arguments at the hearing, and any post-hearing submissions, the Panel will issue its written Determination in this matter.


On behalf of the Panel,

A handwritten signature in black ink, appearing to read "M. Scott Donahey", written over a horizontal line. The signature is stylized and cursive.

M. Scott Donahey, Chair

R-41

RESPONDENT'S EXHIBIT

 KeyCite to Yeow Fag Negative Treatment  
 Decided to Extend by MAZ Encrypt on Technologies, LLC v. Lenovo  
 (United States) Inc., D.Del., June 30, 2015

616 F.3d 1249  
 United States Court of Appeals,  
 Federal Circuit.

BECTON, DICKINSON AND  
 COMPANY, Plaintiff–Cross Appellant,

v.

TYCO HEALTHCARE GROUP,  
 LP, Defendant–Appellant.

Nos. 2009–1053, 2009–1111.

|  
 July 29, 2010.

|  
 Rehearing and Rehearing En  
 Banc Denied Oct. 4, 2010.

### Synopsis

**Background:** In infringement suit brought by assignee of patent directed toward a safety needle designed to prevent accidental needle stick injuries, the United States District Court for the District of Delaware, Gregory M. Sleet, Chief Judge, 2008 WL 4610220, entered judgment based on finding that competitor's safety needles and blood collection devices literally infringed patent claims, and competitor appealed.

**[Holding:]** The Court of Appeals, Mayer, Circuit Judge, held that “spring means” limitation in claims of patent was a “means-plus-function” limitation and required that the spring means be a separate structural element from the hinged arm.

Reversed.

Gajarsa, Circuit Judge, filed dissenting opinion.

### Attorneys and Law Firms

\*1250 William F. Lee, Wilmer Cutler Pickering Hale and Dorr LLP, of Boston, MA, argued for plaintiff-cross appellant. With him on the brief were William G. McElwain, Amy K. Wigmore, Todd C. Zubler and Arthur W. Coviello, of Washington, DC.

Frank P. Porcelli, Fish & Richardson P.C., of Boston, MA, argued for defendant-appellant. With him on the brief were John M. Skenyon, and Juanita R. Brooks, of San Diego, CA.

Before GAJARSA, LINN, and MAYER, Circuit Judges.

### Opinion

Opinion for the court filed by Circuit Judge MAYER. Dissenting opinion filed by Circuit Judge GAJARSA.

MAYER, Circuit Judge.

Tyco Healthcare Group, LP (“Tyco”) appeals a judgment of the United States District Court for the District of Delaware entered after a jury determined that Tyco's Monoject Magellan™ safety needles and blood collection devices literally infringed claims 1, 4, 6, 12, 13, 15, 24 and 27 of U.S.

Patent No. 5,348,544 (the “#544 patent”). Because we conclude that the district court incorrectly construed the “spring means” limitation of the asserted claims and erred in denying Tyco's motion for judgment as a matter of law (“JMOL”), we reverse.

## BACKGROUND

Becton, Dickinson and Company (“Becton”) is the assignee of the #544 patent, which is directed toward a safety needle designed to prevent accidental needle stick injuries. The safety shield, or needle guard, of the patented invention is initially positioned at the base of the needle, next to the needle hub. This is called the “first position” and is shown in figure 2 of the #544 patent.

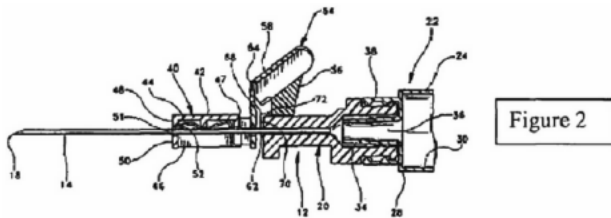
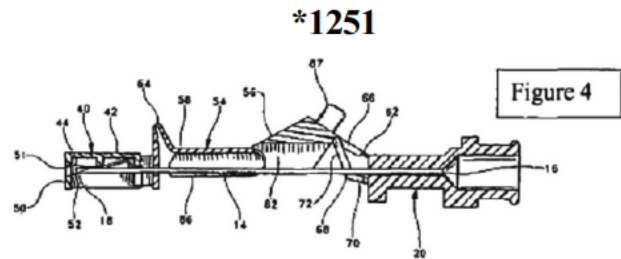


Figure 2

The guard is mounted on or close to the needle cannula and is attached to the needle hub by a hinged arm. When the guard is in the first position, the hinged arm is folded. When the needle has been removed from a patient, the health care worker pushes the hinged arm forward, causing the hinged arm to unfold and the guard to move along the needle cannula toward the tip of the needle. When the guard covers the needle tip, it is said to be in its “second position” as shown in figure 4.



To facilitate the movement of the guard toward the needle tip, the #544 patent discloses a “spring means” for “urging [the] guard along [the] needle cannula.” The specification describes two embodiments in which a spring moves the guard down the needle cannula. The specification does not attribute any movement of the guard to the hinged arm of the safety needle.

On December 23, 2002, Becton filed suit against Tyco, alleging infringement of the #544 patent by Tyco's Monoject Magellan™ safety needles and blood collection devices. Becton subsequently answered Tyco's first set of interrogatories, including interrogatory 3, which called for an infringement claim chart “fully explain[ing] how each claim element is met either literally or under the doctrine of equivalents in each Tyco product accused of infringement.” In response, Becton identified the living hinges in Tyco's accused devices as satisfying the “spring means” limitation of asserted claims 1 and 24 and stated that “[o]nce released, the spring means urges the guard along the needle cannula toward” the tip of the needle. Later, in updated infringement charts served on Tyco just prior to the close of fact discovery, Becton reiterated its assertion that “[o]nce released, the spring means urges the guard

along the needle **cannula**” toward the needle tip.

After the close of fact discovery, Becton issued its only expert report on infringement. Becton's expert, Charles A. Garris, Jr., explained his theory as to how the hinges in the hinged arm of Tyco's accused devices functioned as springs:

The hinged arm [in Tyco's accused products] is ... folded and assembled with the other components of the safety assembly. I expect to explain that folding of the hinged arm imparts stress to the hinge that results in a certain amount of stored energy. In the accused Tyco Monoject Magellan™ devices, the force of this stored energy is initially restrained by a latching mechanism. Once unlatched, the stored energy is released, causing the safety guard to be urged (*i.e.*, moved) along the needle **cannula** toward the tip of the needle.

On May 3, 2004, Tyco moved for summary judgment of non-infringement, arguing that the spring means limitation of the asserted claims required a spring separate from the hinged arm structure. The district court denied this motion, however, rejecting Tyco's argument that a proper construction of the spring means limitation requires

“a separate spring [which] must move the guard along the **cannula** toward the second position.” *Becton, Dickinson & Co. v. Tyco Healthcare Group, LP*, No. 02 1694 GMS, 2004 WL 2075413 at \*4, 2004 U.S. Dist. LEXIS 18637 at \*12 (D.Del. Sept. 16, 2004) (“*Summary Judgment Decision*”).

On October 26, 2004, a jury returned a verdict finding literal infringement by both \*1252 of Tyco's accused products.<sup>1</sup> The jury found that the infringement was willful as to the Magellan safety needle, but not as to the Magellan blood collector; it also found that the patent was not invalid for lack of an adequate written description. Tyco subsequently moved for a new trial, arguing that Becton had improperly changed its theory of infringement during trial. The district court agreed, noting that the only infringement theory disclosed by Becton prior to trial was that “once unlatched” the hinges in the hinged arm caused the safety guard to move down the needle **cannula**:

<sup>1</sup> The district court concluded that Becton had waived the right to assert infringement under the doctrine of equivalents.

From the outset, [this] case was postured on the assertion that Tyco's Monoject Magellan devices infringed the “spring means” limitation of the [#544] patent because, after the devices are unlatched, the hinged arms move the guard toward the **cannula** of the needle. Dr. Garris' expert statement, [Becton's] summary judgment motion, and [Becton's] pretrial memorandum in support of its claim of infringement and for damages, all make clear that the “after unlatching” theory



was the only basis for Tyco's alleged infringement.

*Becton, Dickinson & Co. v. Tyco Healthcare Group, LP*, No. 02 1694 GMS, 2006 WL 890995 at \*10, 2006 U.S. Dist. LEXIS 14999 at \*34 35 (D.Del. Mar. 31, 2006) (“*New Trial Decision*”).

During trial, however, Becton reversed course, arguing that the living hinges in the hinged arm moved the guard before the hinged arm was unlatched. *Id.* at \*12, 2006 U.S. Dist. LEXIS 14999 at \*38 40. Because Becton had “advanced a new theory of infringement at trial” and its actions were “inconsistent with substantial justice ... and resulted in actual prejudice,” the district court granted Tyco's motion for a new trial. *Id.* at \*12, 2006 U.S. Dist. LEXIS 14999 at \*40.

In January 2007, prior to the start of the second trial, Tyco filed a petition in the United States Patent and Trademark Office (“PTO”) requesting reexamination of the #544 patent based on Netherlands Patent Publication No. 9000909. The examiner in charge of the reexamination issued an office action in which she found that the “spring means” limitation in claims 1 and 24 of the #544 patent was a “means-plus-function” limitation and required that the spring means be a separate structural element from the hinged arm. *See* 35 U.S.C. § 112, ¶ 6. Tyco then filed a motion asking the district court to adopt the PTO's construction of the disputed claims, but the court denied this motion on November 21, 2007.<sup>2</sup>

<sup>2</sup> Following the second trial, the PTO issued a final office action affirming the examiner's conclusion

that the spring means limitation was a means plus function limitation.

At the second trial, the district court instructed the jury that the spring means limitation required that “once the hinged arm is unlatched for the first time, the ‘spring means’ must move the guard along the needle toward the needle tip.” The trial court also instructed the jury that “[t]he spring is not required to move the guard all the way to the tip of the needle but must, by itself, move the guard for some distance.”

On November 30, 2007, a jury returned a verdict of infringement as to both of Tyco's accused products. Tyco thereafter filed motions seeking JMOL and a new trial. The district court denied these motions, however, explaining that although it was a “close issue,” Becton had “adduced enough circumstantial evidence from which the jury could reasonably conclude that the living hinges of Tyco's products are \*1253 springs that, by themselves, move the guard toward the needle tip once unlatched.” *See Becton, Dickinson & Co. v. Tyco Healthcare Group, LP*, No. 02 1694 GMS, 2008 WL 4610220 at \*4, 2008 U.S. Dist. LEXIS 82915 at \*10 (D.Del. Oct. 14, 2008) (footnote omitted) (“*JMOL Decision*”).

Tyco then appealed to this court, challenging the district court's interpretation of the asserted claims and the denial of its motions for JMOL and a new trial. Becton filed a conditional cross-appeal, arguing that if the district court's judgment is reversed, it should be granted a new trial on the issue of whether Tyco infringed the #544 patent by manufacturing rather than selling the Magellan needles and blood collectors. We

have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

## DISCUSSION

Precedent requires that this court conduct a *de novo* review of claim construction. See *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed.Cir.1998) (en banc). We review the denial of a JMOL motion “under the law of the regional circuit where the appeal from the district court would normally lie.” *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1323 (Fed.Cir.2008). In the Third Circuit, when determining whether to grant a JMOL motion “[t]he question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.” *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir.1993) (citations and internal quotation marks omitted). “Although judgment as a matter of law should be granted sparingly,” it is mandated “where the record is critically deficient of the minimum quantum of evidence” necessary to support a jury verdict. *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 433 (3d Cir.2009) (internal quotation marks omitted).

### I.

To establish literal infringement, “every limitation set forth in a claim must be found in an accused product, exactly.” *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d

1570, 1575 (Fed.Cir.1995). Thus, “[i]f any claim limitation is absent from the accused device, there is no literal infringement as a matter of law.” *Amgen Inc. v. F. Hoffman LA Roche, Ltd.*, 580 F.3d 1340, 1374 (Fed.Cir.2009). Tyco argues that its Monoject Magellan™ safety needle and blood collection devices do not literally infringe the #544 patent because they lack the added spring member required by the asserted claims. We agree. The unambiguous language of the asserted claims, as well as the disclosure in the specification, requires an added spring element that moves the safety guard toward the tip of the needle.<sup>3</sup>

<sup>3</sup> Tyco also contends that a separate spring is required because the spring means limitation is in means plus function format, see 35 U.S.C. § 112, ¶ 6, and the only structures disclosed in the specification for performing the recited function of moving the guard toward the tip of the needle are added spring members. We need not reach this argument, however, because we conclude that regardless of whether the asserted claims invoke section 112, paragraph 6 an added spring element is required by the plain language of the claims.

[1] Claim 1, which has been treated as representative, calls for a “spring means connected to said hinged arm for urging said guard along said needle cannula toward” the tip of the needle. Following a *Markman* hearing, the district court correctly construed this limitation to require that: “The hinged arm is connected to a spring that moves the guard along the cannula toward” the tip of the needle. By its plain terms, this construction contemplates \*1254 that the spring means and the hinged arm are separate structures which are “connected to” each other. The district court erred, however, when it later held

that its claim construction did not require a spring means that was a distinct structural element from the hinged arm. *See Summary Judgment Decision*, 2004 WL 2075413 at \*4, 2004 U.S. Dist. LEXIS 18637 at \*12 (rejecting Tyco's argument that a proper construction of the spring means limitation requires “a separate spring [which] must move the guard along the *cannula* toward the second position”).

Claim construction “begins and ends in all cases with the actual words of the claim.” *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed.Cir.1998). The unequivocal language of the asserted claims of the #544 patent requires a spring means that is separate from the hinged arm. Claim 1 recites:

1. A shieldable needle assembly comprising:

*a needle cannula* having a proximal end and a distal tip;

*a guard* having a proximal end, an opposed distal end and a side wall extending therebetween, said guard being slidably movable along said needle *cannula* from a first position substantially adjacent said proximal end of said needle *cannula* to a second position where said distal tip of said needle *cannula* is intermediate said opposed proximal and distal ends of said guard;

*a hinged arm* having proximal and distal segments articulated to one another for movement between a first position where said segments are substantially collapsed

onto one another and a second position where said segments are extended from one another, said proximal segment of said hinged arm being articulated to a portion of said needle assembly adjacent said proximal end of said needle *cannula*, said distal segment of said hinged arm being articulated to said guard, said proximal and distal segments of said hinged arm having respective lengths for permitting said guard to move from said first position to said second position on said needle *cannula*, and for preventing said guard from moving distally beyond said second position; *and*

*spring means* connected to said hinged arm for urging said guard along said needle *cannula* toward said second position.

#544 patent col.7 ll.7 35 (emphases added).

[2] Claim 1 lists four separate elements: 1) a needle, 2) a guard that rides on the needle, 3) a hinged arm attached to the guard, and 4) a spring means “connected to” the hinged arm. Where a claim lists elements separately, “the clear implication of the claim language” is that those elements are “distinct component[s]” of the patented invention. *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed.Cir.2004); *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1404 05 (Fed.Cir.1996) (concluding that where a claim provides for two separate elements, a “second portion” and a “return portion,” these two elements “logically cannot be one and the same”). There is nothing in the asserted claims to suggest that the hinged arm and the spring means can be the same structure. *See CAE Screenplates, Inc. v.*

*Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed.Cir.2000) (“In the absence of any evidence to the contrary, we must presume that the use of ... different terms in the claims connotes different meanings.”).

The specification, moreover, confirms that the spring means is a separate element from the hinged arm, as the only elements disclosed in the specification as “spring means” for urging the guard forward are separate structures from the hinged arm and its hinges. There is no suggestion that the hinged arm or its hinges \*1255 can function as springs, because nothing in the specification describes the hinges as moving the guard or even helping to move the guard. Nothing in the specification indicates that the hinges in the hinged arm might contain sufficient stored energy to enable them to move the safety guard toward the tip of the needle. To the contrary, the specification cautions that it is undesirable to allow stored energy to act for any extended period on the plastic parts of the needle assembly. See #544 patent col.5 ll.12 13 (explaining that “stored energy acting on plastic can affect the reliability and performance of the part”). In short, the specification comports with the plain language of the claims, fully supporting the conclusion that the spring means is a separate structural component of the patented invention. See *Astrazeneca AB v. Mut. Pharm. Co.*, 384 F.3d 1333, 1336 (Fed.Cir.2004) (“A long line of cases indicates that evidence intrinsic to the patent particularly the patent's specification, including the inventors' statutorily-required written description of the invention is the primary source for determining claim

meaning.”); *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996) (The specification is “is the single best guide to the meaning of a disputed [claim] term.”).

Indeed, Becton's assertion that the spring means and the hinged arm can be the same structure renders the asserted claims nonsensical. Independent claim 1 of the #544 patent describes the spring means as being “connected to” the hinged arm and independent claim 24 describes it as “extending between” the hinged arm and a mounting means.<sup>4</sup> If the hinged arm and the spring means are one and the same, then the hinged arm must be “connected to” itself and must “extend between” itself and a mounting means, a physical impossibility. A claim construction that renders asserted claims facially nonsensical “cannot be correct.” *Schoenhaus v. Genesco, Inc.*, 440 F.3d 1354, 1357 (Fed.Cir.2006); see *Bd. of Regents v. BENQ Am. Corp.*, 533 F.3d 1362, 1370 (Fed.Cir.2008) (refusing to adopt a claim construction that “would effect [a] nonsensical result”).

<sup>4</sup> Claim 24 calls for a “spring means extending between said mounting means and said hinged arm for urging said guard toward said second position.

Furthermore, if the hinged arm and spring means are not separate structures, then the asserted claims are clearly invalid as obvious over the prior art. See *Whittaker Corp. v. UNR Indus., Inc.*, 911 F.2d 709, 712 (Fed.Cir.1990) (“[C]laims are generally construed so as to sustain their validity, if possible.”). The first three elements of Becton's claimed invention the needle, the protective guard, and the hinged arm

were disclosed in several prior art patents. *See* U.S. Patent Nos. 4,911,706; 4,898,589; 4,790,828. The Hagen patent, U.S. Patent No. 4,735,618, specifically discloses a safety needle, a guard and a hinged arm, which includes hinges comprised of thinned pieces of plastic. What distinguished the claimed invention from the prior art was the addition of a spring means separate from the hinged arm. *See* #544 patent col.1 ll.33-34 (discussing “prior art needle shields [that] are hingedly attached to the hub of the needle cannula”).

There can be no literal infringement where a claim requires two separate structures and one such structure is missing from an accused device. *See Gaus*, 363 F.3d at 1288-90 (concluding that where a claim called for “an electrical operating unit and a pair of spaced-apart electrically exposed conductive probe networks,” it required that the two elements be “separate” structures in the accused device). Because the unequivocal language of the asserted claims of the #544 patent requires both a \*1256 hinged arm and a spring means, there can be no literal infringement by Tyco's accused products which, as the district court correctly concluded, do not contain a spring means that is a separate structural element from the hinged arm and its hinges. *See Summary Judgment Decision*, 2004 WL 2075413 at \*2-3, 2004 U.S. Dist. LEXIS 18637 at \*9.<sup>5</sup>

<sup>5</sup> On appeal, Becton contends that the district court did not find that Tyco's accused devices lacked a spring that was a distinct structural element from the hinged arm. This argument is belied by the record. In denying

Tyco's motion for summary judgment, the district court stated:

Tyco ... sells the Monoject Magellan™ safety products, including the Monoject safety needle products and the Monoject SBC products.... The Monoject safety needle products *do not have a separate spring* that moves the guard toward the second position.... The Monoject SBC products *do not have a separate spring* that moves the guard toward the second position.

*Summary Judgment Decision*, 2004 WL 2075413 at \*3, 2004 U.S. Dist. LEXIS 18637 at \*9 (emphases added).

Although the district court later referenced two of the hinges of the hinged arm as possible springs in its March 2006 decision denying Tyco's JMOL motion following the first trial, the district court never altered its original finding that the accused products do not contain an added spring element. Furthermore, as will be discussed more fully in section III, there is nothing in the #544 patent to suggest that the hinges are not part of the hinged arm or that they function as springs that move the safety guard down the needle cannula.

In rejecting Tyco's argument that the asserted claims require an added spring member, the district court noted that “the abstract of the #544 patent states that a spring *may* be provided to assist movement of the guard toward the distal shielded position. It does not state that a spring *must* be provided.” *Summary Judgment Decision*, 2004 WL 2075413 at \*3-4, 2004 U.S. Dist. LEXIS 18637 at \*12 (emphases added). It is true that the #544 patent states that “a spring may be provided to assist movement of the guard.” This language, however, refers to the fact that the patent has three independent claims and only two of them include a spring means limitation. Independent claim 17, which is not now asserted against Tyco, contains the identical hinged arm limitation found in independent claims 1 and 24 but, unlike the asserted claims, does not contain an added spring means limitation.<sup>6</sup> Thus, while all three

independent claims require a hinged arm comprised of two plastic segments which are “articulated to” each other, “articulated to” the guard, and “articulated to” the needle assembly, only the asserted claims call for an added spring member.

6 Claim 17, which includes a clip feature not found in the asserted claims, recites:

A shieldable needle assembly comprising:

*a needle cannula* having a proximal end and a sharply pointed distal tip,

*a guard* having a proximal end, an opposed distal end and a side wall extending therebetween, said guard being slidably movable along said needle cannula ... and] said guard including a clip retained between said side wall and said needle cannula, said clip being configured to cover said tip when said guard is in said second position on said needle cannula; and

*a hinged arm* having proximal and distal segments articulated to one another for movement between a first position where said segments are substantially collapsed onto one another and a second position where said segments are extended from one another, said proximal segment of said hinged arm being articulated to a portion of said needle assembly adjacent said proximal end of said needle cannula, said distal segment of said hinged arm being articulated to said guard, said proximal and distal segments of said hinged arm having respective lengths for permitting said guard to move from said first position to said second position on said needle cannula, and for preventing said guard from moving distally beyond said second position.

#544 patent col.8 ll.34-64 (emphases added).

\*1257 [3] Claims must be “interpreted with an eye toward giving effect to all terms in the claim.” *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed.Cir.2006). If the spring means limitation contained in claims 1 and 24 but not in claim 17 is not to be read out of the asserted claims, it must require an additional element beyond that which is already called for by the

hinged arm limitation. *See Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 885 (Fed.Cir.2008) (refusing to adopt a claim construction which would render a claim limitation meaningless); *Elekta Instrument S.A. v. O.U.R. Scientific Int'l, Inc.*, 214 F.3d 1302, 1305-07 (Fed.Cir.2000) (refusing to adopt a claim construction which would render claim language superfluous). Simply put, a claim construction that does not require a spring member in addition to the hinged arm structure renders the spring means limitation functionally meaningless. *See Bicon*, 441 F.3d at 950 (“Allowing a patentee to argue that physical structures and characteristics specifically described in a claim are merely superfluous would render the scope of the patent ambiguous, leaving examiners and the public to guess about which claim language the drafter deems necessary to his claimed invention....”).

## II.

[4] Furthermore, even under the trial court's erroneous claim construction, Becton adduced no credible evidence establishing literal infringement by Tyco's accused products. The thrust of Becton's infringement argument was that the hinges in Tyco's needles contain stored energy and that when the hinged arm is unlatched, the hinges act as “springs” that cause the guard to move down the needle cannula. The fatal defect in this theory is that Becton failed to produce any evidence that this posited movement ever occurred. Becton did not provide any test data or even a single live demonstration showing that: 1) the hinges

in the accused devices contained stored energy, or 2) they moved the guard even one millimeter down the needle [cannula](#).

Living hinges are thinned pieces of plastic that have a long “flex-life,” meaning that they can bend or flex repeatedly without breaking. Depending on how they are manufactured, such hinges can contain differing amounts of stored energy. The hinges in certain prior art safety needles contained stored energy. Becton, however, failed to produce evidence demonstrating that the hinges in Tyco's accused devices contained any such stored energy. Tyco's expert, Mary Boyce, testified without contradiction that any stored energy imparted to the hinges during the manufacturing process quickly dissipates.

An important feature of living hinges is that they have “memory,” *i.e.*, they “remember” past positions and seek to return to them after being bent. Although the hinged arm in Tyco's safety needle is initially molded in a flat configuration, it is bent into a folded position during the manufacturing process. During the final step of the manufacturing process, the fully-assembled needle, with the hinged arm folded and latched, is placed in a sealed package and sterilized with gamma radiation. This irradiation changes the molecular structure of the hinges so that the folded position of the hinged arm has become the neutral or “relaxed” position to which the hinged arm, if moved, will tend to return.

At trial, Tyco demonstrated repeatedly that once the hinged arms in the accused devices

were unlatched,<sup>7</sup> the hinges never pushed the guard down the needle [cannula](#) \*1258 . No “spring” from the living hinges was ever demonstrated. To the contrary, if at any time during the period when the guard was being manually pushed down the needle [cannula](#) the user removed his finger from the hinged arm, the hinged arm moved *backwards* toward its original folded position. Instead of pushing the guard toward the tip of the needle, as required by the asserted claims, the living hinges in the accused devices tended to move the hinged arm backwards toward the needle hub.

<sup>7</sup> The district court did not err in instructing the jury that the spring must move the guard “once the hinge is unlatched for the first time. Prior to the first trial, Becton's sole infringement contention was that “once unlatched the hinges in the hinged arm caused the guard to move toward the tip of the needle. During trial, however, Becton reversed course, arguing that the living hinges moved the guard down the needle cannula before the hinged arm was unlatched. Even though Becton's expert had only testified about guard movement after unlatching, Becton attempted to persuade the jury that infringement could be established by pre unlatching movement. Because Becton had improperly changed its theory of infringement, the district court concluded that Tyco had been unfairly prejudiced and granted its motion for a new trial. *See New Trial Decision*, 2006 WL 890995 at \*12, 2006 U.S. Dist. LEXIS 14999 at \*40 (explaining that Becton had “advanced a new theory of infringement at trial and that its actions were “inconsistent with substantial justice ... and resulted in actual prejudice ). When the second trial commenced, the district court, aware that Becton had previously attempted to rely on an improper theory regarding pre unlatching movement, correctly instructed the jury that infringement could be established only by showing movement of the guard after the hinged arm was unlatched.

Thus, as the district court correctly acknowledged, Becton's “direct evidence regarding the movement of the guard [was]

insufficient to support the jury's finding of infringement.” *JMOL Decision*, 2008 WL 4610220 at \*4 n. 2, 2008 U.S. Dist. LEXIS 82915 at \*11 n. 2. The court, however, refused to set aside the jury's verdict. It reasoned that because the accused devices have a latch that holds the hinged arm in a folded position, the hinges might contain some stored energy that might be capable of moving the guard some distance down the needle cannula. *Id.* at \*3 5, 2008 U.S. Dist. LEXIS 82915 at \*10 15.

It is undisputed that the accused devices contain a latch. It is also beyond cavil that a living hinge can contain stored energy and that if that hinge is held back by a latch and then released, it could act as a spring. Not every hinge contains stored energy, however, and not every device with a latch acts as a spring. A door, for example, can have both hinges and a latch, but does not necessarily spring open when unlatched. Although Becton had ample opportunity to do so, it failed to demonstrate either that the hinges in Tyco's safety needles contained any stored energy or that they pushed the guard forward after the latch was released. Instead, as Tyco explained at trial, the latches on the accused safety needles were designed not to restrain stored energy, but to prevent the shield from being accidentally activated or dislodged prior to use.

The Magellan products were initially developed by Specialized Health Products, Inc. (“SHPI”), a small Utah company that designs safety needles for several larger medical companies, including both Tyco and Becton. Mark Ferguson, an

SHPI mechanical engineer, testified that the Magellan safety needles and blood collection devices were specifically designed *not* to include a “spring assist” feature. Instead, they were intended to allow for “full manual control of the activation of the [safety] guard.” The reason for this was that many “clinicians ... didn't care for the abrupt activation of spring-assisted devices.” Furthermore, a spring-assisted blood collection device can activate so rapidly that blood remaining on a needle after use can splatter, increasing the risk of disease transmission. Ferguson stated unequivocally that “[t]he living hinges in the \*1259 Magellan [products] are not springs,” and that “[a]n operator, the nurse or [the] doctor, is the only thing ... that moves the guard toward the needle tip.”

Contrary to Becton's assertions, the testimony of Garris, Becton's expert, is insufficient to support the jury's verdict. *See id.* at \*4 n. 2, 2008 U.S. Dist. LEXIS 82915 at \*11 n. 2 (emphasizing that “Garris' testimony regarding the spring assist of Tyco's Monoject Magellan devices is entitled to little, if any, weight, because it is directed to a combination of forces that cause movement of the guard, not the spring by itself”). Garris, in preparing his expert report, artificially created a “spring” movement in the hinges. At his deposition, Garris admitted that he had repeatedly extended and refolded the hinged arms of the accused devices. Garris was never able to demonstrate that the hinges in the accused products, as manufactured and sold, contained stored energy which moved the guard toward the needle tip. To the



contrary, Garris produced no test evidence and no measurements showing that the hinges contained stored energy or that they moved the guard even the smallest distance after unlatching.

Becton claims that video clips of Tyco's expert, Boyce, removing the latch from an accused needle demonstrates that a spring moves the needle guard down the needle cannula. As the district court correctly concluded, however, "Dr. Boyce's videos ... are not sufficient to support the jury's verdict." *Id.* Boyce did a series of tests in which she attempted to cut the latch off of an accused needle while the hinged arm was still latched. In these tests, however, the guard never moves to the position it would be in after an actual device is unlatched. Nothing in the Boyce videos, therefore, demonstrates that the hinges in the accused devices, as manufactured and sold, move the guard toward the tip of the needle after the hinged arm is unlatched.

[5] Becton also asserts that a force-displacement test conducted by Boyce "shows that the living hinges exert a force immediately after unlatching that helped the artificial finger move the guard forward." As a preliminary matter, it should be noted that even if it had been established that the hinges "helped" the artificial finger move the guard, this would not be sufficient to meet the trial court's claim construction, which required that the hinged arm move the guard "by itself" at least some distance toward the tip of the needle.<sup>8</sup> Even more fundamentally, Becton \*1260 never argued at trial that Boyce's force displacement test showed that

the hinges contributed in any way to the movement of the guard. No witness, either on direct or cross-examination, testified that Boyce's tests reflected any such movement. Unsupported attorney argument, presented for the first time on appeal, is an inadequate substitute for record evidence. *See Gemtron Corp. v. Saint Gobain Corp.*, 572 F.3d 1371, 1380 (Fed.Cir.2009) (emphasizing that "unsworn attorney argument ... is not evidence").

8 The trial court correctly instructed the jury that the spring means was required to move the guard "by itself" for some distance down the needle cannula. The court gave this instruction because, as discussed previously, the only infringement theory disclosed by Becton prior to trial was that once the hinged arm was unlatched, the hinges moved the guard toward the needle tip. Significantly, Becton did not assert that the hinges in the hinged arm only moved the guard when the guard was also being pushed down the cannula by a health care worker. During the second trial, however, Becton attempted to assert yet another new infringement theory, which was that the hinged arm did not actually move the guard by itself, but only helped to move the guard when a health care worker was already pushing the guard down the needle cannula. Recognizing that this "combination of forces" theory was a "new argument" on Becton's part, the district court properly instructed the jury that to establish infringement Becton was required to show that the spring "by itself" moved the guard at least some distance toward the tip of the needle.

A further problem with Becton's newly minted "combination of forces" theory is that Becton never provided any objective evidence demonstrating that the hinges of the hinged arm assisted the user's finger in moving the safety guard down the needle cannula. Although Becton argued that the user's finger and the hinges worked in tandem to move the safety guard, it never established that the hinges actually contributed to this movement. Becton provided no test data that reliably distinguished between movement caused by the user's finger and movement caused by the hinged arm itself.

Becton makes much of the fact that "the accused devices themselves were in evidence,

and the jury was able to examine them.” The jury, however, was not free to disregard the overwhelming record evidence showing that no movement of the guard occurred after the hinged arm was unlatched and instead to “infer” that the hinges might contain some stored energy that might be capable of moving the guard down the needle [cannula](#). It is inconceivable that the jury, by examining the accused devices, could see the hinges move the guard when Becton, despite repeated opportunities to do so, was unable to demonstrate that such movement ever occurred. A jury verdict based on inferences wholly unsupported by the record cannot stand. See *Lightning Lube*, 4 F.3d at 1166 (JMOL is appropriate “if, upon review of the record, it is apparent that the verdict is not supported by legally sufficient evidence.”).

### III.

In its quixotic quest to establish infringement of the [#544 patent](#), Becton argues that Tyco's accused needles do, in fact, have springs that are separate structures from the hinged arm. In support, it contends that the hinges in the hinged arm are separate structures from the hinged arm itself. This argument is unavailing. A “hinged arm,” by definition, must include at least one hinge. Becton, in fact, concedes in its brief on appeal that the middle hinge, which connects the proximal and distal segments of the hinged arm “is part of the hinged arm.” It argues, however, that the two other hinges of the hinged arm — one which connects the arm to the needle hub and one which connects the arm to the guard — are separate

structures from the hinged arm and can therefore satisfy the spring means limitation of the asserted claims.<sup>9</sup> An insurmountable problem with this theory is that the spring means limitation requires not only a spring, but a spring that moves the guard down the needle [cannula](#). See [#544 patent](#) col.7 ll.33-35 (requiring that the spring means “urge” the guard down the needle [cannula](#)). Thus, even if the hinges other than the middle hinge were separate structures from the hinged arm (which they are **\*1261** not) and Becton had produced evidence that the hinges moved the guard down the needle [cannula](#) (which it did not), Becton never established that any hinge other than the middle hinge connecting the two segments of the hinged arm caused such movement. In other words, even if the hinges other than the middle hinge could be considered separate structures from the hinged arm, there is no evidence that they function as springs that move the guard down the needle [cannula](#).

<sup>9</sup> We do not agree with Becton's assertion that some of the hinges of the hinged arm can be considered separate structures from the hinged arm itself. The hinged arm limitation requires the hinged arm to have two segments which are “articulated to each other; it also requires that these segments be “articulated to the guard and “articulated to the needle assembly. The hinged arm limitation thus includes not only the two plastic segments of the arm, but also the hinges that articulate the segments to each other, to the needle guard and to the needle hub. See, e.g., McGraw Hill Dictionary of Sci. & Tech. Terms 142 (6th ed. 2003) (defining an “articulated structure as “a structure in which relative motion is allowed to occur between parts, usually by means of a hinged or sliding joint or joints ).

Becton, moreover, fails to explain why the middle hinge is part of the hinged arm but the other two hinges are not. There is nothing in the language of the asserted claims or the specification of the [#544](#)

patent to suggest that all three hinges are not part of the hinged arm structure.

[6] We likewise reject Becton's argument that the district court erred in granting Tyco's motion for an order *in limine* precluding Becton from presenting evidence that Tyco's accused products infringed the #544 patent during the manufacturing process. After Boyce, Tyco's expert, submitted her expert report concluding that any energy imparted to the hinges in Tyco's accused products quickly dissipates, Becton attempted to rely on the fact that the hinges might contain some stored energy during the manufacturing process. Because Becton's argument that a version of Tyco's products that existed temporarily during the manufacturing process might infringe the #544 patent was not properly raised during discovery, the district court did not abuse its discretion in precluding Becton from presenting evidence regarding this theory at trial.<sup>10</sup> See *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 211 (3d Cir.2009) (In order to show that a trial court abused its discretion in issuing an evidentiary ruling, "an appellant must show that the court's decision was arbitrary, fanciful or clearly unreasonable." (citations and internal quotation marks omitted)).

<sup>10</sup> In its complaint, Becton asserted that Tyco "has made ... and continue[s] to make, use, sell and/or offer for sale ... products which infringe one or more claims of the #544 patent. The argument that a product infringes as it is manufactured and sold, however, is very different from the argument that an *interim* version of Tyco's product, which existed only temporarily during the manufacturing process could infringe the asserted claims, even if that product did not infringe when the manufacturing process was complete or when the item was sold.

## CONCLUSION

Accordingly, the judgment of the United States District Court for the District of Delaware is reversed.

## REVERSED.

GAJARSA, Circuit Judge, dissenting.

The majority avoids the critical issue upon which this decision turns; *i.e.*, whether 35 U.S.C. § 112, ¶ 6 governs the claim construction of the "spring means" limitation. In a brief footnote, the majority sweeps and brushes aside the means-plus-function analysis as unnecessary in light of the "plain language of the claims." Maj. Op. 1253 n. 3. Without having analyzed the scope of the claims, the majority somehow concludes that the claim language covers only devices having separate "spring means" and "hinged arm" structures. Then applying this simplistic claim construction to analyze the sufficiency of the evidence, the majority improperly overturns the jury's verdict finding infringement. For these reasons, I respectfully dissent.

Although the majority ignores the issue completely, the parties have vigorously contested the claim construction of the "spring means" limitation and have made this issue the focal point of their legal position before the district court and this court. The limitation reads: "a spring means connected to said hinged arm for urging said guard along said needle cannula toward

said second position.” \*1262 #544 patent, col.7 ll.33 35. The parties disagree over whether the “spring means” language should be construed as a means-plus-function limitation pursuant to § 112, ¶ 6. The majority, however, dismisses the means-plus-function analysis entirely in a single footnote, asserting that the language of the claims is “unambiguous”:

Tyco ... contends that a separate spring is required because the spring means limitation is in means-plus-function format, see 35 U.S.C. § 112, ¶ 6 ... We need not reach this argument, however, because we conclude that regardless of whether the asserted claims invoke section 112, paragraph 6 an added spring element is required by the plain language of the claims.

Maj. Op. 1253 n. 3. First, it is unclear what the majority means by “an added spring element.” An “added spring element” does not appear in the “plain language of the claims,” specification, or prosecution history of the patent. Second, claim construction is necessary to determine the scope of the claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). The majority opinion injects ambiguity into the claims and fails to construe the claims as required by our case law. See, e.g., *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed.Cir.2005) (en banc);

*Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed.Cir.1996). It is impossible for the majority to determine the scope of the claims without undertaking a means-plus-function analysis. Accordingly, the majority's claim construction is premised upon an inadequate foundation.

If a claim element “contains the word ‘means’ and recites a function,” there is a presumption that the claim is in means-plus-function form. *Envirco Corp. v. Clestra Cleanroom, Inc.*, 209 F.3d 1360, 1364 (Fed.Cir.2000). That presumption can be rebutted, however, if the claim also “recites sufficient structure to perform the claimed function.” *Id.* If the claim term “is one that is understood to describe structure ... [it] is simply a substitute for the term ‘means for.’” *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1360 (Fed.Cir.2004).

To determine whether the claim term should be construed as a means-plus-function limitation, we begin by evaluating how the term “spring” is used in the specification and the intrinsic record. *Phillips*, 415 F.3d at 1315 (“[T]he specification is always highly relevant” and is “the single best guide to the meaning of a disputed term”). Next, the court should consider whether the “spring means” limitation contains additional structure to rebut the means-plus-function presumption. See *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1427 (Fed.Cir.1997) (holding that where a claim recites a function, but goes on to elaborate sufficient structure, the claim is not in means-plus-function format).

In this case, the written description defines the term “spring means” as a type of device that imparts a function of urging the safety guard toward the needle tip. A “spring” as defined in the written description denotes a type of device with a generally understood meaning in the mechanical arts. See *Greenberg v. Ethicon Endo Surgery, Inc.*, 91 F.3d 1580, 1583 (Fed.Cir.1996). Each embodiment described in the patent employs a type of spring; e.g., coil springs, plastic springs, hinged springs, and over-centered springs. #544 patent, col. 3 ll.5 7; *id.* at col. 4 ll. 40 42; *id.* at col. 5 ll.9 16; *id.* at col. 6 ll. 38 42. None of the embodiments employ any structure other than springs. Indeed, the patent contains no suggestion that the claims include urging mechanisms other than springs. Accordingly, the intrinsic evidence demonstrates that the #544 patent \*1263 defines “spring means” as a particular structure a spring.

Next, the court in a proper claim analysis should consider whether the claims elaborate sufficient structure to rebut the means-plus-function presumption. The #544 patent claims state that the function of the “spring means” is for “urging the guard along said needle cannula.” *Id.* at col.7 ll.34 35. The claims go on to recite additional structure to achieve that function. Claim 1 recites “spring means connected to *said hinged arm*,” *id.* at col.7 ll.34 35 (emphasis added), and claim 24 recites “spring means extending between *said mounting means and said hinged arm*,” *id.* at col.10 ll.17 20 (emphasis added). Thus, the claim language demonstrates that the combination of the “spring means” and “hinged arm” perform the “urging”

function. Accordingly, the claims include additional structural limitations to rebut the means-plus-function presumption.

Tyco obviously disagrees with this conclusion; however, its reliance on *Unidynamics Corporation v. Automatic Products International*, 157 F.3d 1311, 1314 (Fed.Cir.1998) is unavailing. This court in *Unidynamics* applied § 112, ¶ 6 to the claim limitation “spring means tending to keep the door closed.” In that case, the patent's written description stated that “[t]he spring ... is *an example* of spring means tending to keep the door closed.” *Id.* at 1319 (emphasis added). Accordingly, the “spring means” was not defined solely as a spring structure, but as any type of structure to perform the function. Furthermore, the *Unidynamics* court noted that the claim language did not provide additional structure following the “spring means” language. *Id.* It merely recited a function of “tending to keep the door closed.” *Id.* Therefore, the court there properly concluded that “spring means” was a means-plus-function limitation because neither the claim language nor the written description provided sufficient structure to rebut the § 112, ¶ 6 presumption. *Id.*

In this case, however, the written description defines “spring means” as a spring structure. For example, each embodiment employs a spring structure; e.g., coil springs, plastic springs, hinged springs, and over-centered springs. Unlike *Unidynamics*, the spring is not just an example of a spring means to perform the function; it is the only type of structure disclosed in the written

description. Moreover, the claim language itself provides additional structure following the “spring means” language. For example, claim 1 recites “spring means connected to *said hinged arm*,” #544 patent, col.7 ll.34 35 (emphasis added), and claim 24 recites “spring means extending between *said mounting means* and *said hinged arm*,” *id.* at col.10 ll.17 20 (emphases added). Unlike *Unidynamics*, the claim language itself includes additional structure; *e.g.*, the hinged arm and mounting means to perform the function of urging the guard along the needle cannula. Here, the means-plus-function presumption is rebutted and the claims should not be construed according to § 112, ¶ 6. Therefore, the district court correctly construed the “spring means” limitation according to its ordinary meaning: “[t]he hinged arm is connected to a spring that moves the guard along the cannula toward the second position.” *Becton, Dickinson & Co. v. Tyco Healthcare Group, LP*, No. 02 1694 GMS, 2004 WL 2075413, at \*4 (D.Del. Sept.16, 2004).

The majority first approves of the district court's claim construction, *see* Maj. Op. 1253 54, but then proceeds to improperly import an extraneous limitation into the claims, which is contrary to our case law. *See* \*1264 *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed.Cir.1998). The majority asserts that “the unequivocal language of the asserted claims of the #544 patent requires a spring means that is separate from the hinged arm” because they are written as separate limitations in the claim language.

Maj. Op. 1254. However, the unequivocal language articulates no requirement for separate structures. It merely recites “a spring means connected to said hinged arm for urging said guard along said needle cannula toward said second position.” The majority's limitation requiring two separate structures is not supported anywhere in the intrinsic or extrinsic record. Such a claim interpretation violates our established tenants of claim construction prohibiting the court from reading extraneous limitations into the claims. *E.I. du Pont de Nemours & Co. v. Phillips Petroleum*, 849 F.2d 1430, 1433 (Fed.Cir.1988) (“It is entirely proper to use the specification to interpret what the patentee meant by a word or phrase in the claim.... But this is not to be confused with adding an extraneous limitation appearing in the specification, which is improper.”) (citation omitted).

The majority relies on *CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed.Cir.2000), which states that “we must presume that the use of ... different *terms* in the claims connotes different *meanings*.” (emphases added). While this is correct, the majority fails to recognize that “the use of two terms in a claim requires that they connote different *meanings*, not that they necessarily refer to two different *structures*.” *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n. 3 (Fed.Cir.2006) (emphases added); *see also Intellectual Prop. Dev., Inc. v. UA Columbia Cablevision of Westchester, Inc.*, 336 F.3d 1308, 1320 (Fed.Cir.2003). Indeed, it is well established that a single structure in an accused device

may satisfy two different claim limitations. *Intellectual Prop.*, 336 F.3d at 1320 n. 9 (“[W]e see no reason why, as a matter of law, one claim limitation may not be responsive to another merely because they are located in the same physical structure”); *In re Kelley*, 305 F.2d 909, 915 16 (CCPA 1962) (stating that two claim terms may read upon the same physical structure). In the absence of evidence *requiring two structures*, the claim language must be interpreted broadly to read upon an accused product containing the two claim terms, regardless of whether those elements are encompassed in one or two structures.

In the #544 patent, nothing in the claim language, written description or prosecution history requires that the “spring means” and “hinged arm” be separate structures. The plain language of the claims includes no such “separate structures” limitation. To the contrary, the written description contemplates that the “spring means” and “hinged arm” be included as part of the same “hinged arm assembly.” *See, e.g., #544 patent*, col.4 ll.40 44 (stating that a spring may be encompassed “between” the joints of the hinged arm assembly); *id.* at col.5 ll.66 68 (“proximal and distal segments ... of [the] hinged arm assembly ... can be articulated about [the] hinges.”). In other words, the “hinged arm assembly” is described as a structure with the “spring means” and “hinged arm” as components of that structure. There is no support in the written description requiring that the “spring means” and “hinged arm” be separate structures themselves. Accordingly, a proper claim construction does not require two

separate structures for the “spring means” and “hinged arm.” The majority's ruling improperly imports an extraneous limitation into the claims and fails to give the claim language its full, literal scope. By injecting this additional and extraneous limitation, the majority sidesteps the required analysis of whether the “spring \*1265 means” limitations are prescribed by § 112, ¶ 6.

In addition to applying a wholly simplistic claim construction, the majority fails to consider substantial evidence on the record supporting the jury's determination of infringement. The majority opinion states that:

The thrust of Becton's infringement argument was that the hinges in Tyco's needles contain stored energy and that when the hinged arm is unlatched, the hinges act as “springs” that cause the guard to move down the needle *cannula*. The fatal defect in this theory is that Becton failed to produce any evidence that this posited movement ever occurred. Becton did not provide any test data or even a single live demonstration showing that: 1) the hinges in the accused devices contained stored energy, or 2) they moved the guard even one millimeter down the needle *cannula*.

Maj. Op. 1257. However, the majority turns a blind eye to sufficient evidence supporting the jury's determination of infringement. In reviewing a motion for judgment as a matter of law (“JMOL”) under Third Circuit law, we overturn a jury verdict “only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.” *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir.1993). In this case, the majority fails to view the evidence in the light most favorable to Becton and fails to draw reasonable inferences from the evidence introduced at trial. Had the majority properly analyzed the jury verdict, it would have concluded that there is sufficient evidence on the record supporting the finding of infringement.

First, the accused devices themselves were entered in evidence, and the jury was able to examine them. The jury requested and received additional samples of the accused safety needles during its deliberations. Observation of the device is sufficient to determine whether the accused devices have a spring that, by itself, moves the guard towards the needle tip once the hinged arm is unlatched. The jurors directly examined the devices and concluded that they infringed. The jury's factual findings based on direct examination of the accused devices are entitled to deference. *See, e.g., Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1329 (Fed.Cir.2002) (affirming the jury's infringement verdict where the accused device was available to the jury).

Second, Becton's expert, Mr. Garris, testified that the accused devices contain a spring that, by itself, moves the guard once unlatched. To show that the living hinges were responsible for motion, Becton's expert demonstrated the activation of a Tyco Safety Needle and Blood Collector before the jury. Mr. Garris testified that a small movement occurs upon unlatching, which is caused by the living hinges. The jury is entitled to credit this testimony, particularly given that the jury viewed the device and could examine the action of the guard and the needle. We as an appellate court cannot and should not reweigh the reasonable evidentiary conclusions found by a jury and reverse its judgment.

Tyco argues that Mr. Garris's opinion “was based entirely on a combination of forces working at the same time to move the guard, and not motion caused by the spring itself,” as required by the district court. But this is incorrect. There is testimony in the record that the court's claim construction allows for a combination of forces “to get the process started,” *e.g.*, to push the guard over the latch. Mr. Garris also testified that once the hinged arm is unlatched, the living hinge “springs \*1266 up”, moving the guard “a little bit” in the direction of the needle tip.

Third, the jury is allowed to infer from the evidence that the living hinge, by itself, moves the guard towards the needle tip based on the fact that Tyco included a latch on its product. Mr. Garris testified that the latch “restrains” the stored energy imparted



to the living hinges at the time that they are folded. Mr. Garris testified that:

[I]t is very obvious that there is a spring. And in the folding process, it's very clear that energy was put in. So without doing anything, it was very clear that there was a spring which was biased in a way that would make the guard go toward the tip of the [cannula](#).

Mr. Garris also explained that the latch functions to “hold back the spring force and prevent[ ] the hinged arm from deploying” while a health care worker is giving an injection.

Fourth, Becton presented evidence that the hinged arm of the accused products is, in fact, biased against the latch at the time of their use and, hence, will extend to move the guard forward once unlatched. Moreover, Becton played a video clip that shows Tyco's expert removing the latch of a Safety Needle while holding the guard in its initial position. The evidentiary video shows that once the latch is removed and the guard is released, the spring, by itself, moves the guard toward the needle tip a small but visible distance. The jurors could reasonably have concluded that this videotaped evidence is sufficient to show infringement.

In sum, there is substantial evidence the jury's self-examination of the accused needle guards, the expert testimony regarding the “spring” in the guard, the presence of the

latch to restrain the guard's movement, and the video tape evidence showing movement of the guard in the absence of the latch to support the jury's finding of infringement. Accordingly, applying the test of the Third Circuit as outlined in *Lightning Lube*, it is improper to disturb the jury's finding of infringement. The district court was correct in denying the JMOL.

In conclusion, the majority opinion is severely flawed in several aspects. Most importantly, it fails to conduct a claim construction analysis to determine whether construction of the “spring means” limitation is governed by § 112, ¶ 6. Indeed, the majority puts the cart before the horse by concluding that the claim language covers only devices having two separate structures, but fails to undertake a proper claim construction analysis. The majority then applies its simplistic claim construction to its infringement analysis in reviewing the denial of JMOL. Contrary to Third Circuit law, the majority fails to view the evidence in the light most favorable to Becton and improperly overturns the jury's verdict finding infringement. The majority climbs Jacob's Ladder in search of perfection in the jury verdict, but, by substituting its own fact finding for that of the jury, it fails to allow the jury to perform its proper function. For these reasons, I dissent from the judgment of the majority opinion.

### All Citations

616 F.3d 1249, 95 U.S.P.Q.2d 1752

End of Document

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R-42

RESPONDENT'S EXHIBIT



[ICANN Resolutions](#) » 2012-12-20 - Accountability Structures Expert Panel Recommendations

**Important note:** The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

## 2012-12-20 - Accountability Structures Expert Panel Recommendations

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Resolution of the ICANN Board

**Topic:**

Accountability Structures Expert Panel Recommendations

**Summary:**

Accountability Structures Expert Panel Recommendations

**Meeting Date:**

Thu, 20 Dec 2012

**Resolution Number:**

2012.12.20.17 – 2012.12.20.19

**URL for Resolution:**

<http://www.icann.org/en/groups/board/documents/resolutions-20dec12-en.htm#2.c>

**Status:**

Complete

**Implementation Actions:**

- Develop and implement plans to implement the Accountability Structures Expert Panel recommendations
  - Responsible entity: President and CEO
  - Due date: None provided
  - Completion date: 11 April 2013
- Report to the Board in Beijing on the status of the implementation
  - Responsible entity: President and CEO
  - Due date: 11 April 2013
  - Completion date: 11 April 2013

**Resolution Text:**

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, under the guidance of the Board Governance Committee (BGC), ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution.

Whereas, after research and review of ICANN's Reconsideration and Independent Review processes, as well as multiple opportunities for public input, the ASEP produced a report in October 2012.

Whereas, the report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after review and consideration of the public comment received, including consideration by the ASEP, the Board has determined that it is appropriate to proceed to implementation of the ASEP's recommendations.

Whereas, additional implementation work is required prior to launching ICANN's revised Independent Review and Reconsideration processes as recommended by the ASEP.

Resolved (2012.12.20.17) the Board accepts the report by Accountability Structures Expert Panel issued in October 2012 in fulfillment of Recommendations 23 and 25 of the Accountability and Transparency Review Team.

Resolved (2012.12.20.18), the Board approves the Bylaws amendments to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as posted for public comment, with an effective date to be determined by the Board after receiving a report from the President and CEO on the status of implementation.

Resolved (2012.12.20.19), the Board directs the President and CEO to develop and execute implementation plans necessary to implement the ASEP recommendations and report to the Board in Beijing on the status of the implementation work, including a recommended effective date for the Bylaws. In the event that, during implementation, the President and CEO determine that issues raised during the public comment regarding the creation of a standing panel for the IRP require modification to the Bylaws, those limited modifications are to be provided to the Board for adoption prior to the recommended effective date for the Bylaws revisions.

### **Rationale for Resolution:**

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations arising out of the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the review requested by the ATRT.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review Processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and the ability to bring collective requests. A new grounds for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed.

The Board is adopting the Bylaws revisions today to allow for certainty as the President and CEO moves forward with implementation work to effectuate the ASEP's recommendations. Because additional documentation and processes must be developed and finalized, the Bylaws revisions to Article VI, Sections 2 and 3 will not go into effect until the implementation work has proceeded sufficiently. The President and CEO is therefore tasked with a report to the Board on the status of implementation, and a

date for the Bylaws to go into effect, by the ICANN meeting in Beijing, China in April 2013. The Board expects that the President and CEO will consider the issues raised in public comment to determine if they need to be or can be addressed in implementation. In the event limited revisions of the Bylaws are necessary to address public comment addressing the creation of a standing panel for the IRP, the Board expects those revisions to be provided to the Board for approval in advance of the identified effective date. The potential for limited modification of the Bylaws prior to the effective date is appropriate in this instance because of the concerns raised in public comment as well as the past challenges faced when trying to create a standing panel for independent reviews.

The adoption of these recommendations will have a fiscal impact on ICANN, in that additional work is required for implementation, including the development of new documentation and the identification of a standing panel to hear requests for independent review. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function for which the Board received public comment at <http://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm>.

### **Other Related Resolutions:**

- Resolution 2013.04.11.06, determining the Bylaws effective date for the posted revisions, at <http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d>
- Other resolutions TBD

### **Additional Information:**

- Additional information about the Accountability Structures Expert Panel is available at: <http://www.icann.org/en/news/in-focus/accountability/asep>
- Public comment regarding the Accountability Structures Expert Panel Recommendations is available at: <http://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm>
- The Accountability Structures Expert Panel Report is available at: <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>
- Information on the updates to the Reconsideration Process is available at <http://www.icann.org/en/groups/board/governance/reconsideration>
- The resolution does not address funding for the items identified therein.

R-43

RESPONDENT'S EXHIBIT



GET  
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COMMENT

RESOURCES

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& ACCOUNTABILITY

## Resources

 About [ICANN](#) Board Accountability Governance Groups

Business

Civil Society

 Contractual  
Compliance Registrars Registries

GDD Metrics

 Identifier  
Systems  
Security, [Stability](#)  
and Resiliency  
(IS-SSR) ccTLDs Internationalized  
Domain Names Universal  
Acceptance  
Initiative

## BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | As amended 30 September 2009

A California Nonprofit Public-Benefit Corporation

As amended 30 September 2009

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## ANNEX C: [THE SCOPE OF THE ccNSO](#)

### ARTICLE I: [MISSION AND CORE VALUES](#)

#### Section 1. [MISSION](#)

The mission of The Internet Corporation for Assigned Names and Numbers (“[ICANN](#)”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, [ICANN](#):

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

- a. Domain names (forming a system referred to as “[DNS](#)”);
- b. Internet protocol (“[IP](#)”) addresses and autonomous system (“[AS](#)”) numbers; and
- c. [Protocol](#) port and parameter numbers.

2. Coordinates the operation and evolution of the [DNS](#) root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions.

#### Section 2. [CORE VALUES](#)

In performing its mission, the following core values should guide the decisions and actions of [ICANN](#):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting [ICANN](#)’s activities to those matters

within ICANN's mission requiring or significantly benefiting from global coordination.

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven

core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

## **ARTICLE II: POWERS**

### **Section 1. GENERAL POWERS**

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of [Article III, Section 6](#), the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to “all of the members of the Board.”

### **Section 2. RESTRICTIONS**

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

### **Section 3. NON-DISCRIMINATORY TREATMENT**

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

## **ARTICLE III: TRANSPARENCY**

### **Section 1. PURPOSE**

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

## **Section 2. WEBSITE**

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

## **Section 3. MANAGER OF PUBLIC PARTICIPATION**

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

## **Section 4. MEETING NOTICES AND AGENDAS**

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

## **Section 5. MINUTES AND PRELIMINARY REPORTS**

1. All minutes of meetings of the Board and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.
2. No later than five (5) business days after each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary

report on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

3. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

## **Section 6. NOTICE AND COMMENT ON POLICY ACTIONS**

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others,

and to reply to those comments, prior to any action by the Board;  
and

c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

## **Section 7. TRANSLATION OF DOCUMENTS**

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

## **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

### **Section 1. PURPOSE**

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

### **Section 2. RECONSIDERATION**

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;

b. determine whether a stay of the contested action pending resolution of the request is appropriate;

c. conduct whatever factual investigation is deemed appropriate;

d. request additional written submissions from the affected party, or from other parties; and

e. make a recommendation to the Board of Directors on the merits of the request.

4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs which are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be



communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within thirty days after:

- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a preliminary report or minutes of the Board's meetings; or
- b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
- c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6. All Reconsideration Requests must include the information required by the Board Governance Committee, which shall include at least the following information:

- a. name, address, and contact information for the requesting party, including postal and e-mail addresses;
- b. the specific action or inaction of ICANN for which review or reconsideration is sought;
- c. the date of the action or inaction;
- d. the manner by which the requesting party will be affected by the action or inaction;
- e. the extent to which, in the opinion of the party submitting the Request for Reconsideration, the action or inaction complained of adversely affects others;
- f. whether a temporary stay of any action complained of is

requested, and if so, the harms that will result if the action is not stayed;

g. in the case of staff action or inaction, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies);

h. in the case of Board action or inaction, a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act;

i. what specific steps the requesting party asks ICANN to take- i.e., whether and how the action should be reversed, cancelled, or modified, or what specific action should be taken;

j. the grounds on which the requested action should be taken; and

k. any documents the requesting party wishes to submit in support of its request.

7. All Reconsideration Requests shall be posted on the Website..

8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as (i) the requests involve the same general action or inaction and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction.

9. The Board Governance Committee shall review Reconsideration Requests promptly upon receipt and announce, within thirty days, its intention to either decline to consider or proceed to consider a Reconsideration Request after receipt of the Request. The announcement shall be posted on the Website.

10. The Board Governance Committee announcement of a decision not to hear a Reconsideration Request must contain an explanation of the reasons for its decision.

11. The Board Governance Committee may request additional information or clarifications from the party submitting the Request for Reconsideration.

12. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

13. If the Board Governance Committee requires additional information, it may elect to conduct a meeting with the party seeking Reconsideration by telephone, e-mail or, if acceptable to the party requesting reconsideration, in person. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

14. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

15. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

16. To protect against abuse of the reconsideration process, a request for reconsideration may be dismissed by the Board Governance Committee where it is repetitive, frivolous, non-substantive, or otherwise abusive, or where the affected party had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. Likewise, the Board Governance Committee may dismiss a request when the requesting party does not show that it will be affected by ICANN's action.

17. The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within ninety days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. The final recommendation shall be posted on the Website.

18. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken.

19. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

- a. the number and general nature of Reconsideration Requests received;
- b. the number of Reconsideration Requests on which the Board Governance Committee has taken action;
- c. the number of Reconsideration Requests that remained pending at the end of the calendar year and the average length of time for which such Reconsideration Requests have been pending;
- d. a description of any Reconsideration Requests that were pending at the end of the calendar year for more than ninety (90) days and the reasons that the Board Governance Committee has not taken action on them;
- e. the number and nature of Reconsideration Requests that the Board Governance Committee declined to consider on the basis that they did not meet the criteria established in this policy;
- f. for Reconsideration Requests that were denied, an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
- g. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

20. Each annual report shall also aggregate the information on the topics listed in [paragraph 19\(a\)-\(e\) of this Section](#) for the period beginning 1 January 2003.

### Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.
3. Requests for such independent review shall be referred to an Independent Review Panel (“IRP”), which shall be charged 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.
4. 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.
5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.
7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.
8. The IRP shall have the authority to:
  - a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
  - b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. 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.

9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.

10. In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.

11. The IRP shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

13. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on the Website when they become available.

14. The IRP may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.

#### **Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS**

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting

Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee shall provide its own review mechanisms.

## **ARTICLE V: OMBUDSMAN**

### **Section 1. OFFICE OF OMBUDSMAN**

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN budget process. The

Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN budget recommended by the ICANN President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

## **Section 2. CHARTER**

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in [Section 2 of Article IV](#) or the Independent Review Policy set forth in [Section 3 of Article IV](#) have not been invoked. The principal function of the Ombudsman shall be to provide 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. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and “shuttle diplomacy” to achieve these results.

## **Section 3. OPERATIONS**

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;



3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN);
4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all ICANN conflicts-of-interest and confidentiality policies.

#### **Section 4. INTERACTION WITH ICANN AND OUTSIDE ENTITIES**

1. No ICANN employee, Board member, or other participant in Supporting Organizations or Advisory Committees shall prevent or impede the Ombudsman's contact with the ICANN community (including employees of ICANN). ICANN employees and Board members shall direct members of the ICANN community who voice problems, concerns, or complaints about ICANN to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.
2. ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.
3. Contact with the Ombudsman shall not constitute notice to ICANN of any particular action or cause of action.
4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.
5. The Ombudsman shall not take any actions not authorized in these

Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies.

## **Section 5. ANNUAL REPORT**

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

## **ARTICLE VI: BOARD OF DIRECTORS**

### **Section 1. COMPOSITION OF THE BOARD**

The ICANN Board of Directors (“Board”) shall consist of fifteen voting members (“Directors”). In addition, six non-voting liaisons (“Liaisons”) shall be designated for the purposes set forth in [Section 9 of this Article](#). Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN Board.

### **Section 2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIRMAN AND VICE-CHAIRMAN**

1. The Directors shall consist of:

- a. Eight voting members selected by the Nominating Committee established by [Article VII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.
- b. Two voting members selected by the Address Supporting Organization according to the provisions of [Article VIII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and Seat 10.
- c. Two voting members selected by the Country-Code Names Supporting Organization according to the provisions of [Article IX](#)

of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 11 and Seat 12.

d. Two voting members selected by the Generic Names Supporting Organization according to the provisions of Article X of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 13 and Seat 14.

e. The President ex officio, who shall be a voting member.

2. In carrying out its responsibilities to fill Seats 1 through 8, the Nominating Committee shall seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At no time when it makes its selection shall the Nominating Committee select a Director to fill any vacancy or expired term whose selection would cause the total number of Directors (not including the President) from countries in any one Geographic Region (as defined in Section 5 of this Article) to exceed five; and the Nominating Committee shall ensure when it makes its selections that the Board includes at least one Director who is from a country in each ICANN Geographic Region (“Diversity Calculation”).

For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship (“Domicile”), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN Bylaws, a person can only have one “Domicile,” which shall be determined by where the candidate has a permanent residence and place of habitation.

3. In carrying out their responsibilities to fill Seats 9 through 14, the Supporting Organizations shall seek to ensure that the ICANN Board is composed of members that in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At any given time, no two Directors selected by a Supporting Organization shall be citizens from the same country or of countries located in the same Geographic Region.

For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship (“Domicile”), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Supporting Organization to use for selection purposes. For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN Bylaws, a person can only have one “Domicile,” which shall be determined by where the candidate has a permanent residence and place of habitation.

4. The Board shall annually elect a Chairman and a Vice-Chairman from among the Directors, not including the President.

### **Section 3. CRITERIA FOR SELECTION OF DIRECTORS**

ICANN Directors shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
2. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;
3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;
4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet;
5. Persons who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
6. Persons who are able to work and communicate in written and

spoken English.

#### **Section 4. ADDITIONAL QUALIFICATIONS**

1. Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term “official” means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

2. No person who serves in any capacity (including as a liaison) on any Supporting Organization Council shall simultaneously serve as a Director or liaison to the Board. If such a person accepts a nomination to be considered for selection by the Supporting Organization Council to be a Director, the person shall not, following such nomination, participate in any discussion of, or vote by, the Supporting Organization Council relating to the selection of Directors by the Council, until the Council has selected the full complement of Directors it is responsible for selecting. In the event that a person serving in any capacity on a Supporting Organization Council accepts a nomination to be considered for selection as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's selection process.

3. Persons serving in any capacity on the Nominating Committee shall be ineligible for selection to positions on the Board as provided by [Article VII, Section 8](#).

#### **Section 5. INTERNATIONAL REPRESENTATION**

In order to ensure broad international representation on the Board, the selection of Directors by the Nominating Committee and each Supporting Organization shall comply with all applicable diversity provisions of these Bylaws or of any Memorandum of Understanding referred to in these Bylaws concerning the Supporting Organization. One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no region shall have more than five

Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a “Geographic Region”: Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section shall be reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

### **Section 6. DIRECTORS' CONFLICTS OF INTEREST**

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN. Each Director shall be responsible for disclosing to ICANN any matter that could reasonably be considered to make such Director an “interested director” within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law (“CNPBCL”). In addition, each Director shall disclose to ICANN any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an “interested person” within the meaning of Section 5227 of the CNPBCL. The Board shall adopt policies specifically addressing Director, Officer, and Supporting Organization conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

### **Section 7. DUTIES OF DIRECTORS**

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.

### **Section 8. TERMS OF DIRECTORS**

1. Subject to the provisions of the [Transition Article of these Bylaws](#), the regular term of office of Director Seats 1 through 14 shall begin as follows:

- a. The regular terms of Seats 1 through 3 shall begin at the conclusion of ICANN's annual meeting in 2003 and each ICANN annual meeting every third year after 2003;

b. The regular terms of Seats 4 through 6 shall begin at the conclusion of ICANN's annual meeting in 2004 and each ICANN annual meeting every third year after 2004;

c. The regular terms of Seats 7 and 8 shall begin at the conclusion of ICANN's annual meeting in 2005 and each ICANN annual meeting every third year after 2005;

d. The regular terms of Seats 9 and 12 shall begin on the day six months after the conclusion of ICANN's annual meeting in 2002 and each ICANN annual meeting every third year after 2002;

e. The regular terms of Seats 10 and 13 shall begin on the day six months after the conclusion of ICANN's annual meeting in 2003 and each ICANN annual meeting every third year after 2003; and

f. The regular terms of Seats 11 and 14 shall begin on the day six months after the conclusion of ICANN's annual meeting in 2004 and each ICANN annual meeting every third year after 2004.

2. Each Director holding any of Seats 1 through 14, including a Director selected to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been selected and qualified or until that Director resigns or is removed in accordance with these Bylaws.

3. At least one month before the commencement of each annual meeting, the Nominating Committee shall give the Secretary of ICANN written notice of its selection of Directors for seats with terms beginning at the conclusion of the annual meeting.

4. No later than five months after the conclusion of each annual meeting, any Supporting Organization entitled to select a Director for a Seat with a term beginning on the day six months after the conclusion of the annual meeting shall give the Secretary of ICANN written notice of its selection.

5. Subject to the provisions of the Transition Article of these Bylaws, no Director may serve more than three consecutive terms. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term.

6. The term as Director of the person holding the office of President

shall be for as long as, and only for as long as, such person holds the office of President.

## Section 9. NON-VOTING LIAISONS

1. The non-voting liaisons shall include:

- a. One appointed by the [Governmental Advisory Committee](#);
- b. One appointed by the Root Server System Advisory Committee established by [Article XI of these Bylaws](#);
- c. One appointed by the [Security and Stability Advisory Committee](#) established by [Article XI of these Bylaws](#);
- d. One appointed by the Technical Liaison Group established by [Article XI-A of these Bylaws](#);
- e. One appointed by the At-Large [Advisory Committee](#) established by [Article XI of these Bylaws](#); and
- f. One appointed by the Internet Engineering Task Force.

2. Subject to the provisions of the [Transition Article of these Bylaws](#), the non-voting liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a non-voting liaison shall give the Secretary of [ICANN](#) written notice of its appointment.

3. Non-voting liaisons shall serve as volunteers, without compensation other than the reimbursement of certain expenses.

4. Each non-voting liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the liaison resigns or is removed in accordance with these Bylaws.

5. The non-voting liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but



shall otherwise not have any of the rights and privileges of Directors. Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

#### **Section 10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON**

Subject to Section 5226 of the CNPBCL, any Director or non-voting liaison may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of ICANN) or by giving written notice thereof to the President or the Secretary of ICANN. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective. The successor shall be selected pursuant to [Section 12 of this Article](#).

#### **Section 11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON**

1. Any Director may be removed, following notice to that Director and, if selected by a Supporting Organization, to that Supporting Organization, by a three-fourths (3/4) majority vote of all Directors; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a voting member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director.

2. With the exception of the non-voting liaison appointed by the Governmental Advisory Committee, any non-voting liaison may be removed, following notice to that liaison and to the organization by which that liaison was selected, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that liaison following such notice. The Board may request the Governmental Advisory Committee to consider the replacement of the non-voting liaison appointed by that Committee if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

#### **Section 12. VACANCIES**

1. A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation, or removal of any Director; if the authorized number of Directors is increased; or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors shall be filled by the Nominating Committee, unless (a) that Director was selected by a Supporting Organization, in which case that vacancy shall be filled by that Supporting Organization, or (b) that Director was the President, in which case the vacancy shall be filled in accordance with the provisions of [Article XIII of these Bylaws](#). The selecting body shall give written notice to the Secretary of ICANN of their appointments to fill vacancies. A Director selected to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been selected and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

2. The organizations selecting the non-voting liaisons identified in [Section 9 of this Article](#) are responsible for determining the existence of, and filling, any vacancies in those positions. They shall give the Secretary of ICANN written notice of their appointments to fill vacancies.

### **Section 13. ANNUAL MEETINGS**

Annual meetings of ICANN shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting for ICANN shall be held at the principal office of ICANN, or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

### **Section 14. REGULAR MEETINGS**

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN.

**Section 15. SPECIAL MEETINGS**

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the members of the Board or by the Chairman of the Board or the President. A call for a special meeting shall be made by the Secretary of ICANN. In the absence of designation, special meetings shall be held at the principal office of ICANN.

**Section 16. NOTICE OF MEETINGS**

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and non-voting liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and non-voting liaison at the Director's or non-voting liaison's address as it is shown on the records of ICANN. In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

**Section 17. QUORUM**

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time, or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

**Section 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT**

Members of the Board or any Committee of the Board may participate in a meeting of the Board or Committee of the Board through use of (i) conference

telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (ii) electronic video screen communication or other communication equipment; provided that (a) all Directors participating in such a meeting can speak to and hear one another, (b) all Directors are provided the means of fully participating in all matters before the Board or Committee of the Board, and (c) ICANN adopts and implements means of verifying that (x) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (y) all actions of, or votes by, the Board or Committee of the Board are taken or cast only by the members of the Board or Committee and not persons who are not members. Participation in a meeting pursuant to this Section constitutes presence in person at such meeting. ICANN shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

#### **Section 19. ACTION WITHOUT MEETING**

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

#### **Section 20. ELECTRONIC MAIL**

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

#### **Section 21. RIGHTS OF INSPECTION**

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN. ICANN shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

#### **Section 22. COMPENSATION**

The Directors shall receive no compensation for their services as Directors. The Board may, however, authorize the reimbursement of actual and necessary reasonable expenses incurred by Directors and non-voting liaisons

performing their duties as Directors or non-voting liaisons.

### **Section 23. PRESUMPTION OF ASSENT**

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary of ICANN immediately after the adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

## **ARTICLE VII: NOMINATING COMMITTEE**

### **Section 1. DESCRIPTION**

There shall be a Nominating Committee of ICANN, responsible for the selection of all ICANN Directors except the President and those Directors selected by ICANN's Supporting Organizations, and for such other selections as are set forth in these Bylaws.

### **Section 2. COMPOSITION**

The Nominating Committee shall be composed of the following persons:

1. A non-voting Chair, appointed by the ICANN Board;
2. The immediately previous Nominating Committee Chair, as a non-voting advisor;
3. A non-voting liaison appointed by the ICANN Root Server System Advisory Committee established by [Article XI of these Bylaws](#);
4. A non-voting liaison appointed by the ICANN Security and Stability Advisory Committee established by [Article XI of these Bylaws](#);
5. A non-voting liaison appointed by the [Governmental Advisory Committee](#);
6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory Committee established by [Article XI of these Bylaws](#);

7. Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization, established by [Article X of these Bylaws](#), as follows:

- a. One delegate from the Registries Stakeholder Group;
- b. One delegate from the Registrars Stakeholder Group;
- c. Two delegates from the Business Constituency, one representing small business users and one representing large business users;
- d. One delegate from the Internet Service Providers Constituency;
- e. One delegate from the Intellectual Property Constituency; and
- f. One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.

8. One voting delegate each selected by the following entities:

- a. The Council of the Country Code Names Supporting Organization established by [Article IX of these Bylaws](#);
- b. The Council of the Address Supporting Organization established by [Article VIII of these Bylaws](#);
- c. An entity designated by the Board to represent academic and similar organizations;
- d. The Internet Engineering Task Force; and
- e. The ICANN Technical Liaison Group established by [Article XI-A of these Bylaws](#);

9. A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not

serve, temporarily or otherwise, in the place of the Chair.

### **Section 3. TERMS**

Subject to the provisions of the [Transition Article of these Bylaws](#):

1. Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
2. The regular term of each voting delegate shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the immediately following ICANN annual meeting.
3. Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the immediately previous Chair serving as an advisor, and any Associate Chair shall serve as such until the conclusion of the next ICANN annual meeting.
4. Vacancies in the positions of delegate, non-voting liaison, or Chair shall be filled by the entity entitled to select the delegate, non-voting liaison, or Chair involved. A vacancy in the position of non-voting advisor (immediately previous Chair) may be filled by the Board from among persons with prior service on the Board or a Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 2(9) of this Article.
5. The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

### **Section 4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES**

Delegates to the ICANN Nominating Committee shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;

2. Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN;
3. Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
4. Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;
5. Persons with an understanding of ICANN's mission and the potential impact of ICANN's activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
6. Persons who are able to work and communicate in written and spoken English.

#### **Section 5. DIVERSITY**

In carrying out its responsibilities to select members of the ICANN Board (and selections to any other ICANN bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the ICANN Board (and such other bodies), and seek to ensure that the persons selected to fill vacancies on the ICANN Board (and each such other body) shall, to the extent feasible and consistent with the other criteria required to be applied by [Section 4 of this Article](#), make selections guided by Core Value 4 in [Article I, Section 2](#) .

#### **Section 6. ADMINISTRATIVE AND OPERATIONAL SUPPORT**

ICANN shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

#### **Section 7. PROCEDURES**

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

#### **Section 8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE**

No person who serves on the Nominating Committee in any capacity shall be



eligible for selection by any means to any position on the Board or any other ICANN body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

## **Section 9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE**

No person who is an employee of or paid consultant to ICANN (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in [Section 2 of this Article](#).

## **ARTICLE VIII: ADDRESS SUPPORTING ORGANIZATION**

### **Section 1. DESCRIPTION**

1. The Address Supporting Organization (ASO) shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.
2. The ASO shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN and the Number Resource Organization (NRO), an organization of the existing regional Internet registries (RIRs).

### **Section 2. ADDRESS COUNCIL**

1. The ASO shall have an Address Council, consisting of the members of the NRO Number Council.
2. The Address Council shall select Directors to those seats on the Board designated to be filled by the ASO.

## **ARTICLE IX: COUNTRY-CODE NAMES SUPPORTING ORGANIZATION**

### **Section 1. DESCRIPTION**

There shall be a policy-development body known as the Country-Code Names Supporting Organization (ccNSO), which shall be responsible for:

1. developing and recommending to the Board global policies relating to country-code top-level domains;
2. Nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and
3. Coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN.

Policies that apply to ccNSO members by virtue of their membership are only those policies developed according to section 4.10 and 4.11 of this Article. However, the ccNSO may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD managers, assisting in skills building within the global community of ccTLD managers, and enhancing operational and technical cooperation among ccTLD managers.

## **Section 2. ORGANIZATION**

The ccNSO shall consist of (i) ccTLD managers that have agreed in writing to be members of the ccNSO (see [Section 4\(2\) of this Article](#)) and (ii) a ccNSO Council responsible for managing the policy-development process of the ccNSO.

## **Section 3. ccNSO COUNCIL**

1. The ccNSO Council shall consist of (a) three ccNSO Council members selected by the ccNSO members within each of ICANN's Geographic Regions in the manner described in [Section 4\(7\) through \(9\) of this Article](#); (b) three ccNSO Council members selected by the ICANN Nominating Committee; (c) liaisons as described in [paragraph 2 of this Section](#); and (iv) observers as described in [paragraph 3 of this Section](#).
2. There shall also be one liaison to the ccNSO Council from each of the following organizations, to the extent they choose to appoint such a liaison: (a) the Governmental Advisory Committee; (b) the At-Large Advisory Committee; and (c) each of the Regional Organizations described in [Section 5 of this Article](#). These liaisons shall not be members of or entitled to vote on the ccNSO Council, but otherwise

shall be entitled to participate on equal footing with members of the ccNSO Council. Appointments of liaisons shall be made by providing written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.

3. The ccNSO Council may agree with the Council of any other ICANN Supporting Organization to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO Council at any time by providing written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.

4. Subject to the provisions of the [Transition Article of these Bylaws](#): (a) the regular term of each ccNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the third ICANN annual meeting thereafter; (b) the regular terms of the three ccNSO Council members selected by the ccNSO members within each ICANN Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (c) the regular terms of the three ccNSO Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

5. A ccNSO Council member may resign at any time by giving written notice to the ICANN Secretary, with a notification copy to the ccNSO Council Chair.

6. ccNSO Council members may be removed for not attending three consecutive meetings of the ccNSO Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO Council.

7. A vacancy on the ccNSO Council shall be deemed to exist in the

case of the death, resignation, or removal of any ccNSO Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN Secretary written notice of its selection, with a notification copy to the ccNSO Council Chair. Vacancies in the positions of the ccNSO Council members selected by ccNSO members shall be filled for the unexpired term by the procedure described in [Section 4\(7\) through \(9\) of this Article](#).

8. The role of the ccNSO Council is to administer and coordinate the affairs of the ccNSO (including coordinating meetings, including an annual meeting, of ccNSO members as described in [Section 4\(6\) of this Article](#)) and to manage the development of policy recommendations in accordance with Section 6 of this Article. The ccNSO Council shall also undertake such other roles as the members of the ccNSO shall decide from time to time.

9. The ccNSO Council shall make selections to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO Council then in office. Notification of the ccNSO Council's selections shall be given by the ccNSO Council Chair in writing to the ICANN Secretary, consistent with Article VI, [Sections 8\(4\) and 12\(1\)](#).

10. The ccNSO Council shall select from among its members the ccNSO Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO Council then in office. The term of office of the ccNSO Council Chair and any Vice Chair(s) shall be as specified by the ccNSO Council at or before the time the selection is made. The ccNSO Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

11. The ccNSO Council, subject to direction by the ccNSO members, shall adopt such rules and procedures for the ccNSO as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO membership and operating procedures adopted by the ccNSO Council shall be published on the Website.

12. Except as provided by [paragraphs 9 and 10 of this Section](#), the ccNSO Council shall act at meetings. The ccNSO Council shall meet regularly on a schedule it determines, but not fewer than four times

each calendar year. At the discretion of the ccNSO Council, meetings may be held in person or by other means, provided that all ccNSO Council members are permitted to participate by at least one means described in [paragraph 14 of this Section](#). Except where determined by a majority vote of the members of the ccNSO Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO Council meetings should be held in conjunction with meetings of the Board, or of one or more of ICANN's other Supporting Organizations.

13. Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO Council shall be provided to each ccNSO Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

14. Members of the ccNSO Council may participate in a meeting of the ccNSO Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (a) all ccNSO Council members participating in the meeting can speak to and hear one another, (b) all ccNSO Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO Council, and (c) there is a reasonable means of verifying the identity of ccNSO Council members participating in the meeting and their votes. A majority of the ccNSO Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO Council members present at any meeting at which there is a quorum shall be actions of the ccNSO Council, unless otherwise provided in these Bylaws. The ccNSO Council shall transmit minutes of its meetings to the ICANN Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

#### Section 4. MEMBERSHIP

1. The ccNSO shall have a membership consisting of ccTLD managers. Any ccTLD manager that meets the membership qualifications stated in [paragraph 2 of this Section](#) shall be entitled to be members of the ccNSO. For purposes of this Article, a ccTLD manager is the organization or entity responsible for managing an ISO 3166 country-code top-level domain and referred to in the IANA database under the current heading of “Sponsoring Organization”, or under any later variant, for that country-code top-level domain.

2. Any ccTLD manager may become a ccNSO member by submitting an application to a person designated by the ccNSO Council to receive applications. Subject to the provisions of the Transition Article of these Bylaws, the application shall be in writing in a form designated by the ccNSO Council. The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO membership fees established by the ccNSO Council under [Section 7\(3\) of this Article](#). A ccNSO member may resign from membership at any time by giving written notice to a person designated by the ccNSO Council to receive notices of resignation. Upon resignation the ccTLD manager ceases to agree to (a) adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO membership fees established by the ccNSO Council under [Section 7\(3\) of this Article](#). In the absence of designation by the ccNSO Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN Secretary, who shall notify the ccNSO Council of receipt of any such applications and notices.

3. Neither membership in the ccNSO nor membership in any Regional Organization described in [Section 5 of this Article](#) shall be a condition for access to or registration in the IANA database. Any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services is not in any way contingent upon membership in the ccNSO.

4. The Geographic Regions of ccTLDs shall be as described in [Article VI, Section 5 of these Bylaws](#). For purposes of this Article, managers of

ccTLDs within a Geographic Region that are members of the ccNSO are referred to as ccNSO members “within” the Geographic Region, regardless of the physical location of the ccTLD manager. In cases where the Geographic Region of a ccNSO member is unclear, the ccTLD member should self-select according to procedures adopted by the ccNSO Council.

5. Each ccTLD manager may designate in writing a person, organization, or entity to represent the ccTLD manager. In the absence of such a designation, the ccTLD manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA database.

6. There shall be an annual meeting of ccNSO members, which shall be coordinated by the ccNSO Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD managers that are not members of the ccNSO as well as other non-members of the ccNSO to address the meeting. To the extent practicable, annual meetings of the ccNSO members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN's other Supporting Organizations.

7. The ccNSO Council members selected by the ccNSO members from each Geographic Region (see [Section 3\(1\)\(a\) of this Article](#)) shall be selected through nomination, and if necessary election, by the ccNSO members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO-member-selected member of the ccNSO Council, or upon the occurrence of a vacancy in the seat of such a ccNSO Council member, the ccNSO Council shall establish a nomination and election schedule, which shall be sent to all ccNSO members within the Geographic Region and posted on the Website.

8. Any ccNSO member may nominate an individual to serve as a ccNSO Council member representing the ccNSO member's Geographic Region. Nominations must be seconded by another ccNSO member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO Council agree to support the policies committed to by ccNSO members.

9. If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO Council. Otherwise, an election by written ballot

(which may be by e-mail) shall be held to select the ccNSO Council members from among those nominated (with seconds and acceptances), with ccNSO members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO members within the Geographic Region. The ccNSO Council Chair shall provide the ICANN Secretary prompt written notice of the selection of ccNSO Council members under this paragraph.

10. Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies (a) only address issues that are within scope of the ccNSO according to Article IX, Section 6 and Annex C; (b) have been developed through the ccPDP as described in [Section 6 of this Article](#), and (c) have been recommended as such by the ccNSO to the Board, and (d) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

11. A ccNSO member shall not be bound if it provides a declaration to the ccNSO Council stating that (a) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [paragraph 10 of this Section](#)), and (b) failure to implement the policy would not impair DNS operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO Council will provide a response to the ccNSO member's declaration. If there is a ccNSO Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO Council, the response shall state the ccNSO Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO Council's agreement with the declaration. If the ccNSO Council disagrees, the ccNSO Council shall review the situation after a six-month period. At the end of that period, the ccNSO Council shall make findings as to (a) whether the ccNSO members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [paragraph 10 of this Section](#)) and (b) whether failure to implement the policy would impair DNS operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO Council shall proceed by consensus, which may be demonstrated by a



vote of 14 or more members of the ccNSO Council.

## **Section 5. REGIONAL ORGANIZATIONS**

The ccNSO Council may designate a Regional Organization for each ICANN Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO Council and shall be subject to review according to procedures established by the Board.

## **Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE**

1. The scope of the ccNSO's policy-development role shall be as stated in [Annex C to these Bylaws](#); any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall be as stated in [Annex B to these Bylaws](#); modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

## **Section 7. STAFF SUPPORT AND FUNDING**

1. Upon request of the ccNSO Council, a member of the ICANN staff may be assigned to support the ccNSO and shall be designated as the ccNSO Staff Manager. Alternatively, the ccNSO Council may designate, at ccNSO expense, another person to serve as ccNSO Staff Manager. The work of the ccNSO Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO Council, and may include the duties of ccPDP Issue Manager.

2. Upon request of the ccNSO Council, ICANN shall provide administrative and operational support necessary for the ccNSO to carry out its responsibilities. Such support shall not include an obligation for ICANN to fund travel expenses incurred by ccNSO participants for travel

to any meeting of the ccNSO or for any other purpose. The ccNSO Council may make provision, at ccNSO expense, for administrative and operational support in addition or as an alternative to support provided by ICANN.

3. The ccNSO Council shall establish fees to be paid by ccNSO members to defray ccNSO expenses as described in [paragraphs 1 and 2 of this Section](#), as approved by the ccNSO members.

4. Written notices given to the ICANN Secretary under this Article shall be permanently retained, and shall be made available for review by the ccNSO Council on request. The ICANN Secretary shall also maintain the roll of members of the ccNSO, which shall include the name of each ccTLD manager's designated representative, and which shall be posted on the Website.

## **ARTICLE X: GENERIC NAMES SUPPORTING ORGANIZATION**

### **Section 1. DESCRIPTION**

There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

### **Section 2. ORGANIZATION**

The GNSO shall consist of:

- (i) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in [Section 5 of this Article](#);
- (ii) Four Stakeholder Groups organized within Houses as described in [Section 5 of this Article](#);
- (iii) Two Houses within the GNSO Council as described in [Section 3\(8\) of this Article](#); and
- (iv) a GNSO Council responsible for managing the policy development process of the GNSO, as described in [Section 3 of this Article](#).

Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the ICANN Board of Directors.

### Section 3. GNSO COUNCIL

1. Subject to the provisions of [Transition Article XX, Section 5 of these Bylaws](#) and as described in [Section 5 of Article X](#), the GNSO Council shall consist of:

- a. three representatives selected from the Registries Stakeholder Group;
- b. three representatives selected from the Registrars Stakeholder Group;
- c. six representatives selected from the Commercial Stakeholder Group;
- d. six representatives selected from the Non-Commercial Stakeholder Group; and
- e. three representatives selected by the ICANN Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee Appointee voting representative shall be assigned to each House (as described in [Section 3\(8\) of this Article](#)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO Council is as diverse as possible and practicable, including considerations of geography, GNSO Constituency, sector, ability and gender.

There may also be liaisons to the GNSO Council from other ICANN Supporting Organizations and/or Advisory Committees, from time to

time. The appointing organization shall designate, revoke, or change its liaison on the GNSO Council by providing written notice to the Chair of the GNSO Council and to the ICANN Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO Council.

2. Subject to the provisions of the [Transition Article XX, and Section 5 of these Bylaws](#), the regular term of each GNSO Council member shall begin at the conclusion of an ICANN annual meeting and shall end at the conclusion of the second ICANN annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a “special circumstance,” such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A “special circumstance” is defined in the GNSO Operating Procedures.

3. A vacancy on the GNSO Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position

before the vacancy occurred by giving the GNSO Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO Council member selected by the Nominating Committee may be removed for cause: i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see [Section 3\(8\) of this Article](#)). Such removal shall be subject to reversal by the ICANN Board on appeal by the affected GNSO Council member.

4. The GNSO Council is responsible for managing the policy development process of the GNSO. It shall adopt such procedures (the “GNSO Operating Procedures”) as it sees fit to carry out that responsibility, provided that such procedures are approved by a majority vote of each House. The GNSO Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO Council, the applicable procedures shall be as set forth in [Section 6 of this Article](#).

5. No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO Council at any given time.

6. The GNSO shall make selections to fill Seats 13 and 14 on the ICANN Board by written ballot or by action at a meeting. Each of the two voting Houses of the GNSO, as described in [Section 3\(8\) of this Article](#), shall make a selection to fill one of two ICANN Board seats, as outlined below; any such selection must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

a. the Contracted Party House shall select a representative to fill Seat 13; and

b. the Non-Contracted Party House shall select a representative to fill Seat 14

Election procedures are defined in the GNSO Operating Procedures.

Notification of the Board seat selections shall be given by the GNSO

Chair in writing to the ICANN Secretary, consistent with Article VI, Sections 8(4) and 12(1).

7. The GNSO Council shall select the GNSO Chair for a term the GNSO Council specifies, but not longer than one year. Each House (as described in [Section 3.8 of this Article](#)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO Council, for a term the GNSO Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO Operating Procedures. In the event that the GNSO Council has not elected a GNSO Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO Co-Chairs until a successful election can be held.

8. Except as otherwise required in these Bylaws, for voting purposes, the GNSO Council (see [Section 3\(1\) of this Article](#)) shall be organized into a bicameral House structure as described below:

a. the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN Nominating Committee for a total of seven voting members; and

b. the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO Council.

9. Except as otherwise specified in these Bylaws, [Annex A](#) hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO actions:

a. Create an Issues Report: requires an affirmative vote of more

- than 25% vote of each House or majority of one House;
- b. Initiate a Policy Development Process (“PDP”) Within Scope (as described in [Annex A](#)): requires an affirmative vote of more than 33% of each House or more than 66% of one House;
- c. Initiate a PDP Not Within Scope: requires an affirmative vote of more than 75% of one House and a majority of the other House (“GNSO Supermajority”);
- d. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation;
- e. Approve a PDP Recommendation With a GNSO Supermajority: requires an affirmative vote of a GNSO Supermajority; and
- f. Approve a PDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that “a two-thirds vote of the council” demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded with respect to any contracting party affected by such contract provision.

#### Section 4. STAFF SUPPORT AND FUNDING

1. A member of the ICANN staff shall be assigned to support the GNSO, whose work on substantive matters shall be assigned by the Chair of the GNSO Council, and shall be designated as the GNSO Staff Manager (Staff Manager).
2. ICANN shall provide administrative and operational support necessary for the GNSO to carry out its responsibilities. Such support shall not include an obligation for ICANN to fund travel expenses incurred by GNSO participants for travel to any meeting of the GNSO or for any other purpose. ICANN may, at its discretion, fund travel expenses for GNSO participants under any travel support procedures or guidelines that it may adopt from time to time.

## Section 5. STAKEHOLDER GROUPS

1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the [Transition Article XX, Section 5 of these Bylaws](#):

a. Registries Stakeholder Group representing all gTLD registries under contract to ICANN;

b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN;

c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and

d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with [Section 3\(1\) of this Article](#).

3. Each Stakeholder Group identified in [paragraph 1 of this Section](#) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

4. Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

a. A detailed explanation of why the addition of such a



Constituency will improve the ability of the GNSO to carry out its policy-development responsibilities;

b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;

c. A recommendation for organizational placement within a particular Stakeholder Group; and

d. A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

5. The Board may create new Constituencies as described in [Section 5\(3\)](#) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN. In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

## **Section 6. POLICY DEVELOPMENT PROCESS**

The policy-development procedures to be followed by the GNSO shall be as stated in [Annex A](#) to these Bylaws. These procedures may be supplemented or revised in the manner stated in [Section 3\(4\) of this Article](#).

## **ARTICLE XI: ADVISORY COMMITTEES**

### **Section 1. GENERAL**

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may

also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.

## **Section 2. SPECIFIC ADVISORY COMMITTEES**

There shall be at least the following Advisory Committees:

### 1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

b. Membership in the Governmental Advisory Committee shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee through its Chair.

c. The Governmental Advisory Committee may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

d. The chair of the Governmental Advisory Committee shall be elected by the members of the Governmental Advisory Committee pursuant to procedures adopted by such members.

e. Each member of the Governmental Advisory Committee shall appoint one accredited representative to the Committee. The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

g. The Governmental Advisory Committee may designate a non-voting liaison to each of the Supporting Organization Councils and Advisory Committees, to the extent the Governmental Advisory Committee deems it appropriate and useful to do so.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

## 2. Security and Stability Advisory Committee

a. The role of the Security and Stability Advisory Committee (“SAC”) is to advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

1. To develop a security framework for Internet naming and address allocation services that defines the key focus areas, and identifies where the responsibilities for each area lie. The committee shall focus on the operational considerations of critical naming infrastructure.

2. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS and address allocation and those engaged in operations planning.

3. To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN community accordingly. The Committee shall recommend any necessary audit activity to assess the current status of DNS and address allocation security in relation to identified risks and threats.

4. To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF, RSSAC, RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The Committee shall monitor these activities and inform the ICANN community and Board on their progress, as appropriate.

5. To report periodically to the Board on its activities.

6. To make policy recommendations to the ICANN community and Board.

b. The SAC's chair and members shall be appointed by the Board.

c. The SAC shall annually appoint a non-voting liaison to the ICANN Board according to [Section 9 of Article VI](#).

### 3. Root Server System Advisory Committee

a. The role of the Root Server System Advisory Committee (“RSSAC”) shall be to advise the Board about the operation of the root name servers of the domain name system. The RSSAC shall consider and provide advice on the operational requirements of root name servers, including host hardware capacities, operating systems and name server software versions, network connectivity and physical environment. The RSSAC shall examine and advise on the security aspects of the root name server system. Further, the RSSAC shall review the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.

b. Membership in the RSSAC shall consist of (i) each operator of an authoritative root name server (as listed at <ftp://ftp.internic.net/domain/named.root>), and (ii) such other persons as are appointed by the ICANN Board.

c. The initial chairman of the DNS Root Server System Advisory Committee shall be appointed by the Board; subsequent chairs shall be elected by the members of the DNS Root Server System Advisory Committee pursuant to procedures adopted by the members.

d. The Root Server System Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on re-appointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

#### 4. At-Large Advisory Committee

a. The role of the At-Large Advisory Committee (“ALAC”) shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users.

b. The ALAC shall consist of (i) two members selected by each of the Regional At-Large Organizations (“RALOs”) established according to paragraph 4(g) of this Section, and (ii) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 5 of Article VI.

c. Subject to the provisions of the Transition Article of these Bylaws, the regular terms of members of the ALAC shall be as follows:

1. The term of one member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an even-numbered year.

2. The term of the other member selected by each RALO shall begin at the conclusion of an ICANN annual meeting in an odd-numbered year.

3. The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.

4. The regular term of each member shall end at the conclusion of the second ICANN annual meeting after the term began.

d. The Chair of the ALAC shall be elected by the members of the ALAC pursuant to procedures adopted by the Committee.

e. The ALAC shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on re-appointment, and shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region, as defined according to [Section 5 of Article VI](#)) to the Nominating Committee.

f. Subject to the provisions of the [Transition Article of these Bylaws](#), the At-Large Advisory Committee may designate non-voting liaisons to each of the ccNSO Council and the GNSO Council.

g. There shall be one RALO for each Geographic Region established according to [Section 5 of Article VI](#). Each RALO shall serve as the main forum and coordination point for public input to ICANN in its Geographic Region and shall be a non-profit organization certified by ICANN according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee. An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN addressing the respective roles and responsibilities of ICANN and the RALO regarding the process for selecting ALAC members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures.

h. Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN according to [paragraph 4\(i\) of this Section](#). If so provided by its Memorandum of Understanding with ICANN, a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

i. Membership in the At-Large Community

1. The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC and shall be stated in the Memorandum of Understanding between ICANN and the RALO for each

Geographic Region.

2. The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region (as defined in [Section 5 of Article VI](#)) of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.
  3. Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.
  4. To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.
  5. Once the criteria and standards have been established as provided in this Clause i, the [ALAC](#), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.
  6. Decisions to certify or decertify an At-Large Structure shall be made as decided by the [ALAC](#) in its Rules of Procedure, save always that any changes made to the Rules of Procedure in respect of [ALS](#) applications shall be subject to review by the RALOs and by the [ICANN Board](#).
  7. Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.
  8. On an ongoing basis, the [ALAC](#) may also give advice as to whether a prospective At-Large Structure meets the applicable criteria and standards.
- j. The [ALAC](#) is also responsible, working in conjunction with the



RALOs, for coordinating the following activities:

1. Keeping the community of individual Internet users informed about the significant news from ICANN;
2. Distributing (through posting or otherwise) an updated agenda, news about ICANN, and information about items in the ICANN policy-development process;
3. Promoting outreach activities in the community of individual Internet users;
4. Developing and maintaining on-going information and education programs, regarding ICANN and its work;
5. Establishing an outreach strategy about ICANN issues in each RALO's Region;
6. Making public, and analyzing, ICANN's proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;
7. Offering Internet-based mechanisms that enable discussions among members of At-Large structures; and
8. Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN decision-making, so interested individuals can share their views on pending ICANN issues.

### **Section 3. PROCEDURES**

Each Advisory Committee shall determine its own rules of procedure and quorum requirements.

### **Section 4. TERM OF OFFICE**

The chair and each member of a committee shall serve until his or her successor is appointed, or until such committee is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the committee.

### **Section 5. VACANCIES**

Vacancies on any committee shall be filled in the same manner as provided in the case of original appointments.

### **Section 6. COMPENSATION**

Committee members shall receive no compensation for their services as a member of a committee. The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by committee members, including Directors, performing their duties as committee members.

## **ARTICLE XI-A: OTHER ADVISORY MECHANISMS**

### **Section 1. EXTERNAL EXPERT ADVICE**

1. Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN. In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

2. Types of Expert Advisory Panels.

a. On its own initiative or at the suggestion of any ICANN body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of [Section 1\(3\)\(b\) of this Article](#) shall apply.

b. In addition, in accordance with [Section 1\(3\) of this Article](#), the Board may refer issues of public policy pertinent to matters within ICANN's mission to a multinational governmental or treaty organization.

### 3. Process for Seeking Advice-Public Policy Matters.

a. The Governmental Advisory Committee may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

b. In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

c. The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee, with the suggestion that the request be transmitted by the Governmental Advisory Committee to the multinational governmental or treaty organization.

4. Process for Seeking and Advice-Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with [Section 1\(2\)\(a\) of this Article](#) shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

5. Receipt of Expert Advice and its Effect. External advice pursuant to this Section shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities.

6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

## Section 2. TECHNICAL LIAISON GROUP

1. Purpose. The quality of ICANN's work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN's activities. ICANN's relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group (TLG) shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN's activities.

2. TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI), the International Telecommunications Union's Telecommunication Standardization Sector (ITU-T), the World Wide Web Consortium (W3C), and the Internet Architecture Board (IAB).

3. Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

a. In response to a request for information, to connect the Board or other ICANN body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

b. As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN's mission. This component of the TLG role covers circumstances in which ICANN is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

4. TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although

TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

5. Technical Work of the IANA. The TLG shall have no involvement with the IANA's work for the Internet Engineering Task Force, Internet Research Task Force, or the Internet Architecture Board, as described in the Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000.

6. Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN's activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN when ICANN does not ask a specific TLG organization directly.

7. Board Liaison and Nominating Committee Delegate. Annually, in rotation, one TLG organization shall appoint one non-voting liaison to the Board according to [Article VI, Section 9\(1\)\(d\)](#). Annually, in rotation, one TLG organization shall select one voting delegate to the ICANN Nominating Committee according to [Article VII, Section 2\(8\)\(j\)](#). The rotation order for the appointment of the non-voting liaison to the Board shall be ETSI, ITU-T, and W3C. The rotation order for the selection of the Nominating Committee delegate shall be W3C, ETSI, and ITU-T. (IAB does not participate in these rotations because the IETF otherwise appoints a non-voting liaison to the Board and selects a delegate to the ICANN Nominating Committee.)

## **ARTICLE XII: BOARD AND TEMPORARY COMMITTEES**

### **Section 1. BOARD COMMITTEES**

The Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board

shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all members of the Board; provided, however, that any Director or Directors which are the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required two-thirds (2/3) vote; and, provided further, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all members of the Board.

## Section 2. POWERS OF BOARD COMMITTEES

1. The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- a. The filling of vacancies on the Board or on any committee;
- b. The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- c. The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;
- d. The appointment of committees of the Board or the members thereof;
- e. The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CNPBCL;
- f. The approval of the annual budget required by [Article XVI](#); or
- g. The compensation of any officer described in [Article XIII](#).

2. The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings shall be governed by the

provisions of [Article VI](#) applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

### **Section 3. TEMPORARY COMMITTEES**

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

## **ARTICLE XIII: OFFICERS**

### **Section 1. OFFICERS**

The officers of ICANN shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN.

### **Section 2. ELECTION OF OFFICERS**

The officers of ICANN shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chairman of the ICANN Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

### **Section 3. REMOVAL OF OFFICERS**

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

### **Section 4. PRESIDENT**

The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The

President shall serve as an ex officio member of the Board, and shall have all the same rights and privileges of any Board member. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

#### **Section 5. SECRETARY**

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

#### **Section 6. CHIEF FINANCIAL OFFICER**

The Chief Financial Officer (“CFO”) shall be the chief financial officer of ICANN. If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN and shall keep or cause to be kept, in books belonging to ICANN, full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN. The CFO shall be responsible for ICANN's financial planning and forecasting and shall assist the President in the preparation of ICANN's annual budget. The CFO shall coordinate and oversee ICANN's funding, including any audits or other reviews of ICANN or its Supporting Organizations. The CFO shall be responsible for all other matters relating to the financial operation of ICANN.

#### **Section 7. ADDITIONAL OFFICERS**

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

#### **Section 8. COMPENSATION AND EXPENSES**

The compensation of any Officer of ICANN shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of



Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

### **Section 9. CONFLICTS OF INTEREST**

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN.

### **ARTICLE XIV: INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS**

ICANN shall, to maximum extent permitted by the CNPBCL, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN, provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN's best interests and not criminal. For purposes of this Article, an "agent" of ICANN includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (including a member of any Supporting Organization, any Advisory Committee, the Nominating Committee, any other ICANN committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN would have the power to indemnify the agent against that liability under the provisions of this Article.

### **ARTICLE XV: GENERAL PROVISIONS**

#### **Section 1. CONTRACTS**

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind

ICANN or to render it liable for any debts or obligations.

### **Section 2. DEPOSITS**

All funds of ICANN not otherwise employed shall be deposited from time to time to the credit of ICANN in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

### **Section 3. CHECKS**

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN shall be signed by such Officer or Officers, agent or agents, of ICANN and in such a manner as shall from time to time be determined by resolution of the Board.

### **Section 4. LOANS**

No loans shall be made by or to ICANN and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN to its Directors or Officers.

## **ARTICLE XVI: FISCAL MATTERS**

### **Section 1. ACCOUNTING**

The fiscal year end of ICANN shall be determined by the Board.

### **Section 2. AUDIT**

At the end of the fiscal year, the books of ICANN shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

### **Section 3. ANNUAL REPORT AND ANNUAL STATEMENT**

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement and a description of any payments made by ICANN to Directors (including reimbursements of expenses). ICANN shall cause the annual report and the annual statement of certain transactions as required by the CNPBCL to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN's fiscal year.

### **Section 4. ANNUAL BUDGET**

At least forty-five (45) days prior to the commencement of each fiscal year, the President shall prepare and submit to the Board, a proposed annual budget of ICANN for the next fiscal year, which shall be posted on the Website. The proposed budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item. The Board shall adopt an annual budget and shall publish the adopted Budget on the Website.

## **Section 5. FEES AND CHARGES**

The Board may set fees and charges for the services and benefits provided by ICANN, with the goal of fully recovering the reasonable costs of the operation of ICANN and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN. Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

## **ARTICLE XVII: MEMBERS**

ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law (“CNPBCL”), notwithstanding the use of the term “Member” in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.

## **ARTICLE XVIII: OFFICES AND SEAL**

### **Section 1. OFFICES**

The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

### **Section 2. SEAL**

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

## **ARTICLE XIX: AMENDMENTS**

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

## ARTICLE XX: TRANSITION ARTICLE

### Section 1. PURPOSE

This Transition Article sets forth the provisions for the transition from the processes and structures defined by the ICANN Bylaws, as amended and restated on 29 October 1999 and amended through 12 February 2002 (the “[Old Bylaws](#)”), to the processes and structures defined by the Bylaws of which this Article is a part (the “[New Bylaws](#)”). [Explanatory Note (dated 10 December 2009): For Section 5(3) of this Article, reference to the Old Bylaws refers to the Bylaws as amended and restated through to 20 March 2009.]

### Section 2. BOARD OF DIRECTORS

1. For the period beginning on the adoption of this Transition Article and ending on the Effective Date and Time of the New Board, as defined in [paragraph 5 of this Section 2](#), the Board of Directors of the Corporation (“Transition Board”) shall consist of the members of the Board who would have been Directors under the Old Bylaws immediately after the conclusion of the annual meeting in 2002, except that those At-Large members of the Board under the Old Bylaws who elect to do so by notifying the Secretary of the Board on 15 December 2002 or in writing or by e-mail no later than 23 December 2002 shall also serve as members of the Transition Board. Notwithstanding the provisions of [Article VI, Section 12 of the New Bylaws](#), vacancies on the Transition Board shall not be filled. The Transition Board shall not have liaisons as provided by [Article VI, Section 9 of the New Bylaws](#). The Board Committees existing on the date of adoption of this Transition Article shall continue in existence, subject to any change in Board Committees or their membership that the Transition Board may adopt by resolution.

2. The Transition Board shall elect a Chair and Vice-Chair to serve until the Effective Date and Time of the New Board.

3. The “New Board” is that Board described in [Article VI, Section 2\(1\) of the New Bylaws](#).

4. Promptly after the adoption of this Transition Article, a Nominating Committee shall be formed including, to the extent feasible, the delegates and liaisons described in [Article VII, Section 2 of the New Bylaws](#), with terms to end at the conclusion of the ICANN annual meeting in 2003. The Nominating Committee shall proceed without

delay to select Directors to fill Seats 1 through 8 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for those Seats in [Article VI, Section 8\(1\)\(a\)-\(c\) of the New Bylaws](#), and shall give the ICANN Secretary written notice of that selection.

5. The Effective Date and Time of the New Board shall be a time, as designated by the Transition Board, during the first regular meeting of ICANN in 2003 that begins not less than seven calendar days after the ICANN Secretary has received written notice of the selection of Directors to fill at least ten of Seats 1 through 14 on the New Board. As of the Effective Date and Time of the New Board, it shall assume from the Transition Board all the rights, duties, and obligations of the ICANN Board of Directors. Subject to Section 4 of this Article, the Directors ([Article VI, Section 2\(1\)\(a\)-\(d\)](#)) and non-voting liaisons ([Article VI, Section 9](#)) as to which the ICANN Secretary has received notice of selection shall, along with the President ([Article VI, Section 2\(1\)\(e\)](#)), be seated upon the Effective Date and Time of the New Board, and thereafter any additional Directors and non-voting liaisons shall be seated upon the ICANN Secretary's receipt of notice of their selection.

6. The New Board shall elect a Chairman and Vice-Chairman as its first order of business. The terms of those Board offices shall expire at the end of the annual meeting in 2003.

7. Committees of the Board in existence as of the Effective Date and Time of the New Board shall continue in existence according to their existing charters, but the terms of all members of those committees shall conclude at the Effective Date and Time of the New Board. Temporary committees in existence as of the Effective Date and Time of the New Board shall continue in existence with their existing charters and membership, subject to any change the New Board may adopt by resolution.

8. In applying the term-limitation provision of [Section 8\(5\) of Article VI](#), a Director's service on the Board before the Effective Date and Time of the New Board shall count as one term.

### **Section 3. ADDRESS SUPPORTING ORGANIZATION**

The Address Supporting Organization shall continue in operation according to the provisions of the [Memorandum of Understanding originally entered on 18 October 1999](#) between ICANN and a group of regional Internet registries

(RIRs), and [amended in October 2000](#), until a replacement Memorandum of Understanding becomes effective. Promptly after the adoption of this Transition Article, the Address Supporting Organization shall make selections, and give the ICANN Secretary written notice of those selections, of:

1. Directors to fill Seats 9 and 10 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for each of those Seats in [Article VI, Section 8\(1\)\(d\) and \(e\) of the New Bylaws](#); and
2. the delegate to the Nominating Committee selected by the Council of the Address Supporting Organization, as called for in [Article VII, Section 2\(8\)\(f\) of the New Bylaws](#).

With respect to the ICANN Directors that it is entitled to select, and taking into account the need for rapid selection to ensure that the New Board becomes effective as soon as possible, the Address Supporting Organization may select those Directors from among the persons it previously selected as ICANN Directors pursuant to the Old Bylaws. To the extent the Address Supporting Organization does not provide the ICANN Secretary written notice, on or before 31 March 2003, of its selections for Seat 9 and Seat 10, the Address Supporting Organization shall be deemed to have selected for Seat 9 the person it selected as an ICANN Director pursuant to the Old Bylaws for a term beginning in 2001 and for Seat 10 the person it selected as an ICANN Director pursuant to the Old Bylaws for a term beginning in 2002.

#### **Section 4. COUNTRY-CODE NAMES SUPPORTING ORGANIZATION**

1. Upon the enrollment of thirty ccTLD managers (with at least four within each Geographic Region) as members of the ccNSO, written notice shall be posted on the Website. As soon as feasible after that notice, the members of the initial ccNSO Council to be selected by the ccNSO members shall be selected according to the procedures stated in [Article IX, Section 4\(8\) and \(9\)](#). Upon the completion of that selection process, a written notice that the ccNSO Council has been constituted shall be posted on the Website. Three ccNSO Council members shall be selected by the ccNSO members within each Geographic Region, with one member to serve a term that ends upon the conclusion of the first ICANN annual meeting after the ccNSO Council is constituted, a second member to serve a term that ends upon the conclusion of the

second ICANN annual meeting after the ccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSO Council is constituted. (The definition of “ccTLD manager” stated in Article IX, Section 4(1) and the definitions stated in Article IX, Section 4(4) shall apply within this Section 4 of Article XX.)

2. After the adoption of Article IX of these Bylaws, the Nominating Committee shall select the three members of the ccNSO Council described in Article IX, Section 3(1)(b). In selecting three individuals to serve on the ccNSO Council, the Nominating Committee shall designate one to serve a term that ends upon the conclusion of the first ICANN annual meeting after the ccNSO Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN annual meeting after the ccNSO Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN annual meeting after the ccNSO Council is constituted. The three members of the ccNSO Council selected by the Nominating Committee shall not take their seats before the ccNSO Council is constituted.

3. Upon the ccNSO Council being constituted, the At-Large Advisory Committee and the Governmental Advisory Committee may designate one liaison each to the ccNSO Council, as provided by Article IX, Section 3(2)(a) and (b).

4. Upon the ccNSO Council being constituted, the Council may designate Regional Organizations as provided in Article IX, Section 5. Upon its designation, a Regional Organization may appoint a liaison to the ccNSO Council.

5. Until the ccNSO Council is constituted, Seats 11 and 12 on the New Board shall remain vacant. Promptly after the ccNSO Council is constituted, the ccNSO shall, through the ccNSO Council, make selections of Directors to fill Seats 11 and 12 on the New Board, with terms to conclude upon the commencement of the next regular term specified for each of those Seats in Article VI, Section 8(1)(d) and (f) of the New Bylaws, and shall give the ICANN Secretary written notice of its selections.

6. Until the ccNSO Council is constituted, the delegate to the Nominating Committee established by the New Bylaws designated to be selected by the ccNSO shall be appointed by the Transition Board or New Board, depending on which is in existence at the time any

particular appointment is required, after due consultation with members of the ccTLD community. Upon the ccNSO Council being constituted, the delegate to the Nominating Committee appointed by the Transition Board or New Board according to this Section 4(9) then serving shall remain in office, except that the ccNSO Council may replace that delegate with one of its choosing within three months after the conclusion of ICANN's annual meeting, or in the event of a vacancy. Subsequent appointments of the Nominating Committee delegate described in [Article VII, Section 2\(8\)\(c\)](#) shall be made by the ccNSO Council.

## Section 5. GENERIC NAMES SUPPORTING ORGANIZATION

1. The Generic Names Supporting Organization (“GNSO”), upon the adoption of this Transition Article, shall continue its operations; however, it shall be restructured into four new Stakeholder Groups which shall represent, organizationally, the former Constituencies of the GNSO, subject to ICANN Board approval of each individual Stakeholder Group Charter:

a. The gTLD Registries Constituency shall be assigned to the Registries Stakeholder Group;

b. The Registrars Constituency shall be assigned to the Registrars Stakeholder Group;

c. The Business Constituency shall be assigned to the Commercial Stakeholder Group;

d. The Intellectual Property Constituency shall be assigned to the Commercial Stakeholder Group;

e. The Internet Services Providers Constituency shall be assigned to the Commercial Stakeholder Group; and

f. The Non-Commercial Users Constituency shall be assigned to the Non-Commercial Stakeholder Group.

2. Each GNSO Constituency described in paragraph 1 of this



subsection shall continue operating substantially as before and no Constituency official, working group, or other activity shall be changed until further action of the Constituency, provided that each GNSO Constituency described in paragraph 1 (c-f) shall submit to the ICANN Secretary a new or revised Charter inclusive of its operating procedures, adopted according to the Constituency's processes and consistent with these Bylaws Amendments, no later than the ICANN meeting in October 2009, or another date as the Board may designate by resolution.

3. Prior to the commencement of the ICANN meeting in October 2009, or another date the Board may designate by resolution, the GNSO Council shall consist of its current Constituency structure and officers as described in [Article X, Section 3\(1\) of the Bylaws](#) (as amended and restated on 29 October 1999 and amended through 20 March 2009 (the "Old Bylaws")). Thereafter, the composition of the GNSO Council shall be as provided in these Bylaws, as they may be amended from time to time. All committees, task forces, working groups, drafting committees, and similar groups established by the GNSO Council and in existence immediately before the adoption of this Transition Article shall continue in existence with the same charters, membership, and activities, subject to any change by action of the GNSO Council or ICANN Board.

4. Beginning with the commencement of the ICANN Meeting in October 2009, or another date the Board may designate by resolution (the "Effective Date of the Transition"), the GNSO Council seats shall be assigned as follows:

a. The three seats currently assigned to the Registry Constituency shall be reassigned as three seats of the Registries Stakeholder Group;

b. The three seats currently assigned to the Registrar Constituency shall be reassigned as three seats of the Registrars Stakeholder Group;

c. The three seats currently assigned to each of the Business Constituency, the Intellectual Property Constituency, and the Internet Services Provider Constituency (nine total) shall be decreased to be six seats of the Commercial Stakeholder Group;

d. The three seats currently assigned to the Non-Commercial Users Constituency shall be increased to be six seats of the Non-

Commercial Stakeholder Group;

e. The three seats currently selected by the Nominating Committee shall be assigned by the Nominating Committee as follows: one voting member to the Contracted Party House, one voting member to the Non-Contracted Party House, and one non-voting member assigned to the GNSO Council at large.

Representatives on the GNSO Council shall be appointed or elected consistent with the provisions in each applicable Stakeholder Group Charter, approved by the Board, and sufficiently in advance of the October 2009 ICANN Meeting that will permit those representatives to act in their official capacities at the start of said meeting.

5. The GNSO Council, as part of its Restructure Implementation Plan, will document: (a) how vacancies, if any, will be handled during the transition period; (b) for each Stakeholder Group, how each assigned Council seat to take effect at the 2009 ICANN annual meeting will be filled, whether through a continuation of an existing term or a new election or appointment; (c) how it plans to address staggered terms such that the new GNSO Council preserves as much continuity as reasonably possible; and (d) the effect of Bylaws term limits on each Council member.

6. As soon as practical after the commencement of the ICANN meeting in October 2009, or another date the Board may designate by resolution, the GNSO Council shall, in accordance with [Article X, Section 3\(7\)](#) and its GNSO Operating Procedures, elect officers and give the ICANN Secretary written notice of its selections.

## **Section 6. PROTOCOL SUPPORTING ORGANIZATION**

The [Protocol Supporting Organization referred to in the Old Bylaws](#) is discontinued.

## **Section 7. ADVISORY COMMITTEES AND TECHNICAL LIAISON GROUP**

1. Upon the adoption of the New Bylaws, the Governmental Advisory Committee shall continue in operation according to its existing operating principles and practices, until further action of the committee. The Governmental Advisory Committee may designate liaisons to serve with

other ICANN bodies as contemplated by the New Bylaws by providing written notice to the ICANN Secretary. Promptly upon the adoption of this Transition Article, the Governmental Advisory Committee shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2 of the New Bylaws](#).

2. The organizations designated as members of the Technical Liaison Group under [Article XI-A, Section 2\(2\) of the New Bylaws](#) shall each designate the two individual technical experts described in [Article XI-A, Section 2\(6\) of the New Bylaws](#), by providing written notice to the ICANN Secretary. As soon as feasible, the delegate from the Technical Liaison Group to the Nominating Committee shall be selected according to [Article XI-A, Section 2\(7\) of the New Bylaws](#).

3. Upon the adoption of the New Bylaws, the [Security and Stability Advisory Committee](#) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the [Security and Stability Advisory Committee](#) shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2\(4\) of the New Bylaws](#).

4. Upon the adoption of the New Bylaws, the [Root Server System Advisory Committee](#) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the [Root Server Advisory Committee](#) shall notify the ICANN Secretary of the person selected as its delegate to the Nominating Committee, as set forth in [Article VII, Section 2\(3\) of the New Bylaws](#).

5. [At-Large Advisory Committee](#)

a. There shall exist an Interim At-Large Advisory Committee until such time as ICANN recognizes, through the entry of a Memorandum of Understanding, all of the Regional At-Large Organizations (RALOs) identified in [Article XI, Section 2\(4\) of the New Bylaws](#). The Interim At-Large [Advisory Committee](#) shall be composed of (i) ten individuals (two from each ICANN region) selected by the ICANN Board following nominations by the At-Large Organizing Committee and (ii) five additional individuals (one from each ICANN region) selected by the initial Nominating Committee as soon as feasible in accordance with the principles

established in [Article VII, Section 5 of the New Bylaws](#). The initial Nominating Committee shall designate two of these individuals to serve terms until the conclusion of the ICANN annual meeting in 2004 and three of these individuals to serve terms until the conclusion of the ICANN annual meeting in 2005.

b. Upon the entry of each RALO into such a Memorandum of Understanding, that entity shall be entitled to select two persons who are citizens and residents of that Region to be members of the At-Large Advisory Committee established by [Article XI, Section 2\(4\) of the New Bylaws](#). Upon the entity's written notification to the ICANN Secretary of such selections, those persons shall immediately assume the seats held until that notification by the Interim At-Large Advisory Committee members previously selected by the Board from the RALO's region.

c. Upon the seating of persons selected by all five RALOs, the Interim At-Large Advisory Committee shall become the At-Large Advisory Committee, as established by [Article XI, Section 2\(4\) of the New Bylaws](#). The five individuals selected to the Interim At-Large Advisory Committee by the Nominating Committee shall become members of the At-Large Advisory Committee for the remainder of the terms for which they were selected.

d. Promptly upon its creation, the Interim At-Large Advisory Committee shall notify the ICANN Secretary of the persons selected as its delegates to the Nominating Committee, as set forth in [Article VII, Section 2\(6\) of the New Bylaws](#).

## **Section 8. OFFICERS**

ICANN officers (as defined in [Article XIII of the New Bylaws](#)) shall be elected by the then-existing Board of ICANN at the annual meeting in 2002 to serve until the annual meeting in 2003.

## **Section 9. GROUPS APPOINTED BY THE PRESIDENT**

Notwithstanding the adoption or effectiveness of the New Bylaws, task forces and other groups appointed by the ICANN President shall continue unchanged in membership, scope, and operation until changes are made by the President.

## Section 10. CONTRACTS WITH ICANN

Notwithstanding the adoption or effectiveness of the New Bylaws, all agreements, including employment and consulting agreements, entered by ICANN shall continue in effect according to their terms.

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### Annex A: GNSO Policy-Development Process

The following process shall govern the GNSO policy development process (“PDP”) until such time as modifications are recommended to and approved by the ICANN Board of Directors (“Board”). [Note: this Annex includes amendments that were needed on an interim basis to allow the GNSO to operate while community and Board discussions continue on revised policy development and operating procedures].

#### 1. Raising an Issue

An issue may be raised for consideration as part of the PDP by any of the following:

- a. *Board Initiation.* The Board may initiate the PDP by instructing the GNSO Council (“Council”) to begin the process outlined in this Annex.
- b. *Council Initiation.* The GNSO Council may initiate the PDP by a vote of at least twenty-five percent (25%) of the members of the Council of each House or a majority of one House.
- c. *Advisory Committee Initiation.* An Advisory Committee may raise an issue for policy development by action of such committee to commence the PDP, and transmission of that request to the GNSO Council.

#### 2. Creation of the Issue Report

Within fifteen (15) calendar days after receiving either (i) an instruction from the Board; (ii) a properly supported motion from a Council member; or (iii) a properly supported motion from an Advisory Committee, the Staff Manager will create a report (an “Issue Report”). Each Issue Report shall contain at least the following:

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- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;
- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP;
- e. A recommendation from the Staff Manager as to whether the Council should initiate the PDP for this issue (the “Staff Recommendation”). Each Staff Recommendation shall include the opinion of the ICANN General Counsel regarding whether the issue proposed to initiate the PDP is properly within the scope of the ICANN policy process and within the scope of the GNSO. In determining whether the issue is properly within the scope of the ICANN policy process, the General Counsel shall examine whether such issue:

1. is within the scope of ICANN's mission statement;
2. is broadly applicable to multiple situations or organizations;
3. is likely to have lasting value or applicability, albeit with the need for occasional updates;
4. will establish a guide or framework for future decision-making;  
or
5. implicates or affects an existing ICANN policy.

- f. On or before the fifteen (15) day deadline, the Staff Manager shall distribute the Issue Report to the full Council for a vote on whether to initiate the PDP, as discussed below.

### **3. Initiation of PDP**

The Council shall initiate the PDP as follows:

- a. *Issue Raised by the Board.* If the Board directs the Council to initiate the PDP, then the Council shall meet and do so within fifteen (15) calendar days after receipt of the Issue Report, with no intermediate

vote of the Council.

b. *Issue Raised by Other than by the Board.* If a policy issue is presented to the Council for consideration via an Issue Report, then the Council shall meet within fifteen (15) calendar days after receipt of such Report to vote on whether to initiate the PDP. Such meeting may be convened in any manner deemed appropriate by the Council, including in person, via conference call or via electronic mail.

c. *Vote of the Council.* A vote of more than 33% of the Council members of each House or more than 66% vote of one House in favor of initiating the PDP within scope will suffice to initiate the PDP; unless the Staff Recommendation stated that the issue is not properly within the scope of the ICANN policy process or the GNSO, in which case a GNSO Supermajority Vote as set forth in [Article X, Section 3, paragraph 9\(c\)](#) in favor of initiating the PDP will be required to initiate the PDP.

#### **4. Commencement of the PDP**

At the meeting of the Council initiating the PDP, the Council shall decide, by a majority vote of members of each House, whether to appoint a task force to address the issue. If the Council votes:

a. In favor of convening a task force, it shall do so in accordance with the provisions of [Item 7 below](#).

b. Against convening a task force, then it will collect information on the policy issue in accordance with the provisions of [Item 8 below](#).

#### **5. Composition and Selection of Task Forces**

a. Upon voting to appoint a task force, the Council shall invite each of the Constituencies and/or Stakeholder Groups of the GNSO to appoint one individual to participate in the task force. Additionally, the Council may appoint up to three outside advisors to sit on the task force. (Each task force member is referred to in this Annex as a "Representative" and collectively, the "Representatives"). The Council may increase the number of Representatives per Constituency or Stakeholder Group that may sit on a task force in its discretion in circumstances that it deems

necessary or appropriate.

b. Any Constituency or Stakeholder Group wishing to appoint a Representative to the task force must submit the name of the Constituency or Stakeholder Group designee to the Staff Manager within ten (10) calendar days after such request in order to be included on the task force. Such designee need not be a member of the Council, but must be an individual who has an interest, and ideally knowledge and expertise, in the area to be developed, coupled with the ability to devote a substantial amount of time to task force activities.

c. The Council may also pursue other options that it deems appropriate to assist in the PDP, including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Staff Manager within thirty-five (35) calendar days after initiation of the PDP.

## **6. Public Notification of Initiation of the PDP**

After initiation of the PDP, ICANN shall post a notification of such action to the Website. A public comment period shall be commenced for the issue for a period of twenty (20) calendar days after initiation of the PDP. The Staff Manager, or some other designated representative of ICANN shall review the public comments and incorporate them into a report (the "Public Comment Report") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

## **7. Task Forces**

a. *Role of Task Force.* If a task force is created, its role will generally be to (i) gather information detailing the positions of the Stakeholder Groups and the formal constituencies and provisional constituencies, if any, within the GNSO; and (ii) otherwise obtain relevant information that will enable the Task Force Report to be as complete and informative as possible.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that will document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.



b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Staff Manager, shall develop a charter or terms of reference for the task force (the "Charter") within ten (10) calendar days after initiation of the PDP. Such Charter will include:

1. the issue to be addressed by the task force, as such issue was articulated for the vote before the Council that commenced the PDP;
2. the specific timeline that the task force must adhere to, as set forth below, unless the Board determines that there is a compelling reason to extend the timeline; and
3. any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of each house of the Council members.

c. *Appointment of Task Force Chair.* The Staff Manager shall convene the first meeting of the task force within five (5) calendar days after receipt of the Charter. At the initial meeting, the task force members will, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. *Collection of Information*

1. *Constituency and Stakeholder Group Statements.* The Representatives of the Stakeholder Groups will each be responsible for soliciting the position of their Stakeholder Groups or any of their constituencies, at a minimum, and other comments as each Representative deems appropriate, regarding the issue under consideration. This position and other comments, as applicable, should be submitted in a formal statement to the task

force chair (each, a "Constituency/Stakeholder Group Statement") within thirty-five (35) calendar days after initiation of the PDP. Every Constituency/Stakeholder Group Statement shall include at least the following:

(i) If a Supermajority Vote was reached, a clear statement of the constituency's or Stakeholder Group's position on the issue;

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by constituency or Stakeholder Group members;

(iii) A clear statement of how the constituency or Stakeholder Group arrived at its position(s). Specifically, the statement should detail specific constituency or Stakeholder Group meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) An analysis of how the issue would affect the constituency or Stakeholder Group, including any financial impact on the constituency or Stakeholder Group; and

(v) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force, should it deem it appropriate or helpful, may solicit the opinions of outside advisors, experts, or other members of the public, in addition to those of constituency or Stakeholder Group members. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (A) qualifications and relevant experience; and (B) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within thirty-five (35) calendar days after initiation of the PDP.

e. *Task Force Report.* The chair of the task force, working with the Staff Manager, shall compile the Constituency/Stakeholder Group Statements, Public Comment Report, and other information or reports,

as applicable, into a single document ("Preliminary Task Force Report") and distribute the Preliminary Task Force Report to the full task force within forty (40) calendar days after initiation of the PDP. The task force shall have a final task force meeting within five (5) days after the date of distribution of the Preliminary Task Force Report to deliberate the issues and try and reach a Supermajority Vote. Within five (5) calendar days after the final task force meeting, the chair of the task force and the Staff Manager shall create the final task force report (the "Task Force Report") and post it on the Comment Site. Each Task Force Report must include:

1. A clear statement of any Supermajority Vote position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the twenty-day timeline for submission of constituency or Stakeholder Group reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the constituency(ies) or Stakeholder Group(s) that held the position;
3. An analysis of how the issue would affect each constituency or Stakeholder Group of the task force, including any financial impact on the constituency or Stakeholder Group;
4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience; and (ii) potential conflicts of interest.

## **8. Procedure if No Task Force is Formed**

- a. If the Council decides not to convene a task force, the Council will request that, within ten (10) calendar days thereafter, each constituency or Stakeholder Group appoint a representative to solicit the

constituency's or Stakeholder Group's views on the issue. Each such representative shall be asked to submit a Constituency/Stakeholder Group Statement to the Staff Manager within thirty-five (35) calendar days after initiation of the PDP.

b. The Council may also pursue other options that it deems appropriate to assist in the PDP, including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Staff Manager within thirty-five (35) calendar days after initiation of the PDP.

c. The Staff Manager will take all Constituency/Stakeholder Group Statements, Public Comment Statements, and other information and compile (and post on the Comment Site) an Initial Report within fifty (50) calendar days after initiation of the PDP. Thereafter, the PDP shall follow the provisions of Item 9 below in creating a Final Report.

#### **9. Public Comments to the Task Force Report or Initial Report**

a. The public comment period will last for twenty (20) calendar days after posting of the Task Force Report or Initial Report. Any individual or organization may submit comments during the public comment period, including any Constituency or Stakeholder Group that did not participate in the task force. All comments shall be accompanied by the name of the author of the comments, the author's relevant experience, and the author's interest in the issue.

b. At the end of the twenty (20) day period, the Staff Manager will be responsible for reviewing the comments received and adding those deemed appropriate for inclusion in the Staff Manager's reasonable discretion to the Task Force Report or Initial Report (collectively, the "Final Report"). The Staff Manager shall not be obligated to include all comments made during the comment period, including each comment made by any one individual or organization.

c. The Staff Manager shall prepare the Final Report and submit it to the Council chair within ten (10) calendar days after the end of the public comment period.

#### **10. Council Deliberation**

a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for a Council meeting within ten (10) calendar days thereafter. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions or any other means the Council may choose. The deliberation process shall culminate in a formal Council meeting either in person or via teleconference, wherein the Council will work towards achieving a Successful GNSO Vote to present to the Board.

b. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) be accompanied by a detailed statement of the advisor's (x) qualifications and relevant experience; and (y) potential conflicts of interest.

## 11. Council Report to the Board

The Staff Manager will be present at the final meeting of the Council, and will have five (5) calendar days after the meeting to incorporate the views of the Council into a report to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

a. A clear statement of any Successful GNSO Vote recommendation of the Council;

b. If a Successful GNSO Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) or Stakeholder Group(s) that held the position;

c. An analysis of how the issue would affect each constituency or Stakeholder Group, including any financial impact on the constituency or Stakeholder Group;

d. An analysis of the period of time that would likely be necessary to implement the policy;

- e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest;
- f. The Final Report submitted to the Council; and
- g. A copy of the minutes of the Council deliberation on the policy issue, including the all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

## 12. Agreement of the Council

A. Successful GNSO Vote of the Council members will be deemed to reflect the view of the Council, and may be conveyed to the Board as the Council's recommendation. In the event a GNSO Supermajority Vote is not achieved, approval of the recommendations contained in the Final Report requires a majority of both houses and further requires that one representative of at least 3 of the 4 Stakeholder Groups supports the recommendations. Abstentions shall not be permitted; thus all Council members must cast a vote unless they identify a financial interest in the outcome of the policy issue. Notwithstanding the foregoing, as set forth above, all viewpoints expressed by Council members during the PDP must be included in the Board Report.

## 13. Board Vote

- a. The Board will meet to discuss the GNSO Council recommendation as soon as feasible after receipt of the Board Report from the Staff Manager.
- b. In the event that the Council reached a GNSO Supermajority Vote, the Board shall adopt the policy according to the GNSO Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN.
- c. In the event that the Board determines not to act in accordance with the GNSO Supermajority Vote recommendation, the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- d. The Council shall review the Board Statement for discussion with the

Board within twenty (20) calendar days after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

e. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for its current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than sixty-six (66%) percent of the Board determines that such policy is not in the interests of the ICANN community or ICANN.

f. In any case in which the Council is not able to reach GNSO Supermajority vote, a majority vote of the Board will be sufficient to act.

g. When a final decision on a GNSO Council Recommendation or Supplemental Recommendation is timely, the Board shall take a preliminary vote and, where practicable, will publish a tentative decision that allows for a ten (10) day period of public comment prior to a final decision by the Board.

#### **14. Implementation of the Policy**

Upon a final decision of the Board, the Board shall, as appropriate, give authorization or direction to the ICANN staff to take all necessary steps to implement the policy.

#### **15. Maintenance of Records**

Throughout the PDP, from policy suggestion to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each PDP issue, which will describe:

- a. The initial suggestion for a policy;
- b. A list of all suggestions that do not result in the creation of an Issue Report;
- c. The timeline to be followed for each policy;

- d. All discussions among the Council regarding the policy;
- e. All reports from task forces, the Staff Manager, the Council and the Board; and
- f. All public comments submitted.

## 16. Additional Definitions

"Comment Site" and "Website" refer to one or more web sites designated by ICANN on which notifications and comments regarding the PDP will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO Council.

"Staff Manager" means an ICANN staff person(s) who manages the PDP.

"GNSO Supermajority Vote" shall have the meaning set forth in the [Bylaws](#).

A "Successful GNSO Vote" is an affirmative vote of the GNSO Council that meets the relevant voting thresholds set forth in [Article X, Section 3\(9\)](#) including, without limitation, a GNSO Supermajority Vote.

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## Annex B: ccNSO Policy-Development Process (ccPDP)

The following process shall govern the ccNSO policy-development process ("PDP").

### 1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council*. The ccNSO Council (in this Annex B, the "Council") may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting



by e-mail.

b. *Board.* The ICANN Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.

c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

d. *ICANN Supporting Organization or Advisory Committee.* An ICANN Supporting Organization or an ICANN Advisory Committee may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

e. *Members of the ccNSO.* The members of the ccNSO may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

## **2. Creation of the Issue Report and Initiation Threshold**

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (in which case the costs of the Issue Manager shall be borne by ICANN) or such other person or persons selected by the Council (in which case the ccNSO shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;

c. How that party is affected by the issue;

d. Support for the issue to initiate the PDP;

e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP for this issue (the “Manager Recommendation”). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN General Counsel regarding whether the issue is properly within the scope of the ICANN policy process and within the scope of the ccNSO. In coming to his or her opinion, the General Counsel shall examine whether:

1) The issue is within the scope of ICANN's mission statement;

2) Analysis of the relevant factors according to [Article IX, Section 6\(2\)](#) and [Annex C](#) affirmatively demonstrates that the issue is within the scope of the ccNSO;

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

3) Implicates or affects an existing ICANN policy;

4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this [Annex B](#)) or to the scope of the ccNSO ([Annex C](#)) shall be within the scope of ICANN and the ccNSO.

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Article IX, Section 6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO shall inform the Issue Manager accordingly. General Counsel and the ccNSO Council shall engage in a dialogue

according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP, a proposed time line for conducting each of the stages of PDP outlined herein (PDP Time Line).

g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the ICANN Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP.

### **3. Initiation of PDP**

The Council shall decide whether to initiate the PDP as follows:

a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP. Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.

b. A vote of ten or more Council members in favor of initiating the PDP shall be required to initiate the PDP provided that the Issue Report states that the issue is properly within the scope of the ICANN mission statement and the ccNSO Scope.

### **4. Decision Whether to Appoint Task Force; Establishment of Time Line**

At the meeting of the Council where the PDP has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the

Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP Time Lineset out in the Issue Report.

## 5. Composition and Selection of Task Forces

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see [Article IX, Section 6](#)) to appoint two individuals to participate in the task force (the “Representatives”). Additionally, the Council may appoint up to three advisors (the “Advisors”) from outside the ccNSO and, following formal request for GAC participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP, including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP Time Line.

## 6. Public Notification of Initiation of the PDP and Comment Period

After initiation of the PDP, ICANN shall post a notification of such action to the Website and to the other ICANN Supporting Organizations and Advisory Committees. A comment period (in accordance with the PDP Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD managers, other Supporting Organizations, Advisory Committees, and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the “Comment Report”) to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

## 7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the “Charter”) within the time designated in the PDP Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP;
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and
3. Any specific instructions from the Council for the task force,

including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of [Article IX, Section 3\(14\)](#) shall apply to Council actions under this Item 7(b).

*c. Appointment of Task Force Chair.* The Issue Manager shall convene the first meeting of the task force within the time designated in the [PDP Time Line](#). At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

*d. Collection of Information.*

*1. Regional Organization Statements.* The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the [ccNSO](#) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a “Regional Statement”) within the time designated in the [PDP Time Line](#). Every Regional Statement shall include at least the following:

(i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;

(iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("Preliminary Task Force Report") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "Task Force Report") and post it on the Website and to the other ICANN Supporting Organizations and Advisory Committees. Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;
4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

## **8. Procedure if No Task Force is Formed**

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP, including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP Time Line.
- c. The Council shall formally request the Chair of the GAC to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP Time Line.



Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

## 9. Comments to the Task Force Report or Initial Report

a. A comment period (in accordance with the PDP Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD managers, other Supporting Organizations, Advisory Committees, and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.

b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "Final Report". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP Time Line.

## 10. Council Deliberation

a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC Chair an invitation to the GAC to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.

b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.

c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

## **11. Recommendation of the Council**

In considering whether to make a recommendation on the issue (a "Council Recommendation"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all viewpoints expressed by Council members during the PDP must be included in the Members Report.

## **12. Council Report to the Members**

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "Members Report"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

## **13. Members Vote**

Following the submission of the Members Report and within the time designated by the PDP Time Line, the ccNSO members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO members, will be employed if at least 50% of the ccNSO members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO Recommendation.

#### **14. Board Report**

The Issue Manager shall within seven days after a ccNSO Recommendation being made in accordance with Item 13 incorporate the ccNSO Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

#### **15. Board Vote**

- a. The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

1. In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the “Board Statement”); and (ii) submit the Board Statement to the Council.
2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's “Supplemental Recommendation”). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.
4. In the event that the Board does not accept the ccNSO Supplemental Recommendation, it shall state its reasons for doing so in its final decision (“Supplemental Board Statement”).
5. In the event the Board determines not to accept a ccNSO Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO shall, under the ccPDP, make a recommendation on the issue that is deemed

acceptable by the Board.

## **16. Implementation of the Policy**

Upon adoption by the Board of a ccNSO Recommendation or ccNSO Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN staff to implement the policy.

## **17. Maintenance of Records**

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

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## **Annex C: The Scope of the ccNSO**

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO's policy-development role. As provided in [Article IX, Section 6\(2\)](#) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO's authority and responsibilities must recognize the complex relation between ICANN and ccTLD managers/registries with regard to policy issues. This annex shall assist the ccNSO, the ccNSO Council, and the ICANN Board and staff in delineating relevant global policy issues.

### *Policy areas*

The ccNSO's policy role should be based on an analysis of the following functional model of the DNS:

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD name servers.

Within a TLD two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database (Data Entry Function) and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Name Server Function).

These two core functions must be performed at the ccTLD registry level as well as at a higher level (IANA function and root servers) and at lower levels of the DNS hierarchy. This mechanism, as RFC 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be

allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

### *The Core Functions*

#### 1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

(a) under which data will be collected and entered into a database or data changed (at the TLD level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.

(b) for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

#### 2. The Name-Server Function (NSF)

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC 1591.

### *Respective Roles with Regard to Policy, Responsibilities, and Accountabilities*

It is in the interest of ICANN and ccTLD managers to ensure the stable and proper functioning of the domain name system. ICANN and the ccTLD registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO cannot be established without reaching a common understanding of the allocation of authority

between ICANN and ccTLD registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO with regard to developing policies. The scope is limited to the policy role of the ccNSO policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

*Name Server Function (as to ccTLDs)*

Level 1: Root Name Servers

Policy role: IETF, RSSAC (ICANN)

Executive role: Root Server System Operators

Accountability role: RSSAC (ICANN), (US DoC-ICANN MoU)

Level 2: ccTLD Registry Name Servers in respect to interoperability

Policy role: ccNSO Policy Development Process (ICANN), for best practices a ccNSO process can be organized



Executive role: ccTLD Manager

Accountability role: part ICANN (IANA), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD Manager, IETF (RFC)

Executive role: Registrant

Accountability role: ccTLD Manager

*Data Entry Function (as to ccTLDs)*

Level 1: Root Level Registry

Policy role: ccNSO Policy Development Process (ICANN)

Executive role: ICANN (IANA)

Accountability role: ICANN community, ccTLD Managers, US DoC, (national authorities in some cases)

Level 2: ccTLD Registry

Policy role: Local Internet Community, including local government, and/or ccTLD Manager according to local structure

Executive role: ccTLD Manager

Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels

Policy role: Registrant

Executive role: Registrant

Accountability role: Registrant, users of lower-level domain names





<p><b>Who We Are</b></p> <ul style="list-style-type: none"> <li>Get Started</li> <li>Learning</li> <li>Participate</li> <li>Groups</li> <li>Board</li> <li>President's Corner</li> <li>Staff</li> <li>Careers</li> <li>Newsletter</li> <li>Development and Public Responsibility</li> </ul>	<p><b>Contact Us</b></p> <ul style="list-style-type: none"> <li>Offices</li> <li>Global Support</li> <li>Security Team</li> <li>PGP Keys</li> <li>Certificate Authority</li> <li>Registry Liaison</li> <li>Specific Reviews</li> <li>Organizational Reviews</li> <li>Request a Speaker For Journalists</li> </ul>	<p><b>Accountability &amp; Transparency</b></p> <ul style="list-style-type: none"> <li>Accountability Mechanisms</li> <li>Independent Review Process</li> <li>Request for Reconsideration</li> <li>Ombudsman</li> </ul>	<p><b>Governance</b></p> <ul style="list-style-type: none"> <li>Documents</li> <li>Agreements</li> <li>Specific Reviews</li> <li>Annual Report</li> <li>Financials</li> <li>Document Disclosure</li> <li>Planning</li> <li>KPI Dashboard</li> <li>RFPs</li> <li>Litigation</li> <li>Correspondence</li> </ul>	<p><b>Help</b></p> <ul style="list-style-type: none"> <li>Dispute Resolution</li> <li>Domain Name Dispute Resolution</li> <li>Name Collision</li> <li>Registrar Problems</li> <li>WHOIS</li> </ul>
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R-44

RESPONDENT'S EXHIBIT

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

ICM REGISTRY, LLC,	)	
	)	
Claimant,	)	
	)	
	)	ICDR Case No. _____
	)	
v.	)	
	)	
	)	
INTERNET CORPORATION FOR	)	
ASSIGNED NAMES AND NUMBERS,	)	
	)	
Respondent.	)	

**REQUEST FOR  
INDEPENDENT REVIEW PROCESS  
BY ICM REGISTRY, LLC**

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

*Counsel for Claimant*

## **I. INTRODUCTION**

1. Pursuant to Article 4 of the Bylaws for Internet Corporation for Assigned Names and Numbers, the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR”), and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, ICM Registry, LLC (“ICM”) hereby submits this Request for Independent Review Process with respect to a dispute between itself and the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. The dispute, as detailed below, arises out of ICANN’s improper (1) administration of its December 2003 Request for Proposals<sup>1</sup> (“RFP”) process for new, sponsored top-level domains (“sTLD”); and (2) rejection in March 2007 of ICM’s application to serve as the registry operator for the .XXX sTLD. ICANN’s administration of the RFP and its rejection of ICM’s application were arbitrary, lacking in transparency, and discriminatory. ICANN materially violated its Articles of Incorporation and Bylaws, as well as ICM’s rights under international law and applicable international conventions, and local law.

3. Reserving its rights to amend or supplement the relief requested herein, ICM respectfully requests the Independent Review Panel to grant the following:

- (1) Declare that ICANN’s administration of the RFP as it related to ICM’s application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN’s Articles of Incorporation and Bylaws;
- (2) Declare that ICANN’s repudiation of its previous determination that ICM’s application fulfilled the criteria for approval set forth in the RFP was inconsistent with ICANN’s Articles of Incorporation and Bylaws;

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<sup>1</sup> ICANN’s 15 December 2003 Request for Proposals for New Sponsored Top-Level Domains, which is the underlying contract in this dispute, is attached as Claimant’s Exhibit (“C-Exh.”) 1.

- (3) Declare that ICANN's rejection of ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws, resulting in substantial, unjustifiable, and unreasonable harm to ICM;
- (4) Declare that ICANN must immediately execute a registry agreement on terms and conditions substantially similar to ICM's draft registry agreement posted to the ICANN website on 16 February 2007 within thirty (30) days from the issuance of the Panel's declaration;
- (5) Declare that ICANN must pay compensation for all costs incurred by ICM in connection with its application to serve as the registry operator for the .XXX sTLD and this Request, including attorneys' fees and costs;
- (6) Declare ICM the prevailing party in this Independent Review Process;
- (7) Declare that the Panel's determination regarding whether any of ICANN's actions were inconsistent with ICANN's Articles of Incorporation and Bylaws is binding on ICANN; and
- (8) Make such other declarations, or grant such other relief, as the Panel may consider appropriate under the circumstances.

## **II. THE PARTIES' CONTACT INFORMATION**

### **A. Claimant**

4. The Claimant in this dispute is ICM Registry, LLC (previously defined as

"ICM"). ICM's contact details are as follows:

Stuart Lawley, Chairman and President  
ICM Registry, LLC  
1097 Jupiter Park Lane, Suite 3  
Jupiter, FL 33458

ICM is represented in these proceedings by:

Arif H. Ali  
John L. Murino  
Ashley R. Riveira  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Contact Information Redacted

Phone: 202.624.2500  
FAX: 202.628.5116

**B. Respondent**

5. The Respondent is the Internet Corporation for Assigned Names and Numbers

(previously defined as “ICANN”). ICANN’s address is:

Paul Twomey, CEO and President  
ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601  
[twomey@icann.org](mailto:twomey@icann.org)  
Phone: 310.823.9358  
FAX: 310.823.8649

Correspondence to ICANN may also be copied to:

John Jeffrey, General Counsel  
ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601  
[jeffrey@icann.org](mailto:jeffrey@icann.org)  
Phone: 310.823.9358  
FAX: 310.823.8649

**III. BACKGROUND OF THE INTERESTED PARTIES**

**A. ICM Registry, LLC**

6. Claimant, ICM, was established under the laws of the State of Delaware on 28 June 1999,<sup>2</sup> and has its principal place of business in Jupiter, Florida.<sup>3</sup> ICM was formed to serve as the registry operator for the proposed .XXX sTLD.

7. ICM has no affiliation with the adult entertainment industry. It does not, and has committed that it will not, develop, distribute, or sell adult entertainment. Instead, as a registry

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<sup>2</sup> Delaware, Department of State, Division of Corporations, ICM Entity Details, *available through* <https://sos-res.state.de.us/tin/GINameSearch.jsp> (search for “ICM Registry”; then follow “ICM Registry LLC” hyperlink) (last visited 5 June 2008).

<sup>3</sup> Although originally formed as a corporation, ICM Registry was reorganized into a limited liability company in 2005.

operator, its functions will be largely technical, and will involve providing the management, supporting infrastructure, and back-end functionality necessary for the proposed .XXX domain.

8. ICM is a well-funded, financially stable, privately owned company whose ownership and management team have significant experience and expertise in building and operating business infrastructures, including the creation of a field sales force, sales support teams, and the administrative and finance functions needed to run a successful domain. As owner-operators, ICM's management team is uniquely invested in the company's long term stability and success.

9. As discussed in further detail below, it is ICM's intention to serve as the registry operator for the .XXX domain, which will serve as a domain for members of the responsible online adult entertainment community who support and believe in the benefits of a system of self-identification. Websites in the .XXX domain will thus be clearly designated, empowering individuals wishing to select, avoid, or prevent access to such websites to do so easily. Additionally, by registering in the proposed .XXX domain, website operators would voluntarily commit to follow best practices to be developed in conjunction with the other impacted stakeholders. Among other benefits, such best practices would require that all sites be labeled with machine readable meta-tags to allow the effective use of filters. By promoting best practices through voluntary registration, responsible providers of online adult entertainment will be engaging in voluntary self-regulation. There is substantial industry support for the .XXX domain, as evidenced by the number of providers that have participated in ICM's pre-reservation program, which allows for applicants to reserve domain names in advance of the approval of the



sTLD application.<sup>4</sup>

**B. The International Foundation for Online Responsibility**

10. ICM sought to register the .XXX domain as a sponsored top-level domain, or sTLD, and therefore collaborated with a sponsoring organization to develop the plans for the domain.<sup>5</sup> The sponsoring organization for the proposed .XXX domain is The International Foundation for Online Responsibility (“IFFOR”), which will be responsible for overseeing the policy formulation for the proposed sTLD. IFFOR is a non-profit Canadian entity, with its principal place of business to be in Washington, D.C.<sup>6</sup> IFFOR’s incorporation was the product of a “four-year outreach campaign to educate and mobilize the responsible online adult-entertainment community.”<sup>7</sup> IFFOR is to be operated by a board of directors representing all stakeholders in the .XXX domain, including leaders of the responsible online adult entertainment industry, as well as child safety representatives and members of the free speech community.<sup>8</sup> Mr. Stuart Lawley will serve as chairman of both IFFOR and ICM.

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<sup>4</sup> At the time of the Board’s final action, on 30 March 2007, ICM had received more than 75,000 pre-reservations. To date, there are more than 100,000 pre-reservations.

<sup>5</sup> ICANN distinguishes between “unsponsored” and “sponsored” top level domains (“TLDs”) in the following manner: “Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.” ICANN, Top-Level Domains (gTLDs), available at <http://www.icann.org/tlds/> (last visited 5 June 2008) (“Top-Level Domains (gTLDs) Information Page”).

<sup>6</sup> ICM Registry, New sTLD RFP Application, submitted 16 Mar. 2004, available at <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm> (last visited 5 June 2008) (“ICM Application”); see also IFFOR Charter, available at [www.iffor.org](http://www.iffor.org) (last visited 5 June 2008).

<sup>7</sup> ICM Application.

<sup>8</sup> ICM Registry, The Voluntary Adult Top-Level Domain (TLD)–.XXX, available at [www.icmregistry.com](http://www.icmregistry.com) (last visited 5 June 2008).

11. As described in ICM's application, IFFOR has been tasked with formulating the policies for the proposed .XXX domain.<sup>9</sup> IFFOR's Bylaws were substantially modeled after ICANN's own Bylaws to ensure objectivity, transparency, and accountability. IFFOR's mission includes contributing funding towards developing programs and tools to combat child pornography and to promote child protection and parental awareness of online dangers, establishing a forum for the online adult entertainment community to communicate and proactively respond to the needs and concerns of the broader Internet community, and promoting freedom of expression online. Funding to carry out ICANN's mission will come from the registration fees collected for each individual domain name registered in the proposed .XXX domain. IFFOR is expected to contribute several million dollars per year to child protection and free expression initiatives.<sup>10</sup>

**C. Internet Corporation for Assigned Names and Numbers**

12. Respondent, ICANN, is a public benefit, non-profit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is headquartered in Marina del Rey, California.

13. ICANN was established "for the benefit of the Internet community as a whole" and is tasked with "carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law . . . ."<sup>11</sup> As set forth in

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<sup>9</sup> ICM Application.

<sup>10</sup> ICM Application. Specifically, ICM agreed to contribute US\$10 per domain name registered per year to IFFOR.

<sup>11</sup> Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Article 4, available at <http://www.icann.org/general/articles.htm> (last visited 5 June 2008) ("Articles of Incorporation"). Attached as C-Exh. 2.

its Bylaws,<sup>12</sup> the organization has a limited technical mission: “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”<sup>13</sup> Thus, ICANN’s core function is the technical management of the Internet’s Domain Name System (“DNS”), which includes coordinating the introduction of new Top-level Domains (“TLDs”). The DNS is a database of Internet names and addresses that correlates the “human-readable” computer names, websites, and email addresses made of letters and words with the “computer-readable” Internet Protocol (“IP”) addresses that computers actually use to locate information, but which consist of complicated and less user-friendly numerical strings. TLDs appear in the human-readable addresses, or domain names, as the string of letters—such as “.COM”, “.GOV”, “.ORG”, “.EDU”, and so on—following the rightmost “dot” in domain names. ICANN delegates responsibility for the operation of each TLD to a registry operator. In simple terms, ICANN coordinates the technical elements of the DNS to ensure that all Internet users can find all valid addresses. As a technical body, ICANN’s involvement in policy formulation is limited to “policy development reasonably and appropriately related to these technical functions.”<sup>14</sup>

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<sup>12</sup> ICANN’s Bylaws have been amended on numerous occasions throughout the events giving rise to this dispute, although the organization’s relevant principles, mission, and core values remain unchanged. *See generally* ICANN, Bylaws Archive, *available at* <http://www.icann.org/general/archive-bylaws> (last visited 5 June 2008). Any reference herein to ICANN’s Bylaws refers to the Bylaws that took effect on 28 February 2006 (unless otherwise expressly noted), these being the version of the Bylaws that were in effect when the ICANN Board voted to reject ICM’s application notwithstanding its previous determination that it met the RFP criteria. Attached as C-Exh. 3.

<sup>13</sup> Bylaws for Internet Corporation for Assigned Names and Numbers, Article I, § 1 (Mission), *available at* <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm> (last visited 5 June 2008) (“ICANN Bylaws”).

<sup>14</sup> *Id.*

14. ICANN is subject to international law, and it is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws, including objectivity, transparency, and accountability. Thus, by way of example, ICANN’s Bylaws specifically state that it “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment . . . .”<sup>15</sup> ICANN is also obligated to operate “in an open and transparent manner and consistent with procedures designed to ensure fairness”<sup>16</sup> and to “be accountable to the community for operating in a manner that is consistent with [the] Bylaws, and with due regard for the core values set forth” in the organization’s Bylaws.<sup>17</sup>

15. ICANN is managed by a Board of Directors (“Board”). The Board consists of 15 voting directors and six non-voting liaisons from around the globe, “who in the aggregate [are to] display diversity in geography, culture, skills, experience, and perspective.”<sup>18</sup> The voting directors are composed of: (1) six representatives of ICANN’s Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN’s purview; (2) eight independent representatives of the general public interest, currently selected through ICANN’s Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Notably, consistent with ICANN’s mandate to provide private sector technical leadership in the management of the DNS, “no official of a national government” may serve as a director.<sup>19</sup> ICANN’s day-to-day operations

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<sup>15</sup> *Id.* at Article II, § 3 (Non-Discriminatory Treatment).

<sup>16</sup> *Id.* at Article III, § 1 (Transparency).

<sup>17</sup> *Id.* at Article IV, § 1 (Purpose).

<sup>18</sup> *Id.* at Article VI, § 2 (Directors and Their Selection).

<sup>19</sup> *Id.* at Article VI, § 4 (Additional Qualifications).

are overseen by its President and CEO, who is supported by an international staff on several continents.<sup>20</sup>

16. Prior to ICANN's formation in 1998, DNS management was carried out under contractual arrangements with the United States Government. In recognizing ICANN, the United States Department of Commerce retained a limited "oversight" role to ensure the stability of the Internet and DNS during the transfer of DNS management responsibilities to the private sector.<sup>21</sup>

17. In addition to the formal oversight of the Department of Commerce, the Board receives input from a number of Supporting Organizations and Advisory Committees established by the Bylaws. There are three Supporting Organizations: the Generic Names Supporting Organization ("GNSO"), which contributes to policy making for generic top-level domains ("gTLDs"); the Country Code Names Supporting Organization ("ccNSO"), which contributes to policy making for country-code top-level domains ("ccTLDs"); and the Address Supporting Organization ("ASO"), which contributes to policy making for Internet Protocol addresses.<sup>22</sup>

18. The Board also receives input from several Advisory Committees, which provide advice on the interests and needs of stakeholders that do not participate directly in the Supporting Organizations described above. These include: (1) the Governmental Advisory Committee

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<sup>20</sup> See ICANN: The Global Internet Community Working Together to Promote the Stability and Integrity of the Internet, *available at* <http://www.icann.org/tr/english.html> (last visited 5 June 2008).

<sup>21</sup> Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, originally executed 25 Nov. 1998, *available at* <http://www.icann.org/general/icann-mou-25nov98.htm> (last visited 5 June 2008) ("[T]he [Department of Commerce] agrees to . . . [p]rovide general oversight of activities conducted pursuant to this Agreement.").

<sup>22</sup> See generally ICANN Bylaws, Articles VIII-X.

(“GAC”), which is composed of representatives of a number of national governments, distinct economies, and multinational government organizations and treaty organizations (as observers); (2) the At-Large Advisory Committee, which is composed of representatives of organizations of individual Internet users from around the world; (3) the Root Server System Advisory Committee, which is composed of representatives providing advice on the operation of the DNS root server system; and (4) the Security and Stability Advisory Committee, which is composed of Internet experts who study security issues pertaining to ICANN’s mandate.<sup>23</sup> The Bylaws also establish the Technical Liaison Group, which is composed of representatives of other international technical Internet standard-setting bodies.<sup>24</sup> Of these advisory bodies, it is the GAC that is the most relevant to the present dispute.

19. The formal purpose of the GAC is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”<sup>25</sup> The GAC is permitted to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”<sup>26</sup> The GAC is

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<sup>23</sup> See generally ICANN Bylaws, Article XI (Advisory Committees).

<sup>24</sup> See generally ICANN Bylaws, Article XI-A (Other Advisory Mechanisms).

<sup>25</sup> *Id.* at Article XI, § 2(1) (Governmental Advisory Committee); see also Governmental Advisory Committee Operating Principles, Article I, as amended Apr. 2005, available at [http://gac.icann.org/web/home/GAC\\_Operating\\_Principles.doc](http://gac.icann.org/web/home/GAC_Operating_Principles.doc) (last visited 5 June 2008) (“GAC Operating Principles”).

<sup>26</sup> ICANN Bylaws, Article XI, § 2(1)(i) (Governmental Advisory Committee).

not a decision-making body,<sup>27</sup> and has no authority to act for ICANN.<sup>28</sup> The Chairman of the GAC serves as a non-voting liaison to the ICANN Board.<sup>29</sup>

20. ICANN's Bylaws state that the Board shall "notify the Chair of the [GAC] in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action."<sup>30</sup>

21. The Board is not, however, required to follow the GAC's advice.<sup>31</sup> The Bylaws specifically contemplate action by the ICANN Board over the objections of or contrary to the advice of the GAC, by providing that "[i]n the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice," the Board is required to inform the GAC and "state the reasons why it decided not to follow that advice. The GAC and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."<sup>32</sup> However, if no solution can be found, the Board is fully authorized to act, and need only "state in its final decision the reasons why the [GAC's] advice was not followed."<sup>33</sup> Conversely, of course, actions by the ICANN Board do not impinge on the rights of sovereign governments to act in accordance with the rule of law in their respective jurisdictions.<sup>34</sup> The

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<sup>27</sup> GAC Operating Principles, Article I, Principle 2.

<sup>28</sup> *Id.* at Article I, Principle 5.

<sup>29</sup> *Id.* at Article I, Principle 3; ICANN Bylaws, Article VI, § 9(1)(a) (Non-voting Liaisons).

<sup>30</sup> ICANN Bylaws, Article XI, § 2(1)(h) (Governmental Advisory Committee).

<sup>31</sup> *Id.* at § 2(1)(j) (Specific Advisory Committees).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at § 2(1)(k) (Specific Advisory Committees).

<sup>34</sup> Accordingly, the ICANN Board's explanation for any departure from GAC advice is

(continued...)

GAC is not a vehicle for governmental regulation of the DNS, and individual governments remain fully capable of, and regularly engage in, the regulation of online activities within their jurisdictional reach.

#### IV. SUMMARY OF RELEVANT FACTS

##### A. ICANN's 2000 Request For Proposals

22. Global interest in the creation of additional TLDs was at the heart of ICANN's creation, and a fundamental motivation for the U.S. Government's transfer of its DNS management role to the private sector.<sup>35</sup> Accordingly, in 1999, shortly after ICANN assumed overall technical coordinating responsibility for "the global Internet's systems of unique identifiers,"<sup>36</sup> it began to explore the possibility of adding more TLDs to the Internet domain name space in order to expand the number of domain names available for registration by the public.<sup>37</sup> In 2000, after lengthy deliberations and public consultations, which included

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(continued)

"without prejudice to the rights or obligations of [GAC] members with regard to public policy issues falling within their responsibilities." *Id.*

<sup>35</sup> See Management of Internet Names and Addresses, 60 Fed. Reg. 111, 31741, 31749 (10 June 1998) ("The new corporation ultimately should have the authority . . . necessary to . . . [o]versee policy for determining the circumstances under which new TLDs are added to the root system.").

<sup>36</sup> ICANN Bylaws, Article I, § 1 (Mission).

<sup>37</sup> Initially, the domain name space consisted of .ARPA and three open top-level domains (.COM, .NET, and .ORG), four limited top-level domains (.MIL, .INT, .GOV, and .EDU.), and two-letter country code top-level domains from a list published by the International Organization for Standardization. Top-Level Domains (gTLDs) Information Page; *see also* J. Postel, Domain Name System Structure and Delegation, Request for Comments 1591 (Mar. 1994), *available at* <http://www.ietf.org/rfc/rfc1591.txt> (last visited 5 June 2008).



discussion of a possible TLD “restricted to adult uses,”<sup>38</sup> ICANN invited applications for new TLDs.<sup>39</sup>

23. This “proof of concept” round of TLD applications was highly selective, as the applicants were to be the first new TLDs added to the DNS in its history. The goal of this round was to test—conceptually, technically, and commercially—diverse new TLD models and approaches. ICANN received a total of 47 applications, and ultimately agreed to enter into registry agreement negotiations with seven of the applicants.<sup>40</sup> Registry agreements were eventually approved for all seven TLDs—four unsponsored: .BIZ, .INFO, .NAME, and .PRO; and three sponsored: .AERO, .COOP, and .MUSEUM.

24. ICM applied during the “proof of concept” round to serve as the registry operator for the .XXX domain. Although its application was not among those chosen to participate in this “test” round of TLDs, it was not rejected. Rather, as ICANN explained:

[A] small set of TLDs was selected for an initial introduction of new TLDs, with the goal of testing diverse new TLD models and approaches. The fact that a new TLD proposal was not selected

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<sup>38</sup> ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, 13 June 2000, available at [www.icann.org/yokohama/new-tld-topic.htm](http://www.icann.org/yokohama/new-tld-topic.htm) (last visited 5 June 2008). Notably, the GAC’s statement issued subsequent to the Yokohama meeting, in which it identified specific “public policy considerations” regarding the new TLD round, did not voice any concerns with a “TLD restricted to adult uses.” See GAC, Opinion of the Governmental Advisory Committee on New Generic Top Level Domains, 16 Nov. 2000, available at <http://www.icann.org/committees/gac/new-tld-opinion-16nov00.htm> (last visited 5 June 2008).

<sup>39</sup> ICANN Board Resolution on New TLDs, ICANN Board Meeting, Yokohama, Japan, 16 July 2000, available at <http://www.icann.org/tlds/new-tld-resolutions-16jul00.htm> (last visited 5 June 2008).

<sup>40</sup> Top-Level Domains (gTLDs) Information Page; ICANN, TLD Application Review Update, 5 Oct. 2000, available at <http://www.icann.org/tlds/tld-review-update-05oct00.htm> (last visited 5 June 2008).

under those circumstances *should not be interpreted as a negative reflection on the proposal or its sponsor.*<sup>41</sup>

Indeed, the evaluators noted that “[t]he level of thinking about the startup period [was] impressive” and specifically praised the ICM application for its “well-developed marketing strategy . . . strong financial support, intellectual property expertise, and technical partnerships with leaders in the registry/registrar business.”<sup>42</sup>

**B. ICANN’s 2003 Request For Proposals and its Selection Process**

25. Based on the results of the “proof of concept” round, and following lengthy public consultations, ICANN agreed to initiate another round of TLD applications in 2003; this time, however, limited to sTLDs.<sup>43</sup> On 24 June 2003, ICANN posted a Draft Request for Proposals (“Draft RFP”) for public comment.<sup>44</sup>

26. The Draft RFP established five eligibility requirements for the new sTLDs: (1) a well-defined community; (2) a clear charter; (3) a clear definition of responsibilities delegated

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<sup>41</sup> Reconsideration Request 00-15, Recommendation of the ICANN Reconsideration Committee, 30 Apr. 2001 (revised 7 Sept. 2001), *available at* <http://www.icann.org/committees/reconsideration/rc00-15-1.htm> (emphasis added) (last visited 5 June 2008).

<sup>42</sup> ICANN, Report on New TLD Applications, Appendix B—ICM Registry (A General Description of the 2000 Application), 9 Nov. 2000, *available at* <http://www.icann.org/tlds/report/kids3.html> (last visited 5 June 2008). Following this “proof of concept” round, the ICANN Board engaged Summit Strategies International to conduct a review of the legal and policy issues involved in the round and the introduction of the seven new TLDs. The scope of the review was defined by a task force established by the ICANN Board. Nowhere in Summit Strategy International’s review is there any discussion of public policy or legal issues related to adult content. *See* Evaluation of the New gTLDs: Policy and Legal Issues, Prepared by Summit Strategies International, 10 July 2004, *available at* <http://www.icann.org/tlds/new-gtld-eval-31aug04.pdf> (last visited 5 June 2008).

<sup>43</sup> For a brief explanation of sTLDs, *see supra* note 5.

<sup>44</sup> ICANN, Draft of Establishment of new sTLDs: Requests for Proposals, 24 June 2003, *available at* <http://www.icann.org/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm> (last visited 5 June 2008) (“Draft sTLD RFP”).

from ICANN to the sponsor; (4) open and transparent structures; and (5) a willingness to comply with ICANN policies.<sup>45</sup> The Draft RFP also included fixed “Evaluation Methodology and Selection Criteria” to be used by the evaluators of the sTLD applications. ICANN explained in the Draft RFP that:

It is ICANN’s intention to engage the services of one or more external consultants to provide an objective and independent evaluation of the applications with reference to the requirements stated in the RFP and following the selection criteria and evaluation methodology described in this document.<sup>46</sup>

27. After ICANN posted the Draft RFP for public comment, the Board considered the question of who should be permitted to participate in the new round of sTLD applications. On 31 October 2003, the ICANN Board determined that the RFP would not be limited to only those applications submitted in the 2000 round. As was the case with all Board activities, the GAC was invited to and was represented at meetings, provided briefing papers, and was permitted to participate in the Board’s discussions regarding the Draft RFP for new sTLDs.

28. The Board proceeded to announce an “expedited process for a round of new [sTLDs], which will result in new sTLD’s [sic] in 2004,”<sup>47</sup> and directed ICANN’s President to finalize and post an “open Request for Proposals for a limited number of new sTLDs,” taking into consideration the public comments received on the Draft RFP.<sup>48</sup> The Board also resolved

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<sup>45</sup> Draft sTLD RFP.

<sup>46</sup> *Id.*

<sup>47</sup> ICANN Announcement, ICANN Launches Broad Strategic Initiative for New Generic Top-Level Domains, 31 Oct. 2003, *available at* <http://www.icann.org/announcements/announcement-31oct03.htm> (last visited 5 June 2008).

<sup>48</sup> ICANN Board Resolution on New Generic TLDs, ICANN Board Meeting, Carthage, Tunisia, 31 Oct. 2003, *available at* <http://www.icann.org/announcements/advisory-31oct03.htm> (last visited 5 June 2008).

that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms *shall be negotiated*.”<sup>49</sup> Again, as was a matter of course, the GAC was informed of and permitted to participate in the discussions leading up to this decision. No exceptions or exclusions were stated regarding applications for an sTLD connected with adult content, or for any other sTLD potentially raising “public policy” concerns.

29. On 15 December 2003, ICANN issued the final RFP for new sTLDs.<sup>50</sup> The RFP was broken down into six sections. The first section “provided applicants with explanatory notes on the process as well as an indication of the type of information requested by ICANN[,]” and the remaining five sections consisted of the application itself.<sup>51</sup> Consistent with ICANN’s Bylaws, the Explanatory Notes accompanying the RFP stated that “[t]he selection procedure [was to be] based on principles of objectivity, non-discrimination and transparency.”<sup>52</sup>

30. The RFP established a defined universe of criteria according to which each application was to be evaluated.<sup>53</sup> Specifically, applicants had to demonstrate that they satisfied the following criteria:

- **Technical Standards**—The ability to comply with the necessary technical standards “to ensure that [the proposed domain would] not affect the stability and integrity of the domain name system.” Applicants were required to provide: (1) evidence of an ability to ensure stable registry operation, (2)

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<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> ICANN, Request for Proposals for New Sponsored Top-Level Domains, Part A: Explanatory Notes, 15 Dec. 2003, *available at* <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm> (last visited 5 June 2008) (“sTLD RFP”). Attached as C-Exh. 1, *see supra* note 1.

<sup>51</sup> ICANN, Status Report on the sTLD Evaluation Process, p.4, updated 3 Dec. 2005, *available at* <http://www.icann.org/tlds/stld-apps-19mar04/stld-status-report.pdf> (last visited 5 June 2008) (“sTLD Status Report”).

<sup>52</sup> sTLD RFP, Part A: Explanatory Notes.

<sup>53</sup> *See id.*, Part A: Selection Criteria.

evidence that the registry could comply with best practice technical standards for registry operations, (3) evidence of a full range of registry services, and (4) assurances of continuity of registry operation in the event of business failure of the proposed registry;

- **Business Plan Information**—The necessary financial, technical, and operational capabilities. Evaluators were to assess each applicant’s: (1) financial model, and (2) business plan (which included staffing, marketing plan, registrar arrangements, fee structure, technical resources, uniqueness of application, and engagement with and commitment to the sponsoring organization);
- **Sponsorship Information**—The proposed domain’s ability to “address the needs and interests of a clearly defined community.” Evaluators were to assess each applicant’s: (1) definition of a sponsored community, (2) support by a Sponsoring Organization, (3) submissions regarding the appropriateness of the Sponsoring Organization and the policy formulation environment (to demonstrate that the Sponsoring Organization would operate in the best interests of the sTLD community and had the appropriate policy-formulation role), and (4) evidence that it had broad-based support from the community to be represented; and
- **Community Value**—The value that would be added to the Internet by virtue of the inclusion of the proposed sTLD. Evaluators were to assess whether the proposed sTLD would have in effect policies and procedures to: (1) add value to the Internet name space, (2) protect the rights of others, (3) assure charter-compliant registrations and avoid abusive registration practices, (4) assure adequate dispute-resolution mechanisms, and (5) provide ICANN-policy compliant WHOIS services.<sup>54</sup>

31. In order to process the sTLD applications in a timely and efficient manner, ICANN established a two-step process for the consideration, approval, and implementation of the submitted applications. Kurt Pritz, ICANN’s Senior Vice President of Services, was the staff member with oversight authority over the sTLD RFP.

- **First**, sTLD applications were to be (1) checked for completion, (2) posted for public comment, and (3) evaluated for compliance with the Board-approved

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<sup>54</sup> *Id.* In addition to the sTLD RFP, ICANN published criteria for the independent evaluators, describing the qualifications needed to serve on the panel. ICANN, Independent Evaluators of sTLD Proposals, *available at* <http://www.icann.org/tlds/new-stld-rfp/panel.htm> (last visited 5 June 2008).

RFP criteria by independent evaluation teams.<sup>55</sup> As explained by Mr. Pritz, “[t]his first round of the process is to demonstrate involvement in the community, technical competence, financial viability, and a robust business model.”<sup>56</sup>

- **Second**, and only *after* an application was determined by the independent evaluators and the Board to be in compliance with the published RFP Criteria, could the applicant proceed on to commercial and technical negotiations for a registry agreement with ICANN staff.<sup>57</sup>

32. This process was repeatedly confirmed during the “sTLD updates” presented to the ICANN Board and in other public comments by senior ICANN staff throughout the evaluation process. For example, a document entitled “Progress in Process for Introducing New Sponsored Top-Level Domains” stated:

The applications will be reviewed by an independent evaluation panel beginning in May 2004. The criteria for evaluation were posted with the RFP. *All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.*<sup>58</sup>

Similarly, at the ICANN Public Forum meetings in Rome in March 2004, Mr. Pritz explained:

May through July, the independent evaluation will occur. That time may shrink or grow a little bit, depending on the number of applications received. And then with the 1st of August, we’ll

<sup>55</sup> During this first stage, applicants were provided with the opportunity to address any potential deficiencies or contingencies contained in the evaluator’s primary assessments of their sTLD applications, *see* ICANN sTLD Status Report at p. 5.

<sup>56</sup> Kurt Pritz, “sTLD Update”, ICANN Public Forum—Part 1, Rome, Italy, 4 Mar. 2004: Real-Time Captioning, *available at* <http://www.icann.org/meetings/rome/captioning-forum1-04mar04.htm> (last visited 5 June 2008) (“Kurt Pritz sTLD Update, Rome”); *see also* Kurt Pritz, sTLD Update, PowerPoint Presentation to the Board, Rome, Italy, 4 Mar. 2004, *available at* <http://www.icann.org/presentations/pritz-forum-rome-04mar04.pdf> (last visited 5 June 2008).

<sup>57</sup> Kurt Pritz sTLD Update, Rome.

<sup>58</sup> *See* ICANN Announcement: Progress and Process for Introducing New Sponsored Top-Level Domains, 19 Mar. 2004 (emphasis added), *available at* <http://www.icann.org/announcements/announcement-19mar04.htm> (last visited 5 June 2008) (“ICANN Announcement: Progress and Process”).

identify those sTLDs that completed the first round and met the criteria, and we'll go on to the round of technical and commercial negotiations.<sup>59</sup>

33. In December 2004 (by which time the ICM proposal was known to be actively under consideration by the Board), at the ICANN meeting in Cape Town, Mr. Pritz is on record as having described the process for all applications:

There was, essentially, a two-step process to evaluate that application with the goal of establishing a new sTLD. First, the application was reviewed by a panel of independent evaluators. And having passed that hurdle, the applicant would enter into technical and commercial negotiations with the target of establishing the new sponsored top-level domains.<sup>60</sup>

34. And again, the transcript of Mr. Pritz's comments at the Mar del Plata Public Forum Meeting in April 2005 reflects confirmation of the two-step process:

At the end of [the independent evaluation process], if there were still contingencies remaining in the application, the ICANN Board, with full information, *i.e.*, with access to the original application, the questions that went back and forth, the independent evaluators'

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<sup>59</sup> Kurt Pritz sTLD Update, Rome.

<sup>60</sup> Kurt Pritz, sTLD Update, ICANN Public Forum—Part 1, Cape Town, South Africa, 3 Dec. 2004: Real-Time Captioning, *available at* <http://www.icann.org/meetings/capetown/captioning-public-forum-1-03dec04.htm> (last visited 5 June 2008). Mr. Pritz's description of the sTLD evaluation process continued by noting:

So after that process . . . if there were still contingencies remaining at the close of that iteration process, we asked the ICANN board, giving them full information, meaning the original application, the independent evaluators' report, the questions that were asked, and the written responses of the applicants, we asked the board to determine whether the contingencies on the application had been satisfied and that the application could move on to the negotiation step or whether the contingency had not been removed or, perhaps, thirdly, the board may determine that more information was required to make a determination. . . . Those that were determined to meet that application then go on to negotiation.

report, and subsequent writings, took on to confirm whether the contingencies in the application had, in fact, been removed and the application could go on to the negotiation phase, or whether additional information was required, or, in fact, whether the application was deficient and should not be granted.<sup>61</sup>

35. From a practical standpoint, the bifurcated sTLD application process put in place by ICANN made perfect sense. In the first phase, applicants were to be subjected to a rigorous review that would entail: (1) an opportunity for all interested parties, including the GAC, to comment on all applications; (2) recommendations by the independent evaluation teams to the Board, taking into consideration the Board-defined criteria and the submitted public comments; and (3) input by applicants in response to concerns raised by the evaluating teams and the Board. It was only after the Board itself was fully satisfied that an applicant had complied with all of the RFP criteria that an applicant could proceed to phase two: registry agreement negotiations. Indeed, it would have been illogical and inefficient for either ICANN or an applicant to expend the considerable time and expense of negotiating a registry agreement when it had not yet been determined that the application fully satisfied the RFP criteria. Accordingly, nothing in the RFP or related *contemporaneous* commentary describing the evaluation process even hinted at the possibility that an sTLD application could be re-evaluated (*i.e.*, returned to the first phase of the process) after having already been approved by the Board to progress to the second phase.

36. In accordance with the procedures established by ICANN, all of the applications received in response to the RFP were submitted to a panel of independent evaluators. The panel was divided into three teams. One team was responsible for evaluating each application against

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<sup>61</sup> ICANN Public Forum Meeting—Part 2, Mar del Plata, Argentina, 7 Apr. 2005: Real-Time Captioning, *available at* <http://www.icann.org/meetings/mardelplata/captioning-public-forum-2-07apr05.htm> (last visited 5 June 2008).



the technical standards criteria; the second against the business plan and financial criteria; and the third against both the sponsorship criteria and the community value criteria (these two sets of criteria were collectively referred to as the “Sponsorship and Other Issues” criteria).

**C. ICANN Approves Other sTLD Applications**

37. The application period announced in the RFP closed on 16 March 2004. ICANN received ten completed applications by this deadline. Each application was accompanied by a mandatory fee of US\$45,000. The ten applicants were as follows:

- ***DotAsia Organisation Limited*** - application for the ***.ASIA sTLD*** to serve the Pan-Asia and Asia Pacific community.
- ***Fundació puntCAT*** - application for the ***.CAT sTLD*** to serve the Catalan linguistic and cultural community.
- ***Employ Media LLC*** - application for the ***.JOBS sTLD*** to serve the international human resource management community.
- ***The Anti-Spam Community Registry*** - application for the ***.MAIL sTLD*** to serve the community of responsible senders and receivers of spam-free electronic mail.
- ***A consortium of mobile Internet service, equipment, and content providers*** - application for the ***.MOBI sTLD*** to serve consumers of mobile devices, services and applications, mobile content and service providers, mobile operators, mobile device manufacturers and vendors, and information technology and software vendors who serve the mobile community.
- ***The Universal Postal Union*** - application for the ***.POST sTLD*** to serve the worldwide postal community, including public and private operators, organizations and government agencies.
- ***NetNumber, Inc.*** - application for the ***.TEL sTLD***, with Pulver.com as the sponsoring organization, to serve Internet Protocol Communications Service Providers (“*.TEL (Pulver)*”).
- ***Telnic Limited*** - application for the ***.TEL sTLD*** to serve individuals or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space, as well as providers of Internet-Communications services and related content (“*.TEL (Telnic)*”).

- *Tralliance Corporation* - application for the *.TRAVEL sTLD* to serve businesses, organizations, associations, and governmental and non-governmental agencies operating in the travel industry.
- *ICM Registry, Inc.* - application for the *.XXX sTLD* to “serve the needs of the global responsible online adult-entertainment community.”<sup>62</sup>

Like ICM, the applicants for .POST, .MOBI, both versions of .TEL, and .TRAVEL, had all previously submitted applications for TLDs during the 2000 “proof of concept” round, but had not been selected.

38. The public portions of the ten applications were posted on the ICANN website on 19 March 2004. The announcement accompanying the posting explained that the applications would be reviewed by the independent evaluation panel, and stated that “[a]ll applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.”<sup>63</sup>

39. The posting announcement also indicated that there would be a single, month-long period for public comment beginning on 1 April 2004. During this comment period, ICANN received and posted “[d]ozens of public comments” on the applications.<sup>64</sup> All ten applications received both positive and negative comments. Sixty-three comments were posted to the comment forum for ICM’s application, the majority of which were positive.

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<sup>62</sup> ICM Application.

<sup>63</sup> ICANN Announcement: Progress and Process.

<sup>64</sup> sTLD Status Report at p. 5. The comments are archived on the ICANN website, and can be accessed through links at <http://forum.icann.org/lists/stld-rfp-xxx/> (last visited 5 June 2008).

40. The three teams of independent evaluators began their review of the sTLD applications in May 2004.<sup>65</sup> During their evaluations, the teams asked questions of the applicants, and received materials clarifying the applications. Drafts of the evaluation reports were provided to ICANN in July 2004. In the opinion of the independent evaluators, only two applications, .POST and .CAT, met all of the published selection criteria. The evaluators concluded that three applications, .ASIA, .TRAVEL, and .XXX, satisfied the technical and the business and financial criteria, but did not fulfill the sponsorship criteria. Two other applications, .JOBS and .MOBI, were viewed as having satisfied only the business and financial criteria, and the application for .MAIL and both applications for .TEL were deemed to have failed all three sets of criteria. The evaluation reports also concluded that the .ASIA, .JOBS, and .TRAVEL applications merited further discussions with ICANN, despite not meeting the selection criteria at the time of the evaluations, whereas the .MAIL, .MOBI, .TEL (Telnic), .TEL (Pulver), and .XXX applications did not merit further discussion.

41. In July 2004, at the ICANN meetings in Kuala Lumpur, Malaysia, ICANN announced that it would not act exclusively on the evaluation reports, but would give all of the applicants an opportunity to provide additional clarifying information and to answer further questions from the evaluators and the ICANN Board “relating to any potential deficiencies in the application that were highlighted in the independent evaluation.”<sup>66</sup> Each applicant received the evaluation of its respective application in late August 2004, which reflected the applicant’s

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<sup>65</sup> The organization that had prepared the report of the legal and policy issues from the previous “proof of concept” round, Summit Strategies International, was retained to coordinate the evaluation process.

<sup>66</sup> ICANN Public Forum, Kuala Lumpur, Malaysia, 22 July 2004: Real-Time Captioning, available at <http://www.icann.org/meetings/kualalumpur/captioning-public-forum-23jul04.htm> (last visited 5 June 2008).

responses to questions from the evaluation teams, but did not reflect any Board questions or requests for information.

42. Over the next several months, almost all of the applicants worked to answer questions, clarify information, or provide additional materials to ICANN staff, the Board, and/or the independent evaluation panel. The form of these contacts varied, but included correspondence and/or meetings via teleconference. Even the applicant for .CAT was required to provide additional information, despite the opinion of the independent evaluators that the application had satisfied all three of the selection criteria. Only the .POST application automatically entered into registry agreement negotiations (*i.e.*, without Board intervention, action, or resolution) based on the satisfactory results from the evaluation panel. NetNumber, Inc. (one of the applicants for the .TEL sTLD) did not respond to ICANN's request for information to remedy deficiencies in its application, and was therefore informed in November 2004 that the process for its application was closed.<sup>67</sup>

43. From December 2004 through March 2005, the .MAIL applicant collaborated with the independent evaluation panel's business and financial team in an effort to remedy the deficiencies identified in its application. Ultimately, however, in April 2005, the independent evaluators concluded that "the proposal 'for a .mail TLD is not financially viable and that the business plans are not sound.'"<sup>68</sup> Given this conclusion, the questions relating to the technical and sponsorship criteria were never revisited.

44. The .TRAVEL, .JOBS, .MOBI, and .CAT applications all progressed through the evaluation process relatively quickly. The Board authorized negotiations for the .TRAVEL

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<sup>67</sup> See sTLD Status Report at p. 19.

<sup>68</sup> *Id.* at p. 15.

registry agreement on 18 October 2004, and authorized negotiations for the .JOBS and .MOBI registry agreements on 13 December 2004. Following the negotiations, the proposed .TRAVEL and .JOBS registry agreements were posted on the ICANN website on 24 March 2005, and approved by the ICANN Board two weeks later, on 8 April 2005. The proposed .MOBI registry agreement was posted on the ICANN website on 3 June 2005, and approved by the ICANN Board two weeks later, on 28 June 2005. The .CAT application was approved to enter into negotiations on 18 February 2005. The proposed registry agreement for .CAT was posted on the ICANN website on 9 August 2005, and the agreement was approved by the ICANN Board approximately one month later.

45. Approval of the .ASIA and .TEL (Telnic) applications took a little longer. In the end, however, both applications were approved, and both applicants entered into registry agreements, despite the fact that the .TEL (Telnic) application initially had failed all three evaluation categories. The .TEL (Telnic) application was approved to enter into negotiations on 28 June 2005, a proposed registry agreement was posted on the ICANN website in March 2006, and the ICANN Board approved the .TEL (Telnic) registry agreement in May 2006. The .ASIA application was approved to enter into negotiations in December 2005, a proposed registry agreement was posted on the ICANN website in July 2006, and the ICANN Board approved the .ASIA registry agreement in October 2006.

46. In short, even applications that had been identified by the independent evaluation panel as having more deficiencies than the .XXX application, such as .JOBS, .MOBI, and .TEL (Telnic), were subsequently approved by the ICANN Board and the applicants proceeded to execute registry agreements with ICANN. Moreover, despite the longer than anticipated time frame in some cases, the process for each application still followed the original two-step process

of criteria approval followed by registry agreement negotiation. In no case, other than with the .XXX application, did the Board approve an applicant to progress to the second phase (*i.e.*, registry agreement negotiations) and then later reverse the basis for that decision regarding the technical, business and financial, or sponsorship criteria.

**D. ICM's Application and Registry Agreement Negotiations**

47. In contrast to the other sTLD applications, ICM's application was subjected to a prolonged process of approval, negotiations, set-backs, delays, further negotiations, and additional demands, culminating in the Board's ultimate decision to terminate contract negotiations and reject the application.<sup>69</sup> Of all the applicants, it was only ICM that was unexpectedly, unjustifiably, and without notice, required to revisit the sponsorship criteria many months after the Board had originally determined that the application satisfied all of the evaluation criteria. Only ICM was asked, repeatedly, to modify its proposed registry agreement during the negotiation phase to include additional obligations and assurances of compliance. And only ICM's proposed agreement was repeatedly rejected, despite the Board's threshold determination approving ICM to enter into registry agreement negotiations and ICM's repeated accommodation of each and every formal and informal request by the Board and ICANN staff to modify the terms of the agreement.

**1. ICANN Resolves to Commence Registry Agreement Negotiations with ICM**

48. As with the other applicants, ICM received the independent evaluation panel's report regarding its .XXX application in late August 2004. The report indicated that ICM's application met the technical and the business and financial criteria set forth in the RFP.

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<sup>69</sup> Attached as C-Exh. 4 is a timeline of key dates.

However, the “sponsorship and other issues” evaluation team was not convinced that ICM (or most of the other applicants, for that matter) had demonstrated that the sponsorship criteria had been satisfied. The ICANN Board asked ICM to supplement its application with additional sponsorship-related information for the Board’s direct review and consideration. Accordingly, between September and December 2004, ICM submitted, *inter alia*, a detailed letter and follow-up memoranda responding to each section of the evaluators’ report; information regarding the functionality of the proposed policy development processes; information regarding the global value of the proposed sTLD; justifications as to why an sTLD was the best means of achieving the goals of the sponsored community and other stakeholders; and confirmations regarding the commitment of ICM and IFFOR to the success of the proposed sTLD. ICM’s initial response letter also described how the sponsored community, as defined by the application, met the sponsorship requirements, and provided information regarding the support the application had received in the sponsored community and among child safety advocates.<sup>70</sup>

49. The Board considered ICM’s supplemented application at its meeting on 24 January 2005. In light of the deliberations and the questions raised regarding the size and composition of the sponsored community, ICM was requested to give a presentation to the Board on the issue. Accordingly, on 3 April 2005, prior to the ICANN meetings in Mar del Plata, Argentina, ICM’s management gave a detailed, in-person presentation to the Board, in which

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<sup>70</sup> See sTLD Status Report, Appendix E—Supplemental/Follow-up Materials (updated 30 Nov. 2005), at pp. 158-183, available at <http://www.icann.org/tlds/stld-apps-19mar04/AppE-30nov05.pdf> (last visited 5 June 2008). The “sponsorship and other issues” evaluation team raised similar concerns regarding the definition of and support from the sponsored community in their evaluations of a number of the applications. Those applicants, like ICM, responded with materials clarifying and elaborating on the initial applications, and ICANN later approved the other applications with little or no change to the original definitions of the sponsored communities.

they described, *inter alia*, the sponsored community and the policy-making process for the .XXX sTLD. ICM's presentation included remarks by Parry Aftab, the Executive Director of WiredKids and the WiredSafety Group, explaining her support for ICM's application.<sup>71</sup> Present at the briefing were Board members as well as several Board liaisons, including the GAC liaison, Mohamed Sharil Tarmizi.

50. Following this presentation, the Board again discussed ICM's application in detail at its 3 May 2005 meeting. Once again, the sponsorship issue was the main topic of discussion. The Board did not make a final decision on the application, but determined to discuss it again at its next Board meeting. At that meeting, on 1 June 2005, the Board's deliberations again focused on the sponsorship criteria. At the conclusion of these deliberations, the Board adopted a formal resolution authorizing the commencement of the second phase of the approval process: contract negotiations with ICM for .XXX sTLD registry agreement. The resolution read:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of *proposed commercial and technical terms* for a contractual arrangement, the President shall present such proposed

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<sup>71</sup> *Id.* at pp. 184-218. WiredSafety is one of the largest and oldest online safety groups, and the WiredKids program was created to help fight online child pornography and pedophilia. Parry Aftab is both a child safety advocate and a lawyer specializing in Internet privacy and security. She is the author of multiple books about child safety online and was appointed by the United Nations Educational, Social, and Cultural Organization ("UNESCO") to head the U.S. Action Committee of Innocence in Danger, work which she continued after UNESCO was no longer officially involved. Over the course of ICANN's consideration of ICM's application, the proposal received support from numerous child safety and other entities, including the Family Online Safety Institute (formerly the Internet Content Rating Association ("ICRA")) and the Association of Sites Advocating Child Protection ("ASACP"), among others.



terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>72</sup>

51. The resolution reflected the Board's unconditional decision that ICM's application satisfied the RFP evaluation criteria, including the sponsorship criteria, an outcome that was also reflected in comments made by senior ICANN officials and members of the Board.<sup>73</sup> For example, in July 2005, at ICANN's Luxembourg meetings, Dr. Vinton Cerf (then the Chairman of the ICANN Board) informed the GAC that ICM's application had satisfied the selection criteria: "[t]he [.XXX] proposal this time *met the three main criteria, financial, technical, sponsorship*. They [sic] were doubts expressed about the last criteria which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters."<sup>74</sup> Likewise, during the Public Forum at the Luxembourg meetings, Mr. Pritz stated that the .XXX application "ha[d] been found to satisfy the baseline criteria," and was therefore "in negotiation for the designation of registries."<sup>75</sup> These statements provide clear

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<sup>72</sup> ICANN Board Resolution on .XXX sTLD Approval to Enter into Contractual Negotiations, ICANN Board Meeting, 1 June 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-01jun05.htm> (last visited 5 June 2008) (emphasis added).

<sup>73</sup> The following day, Board member Joichi Ito noted in his blog that "[o]ur approval of .XXX is a decision based on whether .XXX met the criteria." Joichi Ito, Some Notes on the .XXX Top Level Domain, 3 June 2005, *available at* <http://joi.ito.com/weblog/2005/06/03/some-notes-on-t.html> (last visited 5 June 2008).

<sup>74</sup> Governmental Advisory Committee Meeting XXII, Plenary Session, Luxembourg City, Luxembourg, 11 July 2005: Minutes (emphasis added), *available at* [http://www.gac.icann.org/web/meetings/mtg22/LUX\\_MINUTES.doc](http://www.gac.icann.org/web/meetings/mtg22/LUX_MINUTES.doc) (last visited 5 June 2008) ("GAC Luxembourg Minutes"). At this meeting, several GAC representatives expressed concern that the GAC had not been consulted sufficiently regarding the public policy aspects of the .XXX application, although it was also noted that there had been several opportunities for the GAC to comment as the process had been public.

<sup>75</sup> ICANN Public Forum—Part II, Luxembourg, 14 July 2005: Real-Time Captioning, *available at* <http://www.icann.org/meetings/luxembourg/captioning-pf2-14jul05.htm> (last visited 5 June 2008).

and *contemporaneous* evidence that the Board's resolution approving the commencement of registry agreement negotiations constituted a decision by the ICANN Board that ICM's application had satisfied all of the requisite RFP criteria.

52. Consistent with ICANN Bylaws, the GAC was invited to and was often represented at meetings in which ICM's application (and others) were discussed and debated, it was regularly provided with briefing papers regarding the sTLD RFP process, and it was permitted to participate in the Board's discussions regarding ICM's application (and others), including those meetings that ultimately led to the Board resolution authorizing registry agreement negotiations.<sup>76</sup>

## 2. ICM and ICANN Negotiate a Proposed Registry Agreement

53. In accordance with the Board's approval of ICM's application, ICM and ICANN staff entered into contract negotiations for a registry agreement. Less than two weeks after the Board directed ICANN staff to begin negotiations, ICM sent a draft of the registry agreement for the .XXX sTLD to ICANN. This draft was based on the form contract that ICANN had provided to all sTLD applicants in February 2005, and was substantially similar to the contracts approved for the other sTLDs. Contract negotiations continued through early August, and on 9 August 2005, in light of the parties' agreement on all terms and conditions, a proposed registry agreement between ICANN and ICM was posted on the ICANN website for public comment. The posting announcement stated that the Board intended to discuss the proposed agreement at its forthcoming meetings scheduled for 16 August 2005.

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<sup>76</sup> See, e.g., ICANN Board Meeting, 3 May 2005: Minutes, *available at* <http://www.icann.org/minutes/minutes-03may05.htm> (last visited 5 June 2008); ICANN Board Meeting, 18 October 2004: Minutes, *available at* <http://www.icann.org/minutes/minutes-18oct04.htm> (last visited 5 June 2008).

### 3. Individual GAC Members Intervene Regarding ICM's Application

54. Prior to July 2005, the GAC had not expressed any objections to the .XXX sTLD; neither at the outset, when the sTLD evaluation criteria were debated and ultimately approved, nor when ICANN resolved to commence registry agreement negotiations with ICM. In fact, only a few months earlier, in April 2005, the GAC's Chairman (Mr. Tarmizi) had confirmed that no GAC members had any objections to any of the sTLD applications.<sup>77</sup> And in July 2005, following a GAC meeting in Luxembourg during which there was significant discussion of the Board's approval of the .XXX application,<sup>78</sup> the resulting GAC Communiqué welcomed "the initiative of ICANN to hold consultations" with the GAC regarding policy only for *future* TLDs, and made no mention of any reservations or objections to the .XXX application or any other pending sTLD application.<sup>79</sup>

55. It was only after ICM's proposed registry agreement was publicly posted on 9 August 2005 (approximately one month after the Luxembourg meetings), that certain GAC members began to formally document and express to the Board their concerns regarding ICM's

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<sup>77</sup> ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Paul Twomey, ICANN CEO and President, 3 Apr. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm> (last visited 5 June 2008) (confirming that "No GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round."). This letter represented GAC's timely advice to the Board, as required by the Bylaws, regarding the sTLD applications. ICANN Bylaws, Article III, § 6 (Notice and Comment on Policy Actions).

<sup>78</sup> At the Luxembourg meeting, the GAC representative from the United States noted that the GAC had already had "several opportunities to raise questions" regarding the sTLD approval process or applications pursuant thereto, and also noted that the entire process "had been public since the beginning." GAC Luxembourg Minutes.

<sup>79</sup> GAC 2005 Communiqué # 22—Luxembourg, 12 July 2005, *available at* <http://www.gac.icann.org/web/communiques/gac22com.rtf> (last visited 5 June 2008). Given that there had been some debate in the GAC at the Luxembourg meetings regarding ICM's application, the fact that the Communiqué made no reference to the ICM application is notable.

application.<sup>80</sup> Between 11 August and 15 August 2005, ICANN received, and posted to its website, two letters: one from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, and head of the National Telecommunications and Information Administration (“Gallagher Letter”), and the other from Mr. Tarmizi, the GAC Chairman.<sup>81</sup> The Gallagher Letter referenced negative comments that the United States Department of Commerce had received regarding the .XXX sTLD. Nonetheless, the letter did not expressly state that the United States Government had any objection to the .XXX proposal, but “urge[d] the Board to ensure that the concerns of all members of the Internet community on [the issue of .XXX] have been adequately heard and resolved before the Board takes action on this application,” and “request[ed] that the Board [] provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.”<sup>82</sup>

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<sup>80</sup> ICM subsequently learned through documents obtained through a Freedom of Information Act request that the United States Department of Commerce had begun monitoring reactions to the proposed .XXX domain following the Board’s 1 June 2005 vote and had decided to intervene regarding the approval of the application. *See generally ICM Registry, LLC v. Department of Commerce*, No. 06-0949 (D.D.C. filed Oct. 16, 2006).

<sup>81</sup> ICANN Correspondence: Letter from Michael Gallagher, Assistant Secretary for Communications and Information, United States Department of Commerce, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, posted 15 Aug. 2005, *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> (last visited 5 June 2008) (“Gallagher Letter”); ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 12 Aug. 2005, *available at* <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (last visited 5 June 2008) (“Tarmizi Letter 12 Aug. 2005”). There is evidence to the effect that the Gallagher Letter was actually received by ICANN before the letter from Mr. Tarmizi, and that the latter letter was issued to mitigate the implications of the former; namely, a rear guard action by the United States Government to block the creation of an Internet domain for the adult entertainment industry, as a result of pressure on the Bush administration from special interest groups.

<sup>82</sup> Gallagher Letter.

56. The letter from Mr. Tarmizi also refrained from stating direct opposition from the GAC to ICM's application, instead noting that "there remain[ed] a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date." Mr. Tarmizi stated that he had informed governments that had approached him on the subject that they were free to write to ICANN directly, and therefore believed that "the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD."<sup>83</sup>

57. ICANN staff informed ICM of this unexpected turn of events shortly before the Board meeting scheduled for 16 August 2005. ICM became aware during consultations with ICANN staff that the surprise interventions had placed the ICANN Board in an awkward situation, and therefore sought to accommodate ICANN by requesting that ICANN delay consideration of the proposed .XXX registry agreement for one month so that ICM could comprehensively address the concerns that were now being voiced. Consideration of the agreement was therefore postponed until the Board meeting scheduled for 15 September 2005.<sup>84</sup>

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<sup>83</sup> Tarmizi Letter 12 Aug. 2005.

<sup>84</sup> Among the comments and letters from governments and others about the .XXX proposal were two received by ICANN during this delay. The first, from the Brazilian Secretary of Information and Technology Policy, did not oppose the .XXX registration, instead stating that the .XXX and .TRAVEL sTLDs had been introduced without sufficient consultation between ICANN and the GAC. The Brazilian Government requested only that the introduction of new TLDs in the future include more robust consultations, especially with national governments. ICANN Correspondence: Letter from Marcelo de Carvalho Lopes, Brazilian Secretary of Information and Technology, to Mohamed Sharil Tarmizi, GAC Chairman, 6 Sept. 2005, available at <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf> (last visited 5 June 2008). The second, from the Swedish State Secretary for Communications and Regional Policy, expressed the opinion that pornography "is not compatible with [] gender equality goals" and asked ICANN to delay consideration of the .XXX proposal until after the next GAC meeting at the end of November in Vancouver, Canada. ICANN Correspondence: Letter from Jonas Bjelfvenstam, Swedish State Secretary for Communications and Regional Policy, to Dr. Paul

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58. To address the GAC's concerns, ICM sent the ICANN Board a detailed letter responding to the letters from Mr. Gallagher and Mr. Tarmizi, describing the ways in which ICM had addressed the concerns of all stakeholders and expressing ICM's continued willingness to work with all stakeholders and governments. The letter reiterated ICM's repeated prior offers, all ignored, to meet with the GAC at any time in order to allow ICM to address any concerns that the GAC had with its application.<sup>85</sup>

59. At its 15 September 2005 meeting, the Board approved a resolution directing the ICANN President and General Counsel "to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application."<sup>86</sup> The resolution specifically mentioned compliance issues in relation to potential changes in the ownership of ICM.<sup>87</sup>

60. Once again, ICM responded to ICANN's requests, discussing with ICANN staff that very same day the changes to the draft registry agreement. ICM agreed to (1) include

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Twomey, ICANN CEO and President, 23 Nov. 2005, *available at* <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm> (last visited 5 June 2008).

<sup>85</sup> The letter also noted the inordinate length of the application evaluation and negotiation process, and the significant costs that had been incurred by ICM, and requested that the finalization of the .XXX registry agreement not be delayed further.

<sup>86</sup> ICANN Board Resolution on Proposed .XXX Sponsored Top-Level Domain Registry Agreement, ICANN Board Meeting, 15 Sept. 2005, *available at* <http://www.icann.org/minutes/minutes-15sep05.htm> (last visited 5 June 2008).

<sup>87</sup> Following this meeting, the Board received a communication from Taiwan's representative to the GAC, noting that the proposed registry agreement would be both technically workable and would assist in the labeling and filtering of adult entertainment websites, but requesting that approval of the proposal take into consideration customs, culture, social conditions, and legal conditions of different countries.

language regarding its obligations to achieve certain policy outcomes, and (2) notify ICANN in advance of any proposed change in control, and not to effect any such change until all ICANN concerns were addressed.<sup>88</sup> Before the end of the month, ICM provided ICANN staff with revisions to the draft agreement, reflecting those consultations. ICANN staff, however, were less responsive, and did not act on the revised draft for approximately six months.<sup>89</sup>

61. During the pendency of the negotiations, ICANN received additional letters from GAC representatives. Among these was one from Peter Zangl, the Deputy Director of the European Commission's Information Society and Media Directorate General, dated 16 September 2005, requesting ICANN to allow the GAC the opportunity to review the independent sTLD evaluation reports before the Board made a final determination on the .XXX application and suggesting that the Board explain to the GAC why the .XXX application had been accepted after being rejected in the 2000 "proof of concept" round.<sup>90</sup>

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<sup>88</sup> See Draft, Sponsored TLD Registry Agreement, Appendix S, Part 7 (Change in Control Transactions), 18 Apr. 2006, available at <http://www.icann.org/tlds/agreements/xxx/revised-proposed-xxx-agreement-clean-20060418.pdf> (last visited 5 June 2008). It would appear that such a request was never made of the other applicants.

<sup>89</sup> Notwithstanding ICM's prompt discussions with ICANN staff and its immediate proffer of language to effect the relevant changes, the first version of the registry agreement (*i.e.*, the version that had been posted on 9 August 2005), remained on the ICANN website, with no indication that revisions had been discussed and agreed to by ICM, or that ICM had drafted contractual language to implement the changes. As a result, long after ICM had addressed the Board's concerns, debate centered on a version of the registry agreement that did not reflect the additional safeguards or terms and conditions agreed to by ICM and ICANN staff and which were ultimately included in the second draft.

<sup>90</sup> ICANN Correspondence: Letter from Peter Zangl, Deputy Director of the European Commission's Information Society and Media Directorate General, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 16 Sept. 2005, available at <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf> (last visited 5 June 2008). Partially as a result of the GAC's interest in the evaluation reports, ICANN informed ICM in October of 2005 that it intended to post the evaluation reports of all the applicants to the ICANN website. This unilateral change of ICANN's previous policy against publishing the reports until

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62. In February 2006, ICANN CEO and President Dr. Paul Twomey responded to the GAC's requests for an explanation of the Board's reasoning with regard to the acceptance of ICM's application. The letter discussed the differences between the 2000 "proof of concept" round and the 2003 RFP, explained the evaluation process, and described the Board's deliberations regarding ICM's application. The letter concluded that:

[b]ased on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, and a review of all supporting documents provided during the evaluation process, at its teleconference on 1 June 2005, the Board authorized the President and General Counsel to enter negotiations relating to proposed commercial and technical terms with ICM.<sup>91</sup>

Notably, no mention was made by Dr. Twomey that any reservations remained among Board members as to whether ICM's application had already satisfied the sponsorship criteria, or that the registry agreement negotiations authorized by the Board were to address any sponsorship issues.

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*after* the registry agreements were executed became a point of contention between ICANN and ICM, as ICM was subjected to disparate treatment. Other applicants who had also received mixed evaluations, such as .JOBS, .MOBI, and .TRAVEL, had already entered into registry agreements with ICANN, and thus public comments resulting from review of the mixed evaluations could no longer interfere with the negotiation process. ICM, however, was disadvantaged by the publication of the evaluation reports, which created more opportunity for criticism of ICM's proposed registry agreement, resulting in further delay in the Board's consideration of ICM's registry agreement. ICM nonetheless cooperated by providing redacted documents for publication, despite the disadvantage to ICM from the publication of the reports.

<sup>91</sup> ICANN Correspondence: Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman, 11 Feb. 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf> (last visited 5 June 2008) ("Twomey Letter 11 Feb. 2006").



#### 4. ICM and ICANN Negotiate a Revised Registry Agreement

63. As noted above, ICM and ICANN staff reached agreement in concept regarding a revised draft of the .XXX registry agreement almost immediately following the September 2005 Board meeting, and ICM submitted the revised language soon thereafter. ICANN did not, however, respond to ICM's proposal or post a draft at this stage. It was not until March 2006 that ICANN staff directed its outside counsel to work directly with ICM's counsel to come to an agreement on the precise language for the revised agreement, based on the text provided by ICM six months earlier. The parties promptly reached agreement. Inexplicably, however, ICANN staff did not post this draft. As a result, neither the GAC nor the ICANN community was aware of the changes, and both the United States Government and the GAC continued to criticize the "failings" of the first draft of the registry agreement without the benefit of the revisions that had been negotiated and agreed upon specifically to address the earlier concerns.<sup>92</sup> For example, on 20 March 2006, the U.S. Department of Commerce expressed its concern that the draft registry agreement failed to guarantee the public interest benefits ICM had described in its application and previous presentation to the GAC, notwithstanding the fact that ICM and ICANN had already negotiated contract language specifically to address this concern.<sup>93</sup> Similarly, following the GAC Plenary meeting in Wellington in March 2006, the GAC issued a Communiqué (the "Wellington Communiqué") requesting confirmation "that any contract currently under

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<sup>92</sup> These communications were themselves especially unusual for the United States Government, which had previously not involved itself with registry agreement details.

<sup>93</sup> ICANN Correspondence: Letter from John Kneuer, Acting Assistant Secretary, United States Department of Commerce, to Mohamed Sharil Tarmizi, GAC Chairman, 20 Mar. 2006, available at <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf> (last visited 5 June 2008).

negotiation between ICANN and ICM Registry . . . include enforceable provisions covering all of ICM Registry's commitments."<sup>94</sup>

64. In response to the Wellington Communiqué, ICM made additional revisions to the proposed registry agreement, and sent those revisions to ICANN staff on 31 March 2006. At the Board Meeting later that same day, however, the Board again directed further registry agreement negotiations, without any acknowledgment or discussion of any of the revisions that had already been agreed upon prior to the Wellington meeting, or the additional revisions offered by ICM during and after the Wellington meeting.<sup>95</sup> It was not until 18 April 2006 that the Board discussed the registry agreement as revised on 31 March 2006.<sup>96</sup> The draft agreement was then posted for public comment on the ICANN website, with the disclosure that the agreement would be considered by the ICANN Board on 10 May 2006.

65. Dr. Twomey also responded to the Wellington Communiqué. On 4 May 2006, he wrote to the GAC stating that, although the Board had determined that the materials provided by

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<sup>94</sup> GAC 2006 Communiqué # 24—Wellington, New Zealand, 28 Mar. 2006, *available at* <http://gac.icann.org/web/communiqués/gac24com.pdf> (last visited 5 June 2008). The Communiqué also stated that several GAC members were opposed to a .XXX sTLD on public policy grounds. Following the Wellington meetings, the United Kingdom's representative to the GAC wrote to the Board, affirming that ICANN had the authority to approve the proposed registry agreement, but noting that it "would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, . . . are genuinely achieved." ICANN Correspondence: Letter from Martin Boyle, United Kingdom Representative to the GAC, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 4 May 2006, *available at* <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm> (last visited 5 June 2008).

<sup>95</sup> See ICANN Board Resolution on ICM Registry sTLD Application, ICANN Board Meeting, Wellington, New Zealand, 31 Mar. 2006: Minutes, *available at* <http://www.icann.org/minutes/minutes-31mar06.htm> (last visited 5 June 2008); ICANN Board Meeting, Wellington, New Zealand, 31 Mar. 2006: Real-Time Captioning, *available at* <http://www.icann.org/meetings/wellington/captioning-board-31mar06.htm> (last visited 5 June 2008).

<sup>96</sup> ICANN Board Meeting, 18 Apr. 2006: Minutes, *available at* <http://www.icann.org/minutes/minutes-18apr06.htm> (last visited 5 June 2008).

ICM were sufficient “to proceed with contractual discussions, the Board [had also] expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.”<sup>97</sup> Yet there is, simply put, nothing in the record that supports this assertion. There is nothing at all in the 1 June 2005 ICANN Board resolution, pursuant to which the registry agreement negotiations were authorized, reflecting the Board’s alleged “concerns” as to whether ICM had “met all of the criteria.” In fact, ICM has not been able to identify anything in any Board minutes, transcripts or other formal ICANN pronouncements (or private discussions) reflecting the notion that the Board’s approval to proceed to the registry agreement negotiation stage was subject to any residual concerns as to whether ICM’s application satisfied all of the RFP selection criteria. To the contrary, the evidence confirms the ICANN Board’s acceptance of the fact that ICM’s application had satisfied all of the RFP selection criteria and its approval of the parties’ negotiations to enter into a registry agreement. This was confirmed by the Chairman of the Board, senior ICANN staff, and members of the Board in contemporaneous statements, and publicly reiterated by senior ICANN staff at subsequent meetings. There is no controversy that those negotiations were only to concern the “proposed commercial and technical terms” of the .XXX registry agreement, a fact that had been confirmed to the GAC only months earlier by Dr. Twomey.<sup>98</sup>

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<sup>97</sup> ICANN Correspondence: Letter from Dr. Paul Twomey, ICANN CEO and President, to Mohamed Sharil Tarmizi, GAC Chairman, 4 May 2006, *available at* <http://www.icann.org/correspondence/twomey-to-tarmizi-04may06.pdf> (last visited 5 June 2008).

<sup>98</sup> Twomey Letter 11 Feb. 2006.

## 5. ICANN Rejects ICM's Revised Registry Agreement

66. At the 10 May 2006 meeting the Board engaged in a lengthy discussion of the proposed .XXX registry agreement, touching upon a number of issues, including the enforceability of the agreement, the sponsorship criteria, public and industry comments, and the advice that had been received from the GAC. The agreement was then put to a roll call vote. It was rejected, eight votes to five. The two main reasons cited by those voting against the draft agreement were, first, that ICM would not be able to fulfill its commitments under the agreement and, second, "public policy" concerns. The vote only constituted a rejection of the draft registry agreement that had been negotiated with ICANN staff, but did not constitute a rejection of ICM's application for the .XXX sTLD.<sup>99</sup>

## 6. ICM Files, Then Withdraws, a Request for Reconsideration Pending Further Negotiations

67. The Board's rejection of the registry agreement came as a shock to ICM, especially in light of the amount of time and effort that it had spent negotiating with ICANN

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<sup>99</sup> ICANN Board Meeting, 10 May 2006: Voting Transcript, *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm> (last visited 5 June 2008). Several Board members who were in favor of the agreement expressed their dissatisfaction with the obligations being imposed on ICM. Mouhamet Diop stated that he was in favor of the .XXX agreement because "[c]hanging our position after all that process will weaken more the organization that [sic] it will help it. . . . If we vote against, we will open the door to a process that we will never come back [from] again. Any group of pressure [sic] will see itself able to make us *change everything* on any issue." *Id.* (emphasis added). Board Member Peter Dengate-Thrush commented that he felt it was "unfair on this particular applicant to attempt to ask it to build a complete and working compliance model before it's allowed to start. That hadn't been imposed on any other applicant, and I don't think it could be or should be imposed on this one." *Id.* Likewise, Board Member Joichi Ito felt that any enforcement or compliance issues that existed with regard to the .XXX agreement "are mostly general issues that should be addressed in the framework of ICANN's ability to enforce agreements generally." *Id.* Board Member Susan Crawford expressed her fear that ICANN "may have gone too far" in addressing public policy concerns, and as a result, perhaps ran the risk of imposing content-related limitations on the use of domain names, rather than simply exercising technical oversight of the registration of domain names. *Id.*

over not one, but several versions of the agreement. During the course of these negotiations, ICM had gone to significant lengths to acquiesce to every reasonable request from ICANN staff, notwithstanding the fact that certain of the conditions being imposed upon ICM had not been required of any of the other applicants. Indeed, ICM's representatives had repeatedly informed the ICANN negotiators that there was effectively no reasonable amendment to the agreement that ICM would not accept. Other factors outside of ICM's control, however, were apparently at play. Accordingly, shortly after the 10 May Board meeting, ICANN filed a Request for Reconsideration of Board Action.<sup>100</sup>

68. No decision, however, was made on ICM's Request. After ICM was informed that it would be appropriate to submit a new draft agreement and to engage in further negotiations regarding a registry agreement for the .XXX sTLD, on 29 October 2006, ICM officially withdrew its Amended Request for Reconsideration.

#### **7. ICM Resumes Contract Negotiations with ICANN**

69. Through November and December 2006, ICM engaged in further negotiations with senior ICANN representatives regarding revisions to the proposed registry agreement. As had previously been the case, ICM attempted to accommodate every demand put forward by ICANN, and provided ICANN with various additional materials to demonstrate its commitment to abide by the letter and spirit of the proposed agreement.<sup>101</sup>

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<sup>100</sup> ICM filed an Amended Request for Reconsideration of Board Action shortly thereafter, once the Board minutes from the 10 May Board meeting were published.

<sup>101</sup> Among other materials, ICM provided a list of individuals within the child safety community who would be willing to sit on the Board of IFFOR, the sponsoring organization for .XXX; commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with child pornography provisions; descriptions of the industry pre-registration service ICM had initiated to demonstrate the level of

(continued...)

70. By the end of December 2006, ICM and senior-most ICANN staff had once again reached agreement regarding the language, terms, and conditions for the proposed registry agreement. The revised agreement was posted on the ICANN website for public comment on 5 January 2007, with the expectation that the comment period would last for approximately 30 days, to be followed by the Board's vote on 12 February 2007.<sup>102</sup>

71. On 2 February 2007, the GAC issued a letter to Dr. Cerf commenting on ICM's application, but adding little of substance. The letter stated that the Wellington Communiqué remained "a valid and important expression of the GAC's views" regarding the .XXX sTLD and referred to no other GAC statements amending or altering the statements of the Wellington Communiqué.<sup>103</sup> The letter also reiterated that various GAC members had objections to the proposed agreement, requested additional information from the Board regarding the Board's decision that ICM's application had overcome the deficiencies identified in the initial analysis, and requested that a final decision on ICM's agreement be delayed until the ICANN meetings in Lisbon, scheduled for the end of March 2007.

72. Notwithstanding the request by the GAC Chair for a postponement, the ICANN Board engaged in a discussion regarding ICM's draft registry agreement at its 12 February 2007

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(continued)

support among the sponsored community; and a number of memos and summaries explaining how the revised agreement addressed all of the concerns that had been raised throughout the process.

<sup>102</sup> ICANN Announcement, ICANN Publishes Revised Proposed Agreement on .XXX, 5 Jan. 2007, *available at* <http://www.icann.org/announcements/announcement-05jan07.htm> (last visited 5 June 2008).

<sup>103</sup> ICANN Correspondence: Letter from Mohamed Sharil Tarmizi, GAC Chairman, to Dr. Vinton Cerf, Chairman of the ICANN Board of Directors, 2 Feb. 2007, *available at* <http://www.icann.org/correspondence/tarmizi-to-cerf-02feb07.pdf> (last visited 5 June 2008).

meetings.<sup>104</sup> The discussion centered on three main issues: “1) community review and public comment of the agreement and the sufficiency of the proposed agreement; 2) the status of advice from the [GAC] and a clarification of the letter from the GAC Chair and Chair-Elect, and whether additional public policy advice had been received or was expected following the Wellington Communiqué; and 3) how ICM measures up against the RFP criteria.”<sup>105</sup>

73. Following the discussion, a resolution was approved stating that “a majority of the Board ha[d] serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs,” although a minority felt the criteria had been met.<sup>106</sup> The resolution directed that the current version of the proposed agreement, with some slight revisions made following the 5 January posting, be posted for public comment for no less than 21 days,<sup>107</sup> and directed ICANN staff to confer with ICM to provide additional information to the Board regarding the sponsorship issue.

74. As the decision was thus again postponed, the ICM application was a subject of discussion at the GAC meetings in Lisbon in March 2007. The Communiqué issued by the GAC following those meetings (“Lisbon Communiqué”) reaffirmed the 2 February letter regarding the

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<sup>104</sup> By the time these discussions took place, there had been considerable turn-over on the Board since it first authorized contract negotiations, and at least one new Board member was unclear on whether or not a final determination had been made regarding whether the application met the RFP criteria. Although the record clearly demonstrates that a final decision had been made, it is apparent from the discussion that the issue was nonetheless reopened.

<sup>105</sup> ICANN Board Meeting, 12 Feb. 2007: Minutes, *available at* <http://www.icann.org/minutes/minutes-12feb07.htm> (last visited 5 June 2008).

<sup>106</sup> *Id.*

<sup>107</sup> Throughout the many years ICM’s application remained in limbo, ICANN received many additional comments regarding the application, some positive and some negative. Some of the negative comments consisted of “canned” statements, pre-written by opponents of ICM and made available on various websites for others to send, and some were generated by automated tools designed to send posts using randomly selected email addresses.

Wellington Communiqué, and further noted concerns that the proposed registry agreement could result in ICANN “assuming an ongoing management and oversight role regarding Internet content.”<sup>108</sup>

#### **8. ICANN Rejects ICM’s Proposed Registry Agreement and Application**

75. At the next Board meeting on 30 March 2007, when both the proposed agreement and ICM’s application for the .XXX sTLD were put to a vote, the Board resolved by 9 votes to 5 to reject the proposed agreement and to turn down ICM’s application. The operative part of the Board’s resolution reads as follows:

[T]he Board has determined that:

- ICM’s Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.
- Based on the extensive public comment and from the GAC’s communiqués that this agreement raises public policy issues.
- Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM’s response does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community. The Board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.
- The ICM Application raises significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.

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<sup>108</sup> GAC 2007 Communiqué #27—Lisbon, Portugal, 28 Mar. 2007, *available at* <http://gac.icann.org/web/communiques/gac27com.pdf> (last visited 5 June 2008).



- The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved (07.18) that the Proposed Agreement with ICM concerning the .XXX sTLD is rejected and the application request for a delegation of the .XXX sTLD is hereby denied.<sup>109</sup>

76. Aside from the sponsorship question, which had already been decided and could not be arbitrarily reversed, the reasons listed for denying ICM's application were unrelated to the originally stated evaluation criteria, unreasonable, and outside the mission of ICANN. Nowhere in the published sTLD RFP criteria, established at the outset of the application process after public comment and review by ICANN, was the possibility raised that an application could be denied based on "public policy" concerns, notions of "offensive content," or variations in national law that might apply to such content.

77. Several Board Members accurately stated these concerns. Peter Dengate-Thrush (now ICANN Chair) expressed his opinion that:

On . . . the issue of the sponsored community, I concluded that there is[,] on the evidence[,] a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system.

It's not affected in my view by the fact that that's a self-selecting community . . . .

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<sup>109</sup> ICANN Board Resolution on Proposed sTLD Agreement with ICM Registry, ICANN Board Meeting, 30 Mar. 2007, *available at* <http://www.icann.org/minutes/resolutions-30mar07.htm> ("ICANN, 30 Mar. 2007 Board Resolution").

And I think it's a particularly thin argument that's been advanced that all of the rules for the application and operation of this community are not yet finalized. . . .

...

I think the resolution that I'm voting against today is particularly weak on this issue: On why the board thinks this community is not sufficiently identified. . . . [T]his silence is disrespectful to the applicant and does a disservice to the community.

The contract. I've also been very concerned, as other board members have, about the scale of the obligations accepted by the applicant. I think to a certain extent, some of those have been forced on them by the process. But for whatever reason, I'm, in the end, satisfied that the compliance rules raise no new issues in kind from previous contracts.

And I say that if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.

It's the same issue in relation to all of the others and we either come to terms with what it means to be granting TLD contracts and the consequences that flow or we stop.<sup>110</sup>

Susan Crawford, another Board Member, expressed similar concerns:

It seems to me that the only plausible basis on which the board can answer the question in the negative -- so [it] could say a group of people may not operate and use a lawful string of letters as a top-level domain -- is to say that the people affected by this decision have a broadly-shared agreement that the admission of this string to the root would amount to unjustifiable wrongdoing.

Otherwise, in the absence of technical considerations, the board has no basis for rejecting this application.

...

. . . ICANN[] . . . ha[s] very limited authority. And we can only speak on behalf of that community. I am personally not aware

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<sup>110</sup> ICANN Board Meeting, Lisbon, Portugal, 30 Mar. 2007: Transcript, *available at* <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm>.

that any global consensus against the creation of a triple X domain exists.

In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. . . .

...

Notwithstanding my personal views on the vacuity of the sponsorship idea, the fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and, in my personal view, concluded that this criteria had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant.

...

I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD, which I personally believe to be closed.

...

I would like to spend a couple of moments talking about the politics of this situation. . . .

...

[T]his content-related censorship should not be ICANN's concern . . .

...

ICANN should not allow itself to be used as a private lever for government chokepoint content control by making up reasons to avoid the creation of such a TLD in the first place.

To the extent there are public policy concerns with this TLD, they can be dealt with through local laws . . . .<sup>111</sup>

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<sup>111</sup> *Id.*

Board Members Joichi Ito, Rajasekhar Ramaraj, and David Wodelet agreed with Mr. Dengate Thrush and Ms. Crawford. Dr. Twomey, the President and CEO, who had previously voted in June 2005 to authorize the .XXX sTLD registry agreement negotiations, and who had personally and materially participated in the negotiations leading up to the Board's 30 March 2007 vote, abstained without explanation.

## V. ICANN'S CONSENT AND PROCEDURAL FRAMEWORK

78. ICANN's consent to subject its conduct "alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws" to independent review is set forth in Article IV, Section 3 of ICANN's Bylaws:

1. . . . ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.
3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") . . . .<sup>112</sup>

79. ICANN has selected the ICDR to serve as its designated international arbitration provider to handle any requests for an IRP.<sup>113</sup>

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<sup>112</sup> ICANN Bylaws, Art. IV, § 3 (Independent Review of Board Actions), as amended effective 15 Feb. 2008, *available at* <http://www.icann.org/general/bylaws.htm> (last visited 5 June 2008). Attached as C-Exh. 5.

<sup>113</sup> ICANN Board Resolution on Establishment of Independent Review Panel, ICANN Board Meeting, 19 Apr. 2004: Adopted Resolutions, *available at* <http://www.icann.org/minutes/resolutions-19apr04.htm> (last visited 5 June 2008); *see generally* ICANN Bylaws, Article IV, § 3 (Independent Review of Board Actions), as amended effective 15 Feb. 2008.

80. The procedural framework for the independent review process is provided by the ICANN Bylaws, the ICDR's International Arbitration Rules, and the Supplementary Procedures for ICANN Independent Review Process issued by the ICDR ("Supplementary Procedures").<sup>114</sup>

## VI. APPLICABLE STANDARDS AND LAW

81. Pursuant to ICANN's Bylaws, the IRP's mandate is to (1) compare those actions of the Board contested by an affected party (in this case, ICM) to the Articles of Incorporation and Bylaws, and (2) to declare whether the Board has taken a decision, acted, or failed to act consistently with the provisions of those Articles of Incorporation and Bylaws.<sup>115</sup>

82. The Panel must therefore determine, *inter alia*, whether ICANN's procedures, processes, consideration and/or disposition of ICM's application to serve as the registry operator for the .XXX sTLD were inconsistent with all or any part of:

- **Paragraph 3 of ICANN's Articles of Incorporation**, which provides, in pertinent part:

[ICANN] shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government

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<sup>114</sup> ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, *available at* <http://www.adr.org/sp.asp?id=32197> (last visited 5 June 2008) ("Supplementary Procedures"). Article 2 of the Supplementary Procedures provides:

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and [the ICDR's International Arbitration Rules], these Supplementary procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

<sup>115</sup> ICANN Bylaws, Article IV, §§ 2 (Reconsideration), 3(3) (Independent Review of Board Actions), 3(8)(b) (same), as amended effective 15 Feb. 2008.

and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

- **Paragraph 4 of ICANN’s Articles of Incorporation**, which provides:

[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, [ICANN] shall cooperate as appropriate with relevant international organizations.

- **Article I, Section 1 of ICANN’s Bylaws**, setting forth ICANN’s “Mission,” which provides:

The mission of [ICANN] is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are[:]
  - a. Domain names (forming a system referred to as “DNS”);
  - b. Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers; and
  - c. Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions.<sup>116</sup>

- **Article I, Section 2 of ICANN's Bylaws**, setting forth ICANN's "Core Values," which provides:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

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<sup>116</sup> ICANN Bylaws, Article I, § 1 (Mission). The quoted provisions have not changed from the date the RFP was published (*see* Bylaws as amended effective 13 Oct. 2003, *available at* <http://www.icann.org/general/archive-bylaws/bylaws-13oct03.htm>) through the date of this filing (*see* Bylaws as amended effective 15 Feb. 2008).

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
  10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
  11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.<sup>117</sup>
- **Article II, Section 3 of ICANN's Bylaws**, requiring ICANN to exercise its powers non-discriminatorily, which states:

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>118</sup>

- **Article III, Section 1 of ICANN's Bylaws**, requiring transparency, which provides:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent

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<sup>117</sup> ICANN Bylaws, Article I, §§ 2(1)-(3); (5)-(9); (11) (Core Values). Article I, § 2 (Core Values) of the Bylaws states:

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

<sup>118</sup> ICANN Bylaws, Article II, § 3 (Non-Discriminatory Treatment).



with procedures designed to ensure fairness.<sup>119</sup>

- **Article XI, Section 2 of ICANN's Bylaws**, governing the GAC, which provides, in pertinent part:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

...

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The

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<sup>119</sup> *Id.* at Article III, § 1 (Purpose).

Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.<sup>120</sup>

As summarized below, ICM respectfully submits that ICANN has acted inconsistently with each and every one of the above provisions of its Articles of Incorporation and Bylaws.<sup>121</sup>

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<sup>120</sup> *Id.* at Article XI, § 2 (Specific Advisory Committees). The GAC's Operating Principles provide that:

ICANN's decision making should take into account public policy objectives including, among other things:

- secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity;
- the robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, world wide;
- transparency and non-discriminatory practices in ICANN's role in the allocation of Internet names and address[es];
- effective competition at all appropriate levels of activity and conditions for fair competition, which will bring benefits to all categories of users including, greater choice, lower prices, and better services;
- fair information practices, including respect for personal privacy and issues of consumer concern; and
- freedom of expression.

GAC Operating Principles (Preamble).

<sup>121</sup> ICM reserves the right to identify additional provisions of ICANN's Articles of Incorporation and Bylaws with which it believes ICANN has acted inconsistently.

## **VII. SUMMARY OF INCONSISTENCIES AND VIOLATIONS**

### **A. ICANN Failed to Follow Its Established Process in Its Rejection of ICM's Application, in Violation of the Articles of Incorporation and Bylaws**

83. It is clear that ICANN did not act consistently with its Articles of Incorporation and Bylaws in the manner in which it evaluated ICM's application to serve as the registry operator for the .XXX sTLD. ICANN's sTLD evaluation process consisted of two phases: (1) an evaluation phase in which a panel of independent evaluators, and then the Board itself, analyzed the applications based on criteria clearly set out in the RFP; and then (2) a contract negotiation phase, in which the applicants determined by the Board to have met the RFP criteria were to negotiate the technical and commercial terms of an sTLD registry agreement with ICANN staff, for subsequent consideration and approval by the Board.

84. As described above, on 1 June 2005, after ICM submitted its application and its supplementary materials in response to the evaluation team's report, and made a presentation to the Board regarding ICM's sponsorship criteria credentials, the Board specifically determined and unconditionally resolved that ICM had satisfied the RFP criteria, and directed ICANN's staff to enter into negotiations regarding the technical and commercial terms of the .XXX registry agreement.

85. Despite the Board's decision in June 2005, however, ICANN delayed in considering a registry agreement with ICM and, in early 2007, when it could no longer credibly rely on alleged contract deficiencies, the Board re-opened its previous decision regarding sponsorship. More than a year and a half after directing ICANN staff to enter into negotiations with ICM, it revived the long settled question of ICM's compliance with the RFP criteria. Completely ignoring its previous decision, and the wealth of evidence proffered by ICM, the Board resolved on 30 March 2007 that ICM's application failed to meet the "Sponsored

Community” criteria and terminated registry agreement negotiations with ICM. The documented procedures established in advance to govern the evaluation of the applications never contemplated that the Board would revisit or reverse a previous decision approving negotiations. Nor did the Board ever inform ICM of any revisions to the formal procedure that would allow reversal of a previous decision. In no other case where the Board unconditionally directed negotiations did the Board later revisit an application’s compliance with the RFP criteria when approving the registry agreement.

86. ICANN’s failure to follow its established procedure in its rejection of ICM’s application violated ICANN’s Bylaws and Articles of Incorporation. Specifically, ICANN’s failure violates:

- ICANN’s Core Value of “[e]mploying open and transparent policy development mechanisms[;]”
- ICANN’s Core Value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]”
- ICANN’s Core Value of “[a]cting with a speed that is responsive to the needs of the Internet[;]”
- ICANN’s Core Value of “[r]emaining accountable to the Internet community[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

**B. ICANN Improperly Established New Criteria in Its Assessment of ICM’s Application, in Violation of the Articles of Incorporation and Bylaws**

87. As discussed above, ICANN established a set of criteria, clearly articulated in the RFP, regarding how each application was to be evaluated. Those criteria—technical, business and financial, and sponsorship—had been vetted by the various stakeholders and commented on by the public before official publication in December 2003. Each came with a specific definition that described the test that each applicant had to pass in order to reach the commercial negotiations phase. ICM’s application passed the technical and business and financial criteria as judged by the independent evaluation teams. The GAC had the opportunity to review the application materials and to consult with the Board at all relevant stages of the review process. The Board later determined that ICM’s application also passed the sponsorship criteria.

88. When the Board ultimately rejected ICM’s application in 2007, however, it did so by applying a *new definition* of the sponsorship criteria. The sponsorship criteria established in 2003 required the applicant to precisely define a sponsored community and demonstrate “broad-based” support from that community. Nothing in the stated criteria prohibited the community from being a self-selecting community, and in fact the Board approved several applications with self-selecting sponsored communities. Nor did anything in the stated criteria require that the sponsored community show unanimous support for the application. Yet, in 2007, the Board rejected the proposed registry agreement in part because the community was a self-selected community that did not have the universal support of all members of the community.<sup>122</sup>

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<sup>122</sup> See, e.g., Rita Rodin, ICANN Board Meeting, Lisbon, Portugal, 30 Mar. 2007: Transcript, available at <http://www.icann.org/meetings/lisbon/transcript-board-30mar07.htm> (last visited 5

(continued...)

89. Moreover, the Board based the rejection of the registry agreement on *new criteria* wholly outside the criteria specified in the original RFP. In doing so, the Board deferred to the input of the GAC in a manner not contemplated in ICANN's Bylaws or established procedures, allowing the GAC to become a *de facto* ultimate decision-maker. Specifically, the Board rejected the application based on conclusions that it:

- “[R]aises public policy issues[.]”
- “[Does] not resolve the issues raised in the GAC Communiqués . . . [and] does not address the GAC’s concern for offensive content, and similarly avoids the GAC’s concern for the protection of vulnerable members of the community.”
- And “raises significant law enforcement compliance issues because of countries’ varying laws relating to content . . . .”<sup>123</sup>

90. The ICANN Board’s decision to use different definitions and entirely new criteria with which to evaluate ICM’s application, not previously articulated to ICM nor applied to any other applicant, is a clear violation of ICANN’s Bylaws. Specifically, ICANN’s use of new, unpublished criteria violates:

- ICANN’s Core Value of “[r]especting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination[;]”
- ICANN’s Core Value of “[e]mploying open and transparent policy development mechanisms[;]”
- ICANN’s Core Value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]”

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(continued)

June 2008) (“I think it’s inappropriate to allow an applicant in any sTLD to simply define out what could potentially be any people that are not in favor of a TLD.”).

<sup>123</sup> ICANN, 30 Mar. 2007 Board Resolutions.

- ICANN’s Core Value of “[r]emaining accountable to the Internet community[;]”
- ICANN’s Core Value of considering governmental recommendations “[w]hile remaining rooted in the private sector[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]”
- ICANN Bylaws, Article XI, Section 2(1)(j): “[t]he advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

**C. ICANN Failed to Engage in Good Faith Negotiations with ICM for a Registry Agreement, in Violation of the Articles of Incorporation and Bylaws**

91. ICANN repeatedly stated throughout the RFP process that once an application was found to meet the published RFP criteria, ICANN staff would commence registry agreement negotiations regarding commercial and technical terms and then return to the Board for final approval. ICANN did exactly this with respect to nearly all of the other successful applicants.<sup>124</sup>

With respect to ICM, however, ICANN determined that the application met the criteria, but

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<sup>124</sup> The single successful applicant not yet to have signed a registry agreement is .POST, which appears now to be negotiating a final agreement.

refused to negotiate a registry agreement in good faith. This failure persisted over a number of months, amounting to a delay of nearly two years, despite ICM's demonstrated willingness to accept not only those modifications reasonably required by the nature of the sTLD itself, but also its commitment to agree to virtually any contract term sought by ICANN. Evidence of ICANN's lack of good faith is clear in the number of times that the agreement was required to be revised based on new, previously unarticulated concerns, the delay in posting the various revised versions of the agreement, and the length of time for which the agreement was required to remain posted for even minor, non-substantive revisions. ICANN staff repeatedly delayed the negotiations, and the Board also delayed a vote on the proposed agreement more than once. Additionally, ICM was required to include obligations in its proposed registry agreement *that no other applicant even had to consider*.

92. Although ICM agreed to ICANN's articulated demands during the negotiations, ICM's concessions were later held against it as the Board questioned whether ICM could perform the obligations that had been proposed by ICANN's negotiators. Even ICANN's CEO, who was one of the principal negotiators of the registry agreement and who brought the final proposed agreement to the Board for a vote, questioned whether it could be enforced and refused to vote in favor of it.

93. ICANN's failure to engage in good faith negotiations for a registry agreement with ICM is a clear violation of ICANN's Bylaws. Specifically, ICANN's failure violates:

- ICANN's Core Value of "[e]mploying open and transparent policy development mechanisms[;]"
- ICANN's Core Value of "[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness[;]"
- ICANN's Core Value of "[a]cting with speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected[;]"



- ICANN’s Core Value of considering governmental recommendations “[w]hile remaining rooted in the private sector[;]”
- ICANN’s Bylaws, Article II, Section 3, that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition[;]”
- ICANN’s Bylaws, Article III, Section 1, that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]” and
- ICANN’s Articles of Incorporation, Paragraph 4, that “[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

**D. ICANN Exceeded Its Mission During the Evaluation and in the Rejection of ICM’s Application, in Violation of its Articles of Incorporation and Bylaws**

94. ICANN’s mission is to coordinate at a technical level the allocation and assignment of top-level domains as needed to ensure the stable and secure operation of the DNS, and to coordinate policy development reasonably and appropriately related to that technical function. ICANN’s Core Values serve as a further constraint on ICANN’s authority and discretion by requiring ICANN to limit its activities to the technical coordination of the DNS.

95. ICM does not dispute that ICANN’s mission appropriately encompasses developing policies and procedures for the orderly introduction of new TLDs, including new sTLDs such as .XXX. That mission was served by ICANN’s issuance of the RFP and its specified criteria, by ICANN’s review of the ICM application, and by its determination that ICM’s application met the criteria. Having determined that .XXX posed no threat to the stability and security of the Internet, the only task left to ICANN with respect to ICM’s application was to negotiate and sign a registry agreement in accordance with published policies and procedures.

96. ICANN's handling of ICM's application after 1 June 2005, however, cannot be reconciled with its policies and procedures or with any concerns related to the technical coordination of the DNS. Rather, ICANN's actions reflect a myriad of other considerations, some of which were vaguely articulated and generally referred to as "public policy" issues.

97. ICANN's rejection of ICM application was, in the end, simply and undeniably a judgment about Internet content, and, as such, violated:

- ICANN's mission "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN: (1) Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. . . . (2) Coordinates the operation and evolution of the DNS root name server system. (3) Coordinates policy development reasonably and appropriately related to these technical functions[;]"
- ICANN's Core Value of "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet[;]"
- ICANN's Core Value of "[r]especting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination[;]"
- ICANN's Core Value of "[e]mploying open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process[;]"
- ICANN's Articles of Incorporation, Paragraph 3, that the corporation is responsible for "(i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)[;]" and
- ICANN's Articles of Incorporation, Paragraph 4, that "[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities

in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”

**E. ICANN’s Actions Materially Affected ICM**

98. As a result of these inconsistencies and violations, ICM has been materially and adversely affected. ICM has expended considerable time, effort, and money in fruitless consultation and negotiation with ICANN. 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.

**VIII. INDEPENDENT REVIEW PROCEDURAL ELECTIONS AND PROPOSALS**

99. The ICDR does not maintain a panel of neutrals under contract for the ICANN Independent Review Process. Accordingly, ICM proposes that the parties agree to waive the requirement in Article IV, Section 3(4) of the Bylaws that the arbitrators be under contract with or nominated by the IRP provider.

100. Pursuant to Article IV, Section 3(6) of the Bylaws, ICM hereby elects that the Panel be composed of three (3) members, each of whom shall be impartial and independent of

the parties.<sup>125</sup>

101. Pursuant to Article IV, Section 3(7) of the Bylaws, ICM proposes the following methodology for constituting the Panel: each party shall appoint one panelist. The two panelists so appointed, and in consultation with the parties, shall jointly select the third panelist, who shall serve as the Chairman of the Panel.

102. ICM shall make its panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. ICANN shall make its panelist appointment within twenty (20) days of being notified of ICM's panelist appointment. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of ICANN's panelist appointment. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist and the Chairman of the Panel within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

103. Pursuant to Article 13 of the ICDR Rules, ICM proposes that the place of arbitration be Washington, D.C., United States of America.

#### **IX. RELIEF REQUESTED**

104. Reserving its rights to amend or supplement the relief requested herein, ICM respectfully requests the Independent Review Panel to grant the following:

- (1) Declare that ICANN's administration of the RFP as it related to ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws;

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<sup>125</sup> See also Supplementary Procedures, Rule 3.

- (2) Declare that ICANN's repudiation of its previous determination that ICM's application fulfilled the criteria for approval set forth in the RFP was inconsistent with ICANN's Articles of Incorporation and Bylaws;
- (3) Declare that ICANN's rejection of ICM's application to serve as the registry operator for the .XXX sTLD was inconsistent with ICANN's Articles of Incorporation and Bylaws, resulting in substantial, unjustifiable, and unreasonable harm to ICM;
- (4) Declare that ICANN must immediately execute a registry agreement on terms and conditions substantially similar to ICM's draft registry agreement posted to the ICANN website on 16 February 2007 within thirty (30) days from the issuance of the Panel's declaration;
- (5) Declare that ICANN must pay compensation for all costs incurred by ICM in connection with its application to serve as the registry operator for the .XXX sTLD and this Request, including attorneys' fees and costs;<sup>126</sup>
- (6) Declare ICM the prevailing party in this Independent Review Process;
- (7) Declare that the Panel's determination regarding whether any of ICANN's actions were inconsistent with ICANN's Articles of Incorporation and Bylaws is binding on ICANN; and
- (8) Make such other declarations, or grant such other relief, as the Panel may consider appropriate under the circumstances.

Date: 6 June 2008

Respectfully submitted,

**CROWELL & MORING LLP**

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<sup>126</sup> ICM acknowledges that under Article IV, § 3(12) of the Bylaws, the party not prevailing in an independent review proceeding shall ordinarily be responsible for bearing all costs of the IRP provider, and agrees that it will bear any costs assessed against it by the IRP.

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RESPONDENT'S EXHIBIT

# **Accountability and Transparency at ICANN**

## **An Independent Review**

Appendix D: The .xxx Domain Case and ICANN Decision-Making Processes  
October 20, 2010



**Berkman**

The Berkman Center for Internet & Society  
at Harvard University

## ***Abstract***

In 2000, ICANN initiated a “proof of concept” stage to begin the adoption of new generic TLDs. ICM Registry unsuccessfully proposed .xxx and .kids. In 2003, after some exchanges with ICANN regarding its first proposal, ICM submitted a revised bid for the creation of .xxx for ICANN’s call for sponsored TLD proposals. The ICANN Board adopted a resolution to begin negotiating the commercial and technical terms of a registry agreement with ICM in June 2005; however, under pressure from a variety of constituencies, ICANN reversed its decision and denied ICM’s proposal in 2007. ICM filed a request for Independent Review in 2008—the first such request to be heard before the Independent Review Panel (IRP) in ICANN’s history. In 2010, a three-person panel of arbiters (which comprised the IRP) decided in favor of ICM.

This case study outlines the key events surrounding the .xxx proposals from 2000 to June 17, 2010, without re-examining the merits of the application itself. This chronology is designed to examine two specific dimensions of the .xxx process: (1) the role of the Independent Review Panel (IRP), and (2) the interaction between the Governmental Advisory Committee (GAC) and the ICANN Board during ICANN’s evaluation of the ICM .xxx proposal, registry agreement negotiations with ICM and, ultimate rejection of ICM’s application.

## ***Case Study Sources and Methodology***

*For more information on our sources and methodology, please see Appendix A.*

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. It provides a summary of the facts regarding the .xxx domain process, with a specific focus on two aspects of the case: the Independent Review Panel (IRP), including ICM’s request for Independent Review, and the role of the Governmental Advisory Committee (GAC) throughout the Board’s review of the .xxx proposals, including its interaction with the Board. As per Exhibit B, Section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the .xxx application process. The observations below will contribute to the Berkman team’s final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

*Note:* As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, aspects of the .xxx case are still evolving. As such, this study may not reflect the most recent developments in this case.



*Disclosure:* Professor Jack Goldsmith, Henry L. Shattuck Professor of Law, Berkman Center Faculty Co-Director and member of the Berkman team, has submitted testimony for ICM in the .xxx case. In the context of the Berkman-internal peer review process, he provided comments on the scope and structure of an earlier draft of this case study.

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## 1 ICM's Proposal for the .xxx sTLD

### 1.1 ICANN's Call for New gTLDs in 2000

#### 1.1.1 Overview of the "Proof of Concept" Round

The core of ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers," a mandate that includes responsibility for the allocation of domain names and management of the Domain Name System (DNS).<sup>1</sup> Since the 1980s, seven top-level domains (TLDs) have been in the DNS (.com, .edu, .gov, .int, .mil, .net, and .org), only three of which were available for public registration without restriction (.com, .net, and .org).<sup>2</sup> From the outset, one of ICANN's primary tasks was to develop a set of policies and best practices for the solicitation, creation, and management of new generic TLDs (gTLDs).<sup>3</sup>

The Domain Name Supporting Organization (DNSO), one of ICANN's original three supporting organizations (which was replaced by the Generic Names Supporting Organization (GNSO) in December 2002),<sup>4</sup> was responsible for making recommendations on the "operation, assignment, and management of the domain name system and other related subjects."<sup>5</sup> In 1999, the DNSO tasked a set of working groups with studying whether the creation of new gTLDs would be desirable, in light of intellectual property rights and other issues.<sup>6</sup> On April 19, 2000, the DNSO recommended that the ICANN Board develop a set of policies to guide the introduction of a "limited number" of new gTLDs.<sup>7</sup> The ICANN Board adopted this recommendation on July 16, 2000<sup>8</sup> and began accepting TLD applications on September 5, 2000, with the goal of completing registry negotiations by the end of the year.<sup>9</sup> Applicants were permitted to submit proposals for

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<sup>1</sup> ICANN Bylaws, Article I, Section 1, September 30, 2009, <http://www.icann.org/en/general/archive-bylaws/bylaws-30sep09-en.htm>.

<sup>2</sup> ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>. One other specialized TLD had also been implemented: .arpa, which is reserved to support the Internet Architecture Board's technical infrastructure projects (see <http://www.iana.org/domains/arpa/>). More than 250 country-code TLDs (ccTLDs) also exist, a handful of which are written in non-Latin characters and are categorized as Internationalized Domain Names (IDNs).

<sup>3</sup> See ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>.

<sup>4</sup> The DNSO was eventually succeeded by the Generic Names Supporting Organizations (GNSO) in 2003. See DNSO, <http://www.dnso.org/>

<sup>5</sup> ICANN Bylaws, Article VII, Section 3(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

<sup>6</sup> A 1999 WIPO report stated that new gTLDs could be introduced slowly if intellectual property rights received adequate protection; see ICANN, "The Management of Internet Names and Addresses: Intellectual Property Issues," April 30, 1999, [http://www.icann.org/en/wipo/FinalReport\\_1.html](http://www.icann.org/en/wipo/FinalReport_1.html). The DNSO's Working Groups B and C were established to address the WIPO report and other intellectual property concerns; see DNSO, "Meeting of the Names Council in San Jose on 25 June 1999," June 25, 1999, <http://www.dnso.org/dns/notes/19990625.NCsj-admin.html>.

<sup>7</sup> DNSO, "DNSO Names Council Statement on new gTLDs," April 19, 2000, <http://www.dnso.org/dns/notes/20000419.NCgtlds-statement.html>.

<sup>8</sup> ICANN, "Resolutions of the ICANN Board on New TLDs," July 16, 2000, <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm>.

<sup>9</sup> ICANN, "New TLD Application Process Overview," August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

either a “sponsored TLD” (sTLD) or an “unsponsored TLD”<sup>10</sup> and each application was required to satisfy nine criteria:

1. The need to maintain the Internet’s stability.
2. The extent to which selection of the proposal would lead to an effective “proof of concept” concerning the introduction of TLDs in the future.
3. The enhancement of competition for registration services.
4. The enhancement of the utility of the DNS.
5. The extent to which the proposal would meet previously unmet types of needs.
6. The extent to which the proposal would enhance the diversity of the DNS and of registration services generally.
7. The evaluation of delegation of policy-formulation functions for special-purpose TLDs to appropriate organizations.
8. Appropriate protections of rights of others in connection with the operation of the TLD.
9. The completeness of the proposals submitted and the extent to which they demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.<sup>11</sup>

“General-Purpose” TLD proposals were grouped into four categories: “General” (for nonspecific proposals, including .biz and .info), “Personal” (for personal content, including .name and .san), “Restricted Content” (for specific types of content, including .xxx and .kids), and “Restricted Commercial” (including .law and .travel).<sup>12</sup>

### ***1.1.2 ICM’s Proposal for .xxx and .kids***

ICANN received 47 applications with proposals for new sponsored and unsponsored TLDs.<sup>13</sup> Three organizations submitted proposals for .xxx,<sup>14</sup> including ICM Registry, Inc. (ICM), which applied to create .xxx and .kids, arguing that, together, the pair of new TLDs would enhance

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<sup>10</sup> Sponsored TLDs (sTLDs) are intended to represent the needs of a particular “sponsored community,” and are required the support of a “sponsoring organization” to be responsible for a defined level of policy formulation for operation of the domain. Unsponsored domains do not carry either of these requirements. See ICANN, “New TLD Application Process Overview,” August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

<sup>11</sup> ICANN, “Criteria for Assessing TLD Proposals,” August 15, 2000, <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm>.

<sup>12</sup> ICANN, “Report on New TLD Applications,” November 9, 2000, <http://www.icann.org/en/tlds/report/>. In addition to “General-Purpose TLDs,” ICANN also grouped proposals as “Special-Purpose” (synonymous with “sponsored”) and “New Services” (which was intended for technical services not currently supported by the existing DNS, including telephony, message routing, LDAP services, and “georeferenced information.”

<sup>13</sup> ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

<sup>14</sup> ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

online child safety by clearly delineating child-friendly and adult-only content areas.<sup>15</sup> ICM also contended that both the adult industry and child-friendly content producers would comply with ICM's policies voluntarily, claiming that "adult content leaders fully back the establishment of these TLDs" and that "eminent children's entertainment and educational organizations are promising extensive investments in the child-friendly domain."<sup>16</sup>

Out of these 47 applications, ICANN selected seven during the exploratory phase: four unsponsored TLDs (.biz, .info, .name, .pro) and three sponsored (.aero, .coop, .museum).<sup>17</sup> In applying the evaluation criteria to ICM's .xxx application, ICANN determined that ICM's proposal for a .kids TLD did meet unmet needs but was unlikely to succeed from a business standpoint.<sup>18</sup> ICANN also found that ICM did not propose "any business or technical methods to effectively restrict content for a .kids TLD."<sup>19</sup> Regarding .xxx, ICANN stated: "[It] does not appear to meet unmet needs. Adult content is readily available on the Internet. To the extent that some believe that an .xxx TLD would segregate adult content, no mechanism (technical or non-technical) exists to require adult content to migrate from existing TLDs to an .xxx TLD." ICANN also noted that the controversial nature of a sex-centric TLD made it ill-suited to the goals of the "proof of concept" phase: "the evaluation team concluded that at this early 'proof of concept' stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs."<sup>20</sup>

Ultimately, ICANN decided to not accept ICM's proposals for .xxx and .kids, providing the following justification:

*Because of the inadequacies in the proposed technical and business measures to actually promote kid-friendly content, the evaluation team does not recommend selecting a .kids domain in the current phase of the TLD program. In addition, because of the controversy surrounding, and poor definition of the hoped-for benefits of, .xxx, we also recommend against its selection at this time.<sup>21</sup>*

In response, ICM filed a Reconsideration Request on December 15, 2000, requesting "clarification from the Board with respect to inaccurate statements made involving [the .xxx] registry

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<sup>15</sup> ICANN, "Registry Operator's Proposal to ICANN," September 18, 2000, <http://www.icann.org/en/tlds/kids3/Default.htm>. ICM's application also hypothesized that the adult oriented content on other domains (e.g., affiliated sites) could be easily filtered by IP addresses and proprietary DNS listings in addition to filtering the .xxx content. Ibid.

<sup>16</sup> ICANN, "Registry Operator's Proposal to ICANN: Volume 2," September 18, 2000, [http://www.icann.org/en/tlds/kids3/HTML/Volume\\_2.html](http://www.icann.org/en/tlds/kids3/HTML/Volume_2.html).

<sup>17</sup> ICANN, "Second Annual Meeting of the Board Minutes," November 16, 2000, <http://www.icann.org/en/minutes/minutes-annual-meeting-16nov00.htm>.

<sup>18</sup> ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

<sup>19</sup> ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

proposal.”<sup>22</sup> Primarily, ICM took issue with the ICANN Board’s claim that the majority of the adult community did not support the creation of .xxx, and argued that “most” adult content providers supported the domain. ICM also maintained that it proposed to operate the .kids registry “only in the event that there was no other credible submission for a .kids registry.”<sup>23</sup> Finally, ICM disagreed with the TLD evaluators’ conclusion that .xxx did not meet an “unmet need,” arguing that the proliferation of online adult material necessitated the creation of the kind of domain policies ICM had proposed.

The Reconsideration Committee decided to take no action, stating, “ICM Registry’s reconsideration request does not seek reconsideration of the Board’s November 16, 2000 decision . . . accordingly, there is no action for the Board to take with respect to the Board’s actual decision at this time.”<sup>24</sup> It noted that “no new TLD proposal has been rejected by ICANN”; rather, a small set of potentially successful applicants had been selected with the aim of testing a diversity of approaches to the creation of new TLDs. The Committee also noted that “the fact that a new TLD proposal was not selected under those circumstances should not be interpreted as a negative reflection on the proposal or its sponsor.”<sup>25</sup>

## ***1.2 ICANN’s Request for Proposals for New sTLDs in 2003***

### ***1.2.1 Overview of the RFP***

On October 18, 2002, ICANN President Stuart Lynn issued a report titled “A Plan for Action Regarding New TLDs,” which advocated extending the “proof of concept” phase by allowing applicants who had participated in the 2000 round to resubmit their TLD proposals.<sup>26</sup> On December 15, 2002, in response to the “Plan for Action,” the ICANN Board directed ICANN staff to develop a strategy for soliciting further TLD applications.<sup>27</sup> This resulted in a draft Request for Proposals (RFP) for the creation of new sponsored TLDs, posted publicly on June 24, 2003.<sup>28</sup>

The 2003 RFP differed from the 2000 “proof of concept” solicitation in two important ways. First, it was restricted to proposals for *sponsored* TLDs. Applicants were required to demonstrate that

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<sup>22</sup> ICANN, “Reconsideration Request 00-15,” December 16, 2000, <http://www.icann.org/en/committees/reconsideration/icm-request-16dec00.htm>. ICANN’s Reconsideration Policy (which has since been superseded) had been established to implement Article III, Section 4(a) of the original Bylaws. ICANN, “Reconsideration Policy,” March 4, 1999, <http://www.icann.org/en/committees/reconsideration/recon-policy-04mar99.htm>.

<sup>23</sup> See “Reconsideration Request,” *Ibid.*

<sup>24</sup> Although unclear in the Recommendation, it appears the Reconsideration Committee’s mandate is only to *reconsider* decisions and issue recommendations, rather than clarify Board decisions. See ICANN, “Reconsideration Request 00-15: Recommendation of the Committee (Revised),” September 7, 2001, <http://www.icann.org/en/committees/reconsideration/rc00-15-1.htm>.

<sup>25</sup> *Ibid.*

<sup>26</sup> ICANN, “A Plan for Action Regarding New TLDs,” October 18, 2002, <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>.

<sup>27</sup> ICANN, “ICANN 2002 Annual Meeting in Amsterdam,” December 14–15, 2002, <http://www.icann.org/en/meetings/amsterdam>.

<sup>28</sup> ICANN, “Establishment of new sTLDs: Request for Proposals (Draft for public comment),” June 24, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm>.

the sTLD served the needs of a well-defined “sponsored community,” and the proposal was required to carry the support of a “sponsoring organization,” which would assume certain responsibilities in developing policies for the TLD. Second, the ICANN Board would not evaluate applications directly. Rather, applications were to be evaluated by several panels of independent evaluators who would submit reports on each proposal to the ICANN Board; the reports, while nonbinding, were intended to play a significant role in shaping the Board’s decisions.<sup>29</sup>

On June 25, 2003—the day after the draft RFP was posted for public comment—ICANN held a public discussion on the draft materials during a Public Forum in Montréal. Some commenters argued that a single day was inadequate for public review, particularly given the controversy that persisted around the proposed TLD policies.<sup>30</sup> On the following day, the ICANN Board resolved to extend the public comment period for two months, through August 25, 2003.<sup>31</sup>

ICANN received more than 70 responses by email, which it posted publicly during the comment period.<sup>32</sup> The At-Large Advisory Committee (ALAC) also submitted a formal response, recommending substantive changes to make the RFP more equitable and proposing a set of principles to guide the introduction of future gTLDs.<sup>33</sup>

On October 13, 2003, the ICANN Board decided it would temporarily shelve the sTLD application process, citing the constraints of the recent amendments to the Memorandum of Understanding with the United States Department of Commerce—particularly the requirement that ICANN quickly “commence a full scale review of policy in this area.”<sup>34</sup> The Generic Names Supporting Organization (GNSO)<sup>35</sup> strongly objected, however, and on October 31, 2003, the ICANN Board reversed its decision and resolved to move forward with the sTLD RFP. Additionally, the Board resolved to revise the terms of the RFP based on commentary from the ALAC, the GNSO, and the public at large. Specifically, it resolved that the RFP would not be limited to applicants who had submitted proposals during the 2000 “proof of concept” round and that eligible sponsoring organizations need not be not-for-profit entities. Finally, it resolved that a final version of the RFP would be posted on December 15, 2003, including an application timeline, the details of the selection criteria, and an explanation of the evaluation process.<sup>36</sup>

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<sup>29</sup> Ibid. See also ICANN, “Independent Evaluators of sTLD Proposals,” <http://icann.org/en/tlds/new-stld-rfp/panel.htm>.

<sup>30</sup> See Edward Hasbrouck, “Sponsored TLD RFP,” June 26, 2003, <http://hasbrouck.org/icann/montreal.html>.

<sup>31</sup> ICANN, “Preliminary Report: Regular Meeting of the Board - Montréal,” June 26, 2003, <http://www.icann.org/en/minutes/prelim-report-26jun03.htm>.

<sup>32</sup> ICANN, “Submissions to the stld-rfp-comments forum,” <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/threads.html> (no date).

<sup>33</sup> ICANN, “ALAC Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes,” October 9, 2003, <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/msg00067.html>.

<sup>34</sup> ICANN, “Preliminary Report: Special Meeting of the Board,” October 13, 2003, <http://www.icann.org/en/minutes/prelim-report-13oct03.htm>.

<sup>35</sup> As of 2003, the GNSO became the successor to the DNSO. See DNSO website, <http://www.dns0.org>.

<sup>36</sup> ICANN, “ICANN Board Resolutions in Carthage, Tunisia,” October 31, 2003, <http://www.icann.org/en/announcements/advisory-31oct03.htm>. The final version of the sTLD RFP is available at ICANN, “New sTLD Application,” December 15, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>.

### **1.2.2 ICM's Proposal for .xxx**

ICM submitted its .xxx sTLD proposal on March 16, 2004. ICM named the “online adult-entertainment community” as the sponsoring community, defining this community as “those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.”<sup>37</sup> ICM named the International Foundation for Online Responsibility (IFFOR) as its sponsoring organization.<sup>38</sup> The role of IFFOR, a Canadian non-profit, would be to protect child safety, guard the safety and privacy of users, and promote responsible business practices in the adult industry. According to the proposal, ICM intended to donate a certain portion of each domain registration fee to promote IFFOR’s policymaking and advocacy efforts.<sup>39</sup>

### **1.2.3 ICANN's Review and Initial Approval**

On March 19, 2004, ICANN publicly announced that it had received ten sTLD applications in response to its RFP: .asia, .cat, .jobs, .mail, .mobi, .post, .tel (NetNumber, Inc), .tel (Telnic Ltd.), .travel, and .xxx. This announcement included invitations to post comments on specific proposals, in addition to a solicitation for general public comments. It also noted that the public comment period would be open during the month of April 2004 and that applications would be reviewed by independent evaluators beginning in May of that year.<sup>40</sup>

In mid-July 2004, the independent evaluators sent reports on the ten applications to ICANN indicating that only .cat and .post satisfied the full range of evaluation criteria.<sup>41</sup> The report declared that ICM’s proposal satisfied the technical, business, and financial criteria, but fell short of meeting the sponsorship criteria.<sup>42</sup> In particular, the report stated that “the difficulty of establishing a clean definition of adult content makes it equally difficult to establish the contours of the adult community. They determined, moreover, that ICM “hypothesizes a set of interests on behalf of a community . . . but little testimony from that community has been provided in support of either its common interests or its cohesiveness.”<sup>43</sup> Finally, the evaluators note that although there was significant support for the proposal from the North American community, “virtually no support was available from the rest of the world.”<sup>44</sup>

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<sup>37</sup> ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm>.

<sup>38</sup> ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm>.

<sup>39</sup> *Ibid.*

<sup>40</sup> ICANN, “Progress in Process for Introducing New Sponsored Top-Level Domains,” March 19, 2004, <http://www.icann.org/en/announcements/announcement-19mar04.htm>. See also, ICANN, “Public Comments for Proposed Sponsored Top-Level Domains,” March 31, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-public-comments.htm>.

<sup>41</sup> See ICANN, “Status Report on the sTLD Application Process,” December 3, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf>.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 24–25.



ICANN announced that it would allow sTLD applicants to provide supplemental material in response to the independent evaluators' concerns.<sup>45</sup> From October through November 2004, ICM submitted a range of supplemental application material, primarily addressing the .xxx proposal's deficiencies regarding sponsorship criteria.<sup>46</sup>

## 2 Involvement of the GAC in the .xxx Process

### 2.1 The Role of the GAC in ICANN

According to the ICANN Bylaws,<sup>47</sup> one of the primary purposes of the Governmental Advisory Committee (GAC) is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws, and international agreements or where they may affect public policy issues.”<sup>48</sup>

The GAC may submit “issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”<sup>49</sup> Apart from receiving unsolicited advice or comment, the Board is required to “notify the Chair of the GAC in a timely manner of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations seeks public comment.”<sup>50</sup> Separately, the Board is required to “request the opinion” of the GAC in cases where “policy action affects public policy concerns” and the policy being considered for adoption “substantially affect[s] the operation of the Internet or third parties.”<sup>51</sup>

Regardless of whether solicited or not, any GAC advice “on public policy matters” triggers a Bylaw provision whereby the Board is required to take such advice into account “both in the formulation and adoption of policies.”<sup>52</sup> If the Board decides not to follow this advice, the Board is then required to notify the GAC and “state the reasons why it decided not to do so” and “try, in

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<sup>45</sup> ICANN, “ICANN Meetings in Kuala Lumpur,” July 23, 2004, <http://www.icann.org/en/meetings/kualalumpur/captioning-public-forum-23jul04.htm>.

<sup>46</sup> ICANN, “Appendix E – Supplemental/Follow-up Materials,” November 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

<sup>47</sup> ICANN Bylaws, August 5, 2010, <http://www.icann.org/en/general/bylaws.htm>. ICANN’s Bylaws have been amended 26 times from the original Bylaws. Archives of previous versions are available on the ICANN website at <http://www.icann.org/en/general/archive-bylaws>.

<sup>48</sup> *Ibid.*, Article XI, Section 2.1(a). ICANN’s original Bylaws did not include the phrase “where they may affect public policy issues,” which was appended to the original in 2002. ICANN Bylaws, Article XI, Section 2.1(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

<sup>49</sup> *Ibid.*, Article XI, Section 2.1(i). It is unclear whether the terms “comment” and “advice” are distinct concepts and are intended to have different meaning.

<sup>50</sup> *Ibid.*, Article XI, Section 2.1(h).

<sup>51</sup> *Ibid.*, Article III, Section 6.1(c). Although this provision does use the term “advice,” which by itself is consistent with the use in Article XI, Section 2.1; “advice” appears to be used interchangeably with “opinion.” Consequently, the precise scope of this provision is unclear, especially with regard to how it interplays with Article XI, Section 2.1.

<sup>52</sup> *Ibid.*, Article XI, Section 2.1(j). Unlike the other provisions in Article XI, this provision uses the term “advice of the Governmental Advisory Committee” explicitly. This appears to suggest that the circumstances where the Board’s requirement to give notice and explanation of actions inconsistent with advice is limited; however, it is somewhat unclear if that was the intended purpose of this provision.

good faith and in a timely and efficient manner, to find a mutually acceptable solution.”<sup>53</sup> If no solution is reached between the Board and the GAC, the Board is required to “state in its final decision the reasons why” the advice was not followed.

The ICANN Bylaws also permit the GAC to “appoint one non-voting liaison to the ICANN Board of Directors.”<sup>54</sup> The GAC Liaison to the Board is “entitled to attend Board Meetings, participate in Board discussions and deliberations.” The Liaison has “access (under conditions established by the Board) to materials provided to Directors for use in Board discussions” and may “use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee.”<sup>55</sup> The individual elected as the GAC Chair has been consistently appointed to the position of GAC Liaison to the Board. Although not described within the ICANN Bylaws or the GAC Operating Principles,<sup>56</sup> interviewees stated that the GAC Liaison to the Board is generally expected to brief the Board on issues of concern amongst GAC members.<sup>57</sup> In addition, interviewees indicated that the Board believes the presence of the GAC Chair at Board Meetings, even if in the capacity of a Liaison to the Board, satisfies the “notification” requirement for proposals raising public policy issues without additional communications.<sup>58</sup> Other interviewees questioned this practice and stated that this interpretation of the Bylaws was not shared by GAC members.<sup>59</sup>

According to the GAC Operating Principles, the GAC advises the Board on matters relating to “governments, multinational government organizations and treaty organizations, and distinct economies as recognized in international fora.”<sup>60</sup> The Operating Principles reflect the GAC’s internal operating principles and procedures, however, the articulations within this document are not necessarily binding on the ICANN Board.<sup>61</sup> The Operating Principles specifically state that “advice from the GAC to the Board is communicated through the Chair.”<sup>62</sup> When the GAC is unable to reach a consensus, the Chair is required to “convey the full range of view expressed by Members to the Board.”<sup>63</sup>

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<sup>53</sup> Ibid., Article XI, Section 2.1(j).

<sup>54</sup> Ibid., Article VI, Section 9.1(a) and Article XI, Section 2.1(g).

<sup>55</sup> Ibid., Article VI, Section 9.5.

<sup>56</sup> The ICANN Bylaws contain a provision which permits the GAC to adopt “its own charter and internal operating principles or procedures to guide its operations.” This provision appears to be manifested by the GAC Operating Principles. GAC Operating Principles, March 2010, [http://gac.icann.org/system/files/GAC\\_Operating\\_Principles\\_1.pdf](http://gac.icann.org/system/files/GAC_Operating_Principles_1.pdf). Importantly, the Operating Principles note that the ICANN Bylaws are authoritative over any differences “in interpretation between the principles set out in these Operating Principles and ICANN’s Articles of Incorporation and Bylaws.” See also GAC Operating Principles, Article XV, Principle 54.

<sup>57</sup> Interviews, September and October 2010.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> GAC Operating Principles, Article I, Principle 1, March 2010.

<sup>61</sup> Ibid., Article XV, Principle 54.

<sup>62</sup> Ibid., Article XII, Principle 46.

<sup>63</sup> Ibid., Article XII, Principle 47.

## 2.2 The Role of the GAC in the .xxx Process: 2004

Between ICM's submission of its .xxx proposal on March 19, 2004 and the submission of the independent evaluators' report on July 13, 2004, there is little documented discussion of the sTLD applications during ICANN Board and GAC meetings.<sup>64</sup> Following receipt of this report, the Board determined that sTLD applicants would be permitted to submit supplemental information to address the evaluators' concerns, beginning in August 2004. ICM began submitting supplemental materials in October 2004.<sup>65</sup>

On October 18, 2004, the ICANN Board held the first meeting since July 2004 during which a discussion of the sTLDs was documented. The corresponding meeting minutes indicate that "Kurt Pritz, the ICANN Vice President of Business Operations[,] provided a detailed summary of the current process of and status regarding the ten sponsored top-level domain applicants" and Paul Twomey, ICANN's President and CEO, also provided information on the sTLD applicants.<sup>66</sup> Mohamed Sharil Tarmizi, Chairman of the GAC, was present during this meeting as the "GAC Liaison."<sup>67</sup> No corresponding resolutions were made by the Board at this meeting.<sup>68</sup> Another meeting was held on November 15, 2004.<sup>69</sup> The minutes note that "Kurt Pritz again provided an update on the status of the process for each of the ten [sTLD] applicants," and there was a "limited discussion by the Board regarding the process points," but no resulting resolutions.<sup>70</sup>

In a five-page letter to Tarmizi, dated December 1, 2004, Dr. Twomey requested "input from the GAC on the public policy elements" on several issues pending before the Board.<sup>71</sup> Twomey also observed that, "it seems to me that the interaction between the GAC and ICANN staff would merit from some increase in intensity" and suggested "establish[ing] a GAC position for transmission to the Board on the public policy elements" of issues pending before the ICANN Board.<sup>72</sup> Twomey also noted in this letter that "it may be worthwhile considering how the

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<sup>64</sup> Between March and July 2004, both the Board and the GAC held meetings, but did not discuss the sTLD applications in significant detail. The Board held meetings on April 19, May 11, May 21, May 25, and June 29, 2004. See ICANN, "2004 Board Meeting Minutes," 2004, <http://www.icann.org/en/minutes/index-2004.html>. The GAC held meetings on February 29 – March 3, and July 17 – 20, 2004. See GAC, "GAC Meetings," <http://gac.icann.org/meetings>. See ICANN, "Status Report on the sTLD Evaluation Process," December 3, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf>; Independent Evaluators, "Evaluation Report on New sTLD Applications," July 12, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>.

<sup>65</sup> ICANN, "Appendix E – Supplemental/Follow-up Materials," November, 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

<sup>66</sup> ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

<sup>67</sup> *Ibid.* A liaison to the Board is a non-voting member, who is permitted to attend Board meetings. The Bylaws specify that the GAC must appoint the position of liaison annually. See ICANN Bylaws Art. VI. Sec. 9.

<sup>68</sup> ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

<sup>69</sup> ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

<sup>70</sup> ICANN, "Special Meeting of the Board Minutes," November 15, 2004, <http://www.icann.org/en/minutes/minutes-15nov04.htm>.

<sup>71</sup> *Ibid.*

<sup>72</sup> Paul Twomey to Mohamed Sharil Tarmizi, ICANN Correspondence, December, 1 2004, <http://www.icann.org/correspondence/twomey-to-tarmizi-01dec04.pdf>.

<sup>73</sup> *Ibid.*

interaction could be increased between the GAC and the other Supporting Organizations and Advisory Committees for the mutual benefit of both sides.”<sup>73</sup>

The next section of this letter laid out the issues pending before the Board for which Twomey requested GAC input. In the following paragraph, Twomey outlined the status of the sTLD applications:

*ICANN continues to move forward on three (3) fronts in the area of **generic Top-Level Domains**. First of all, following the 10 applications for new sponsored TLD’s (sTLDs) and the evaluation of their bids by independent evaluators, we have commenced contract negotiations with the applicants for .TRAVEL and .POST. In parallel, the applicants are responding to the reports of the independent evaluators, and in some instance have entered into direct discussions with the evaluation panels in order to clarify some issues. Any outstanding issues between the independent panels and the applicants will be resolved by ICANN’s Board and we expect to move towards contract negotiations with some other applicants as well. Secondly, ICANN is about to launch the re-bid of the .NET agreement as foreseen in the relevant contract. GAC members can follow the process via the information we post to the ICANN web-site. Thirdly, as mentioned, we have published the draft of a Strategy for the Introduction of New gTLD’s.*<sup>74</sup>

### **2.3 The Role of the GAC in the .xxx Process: 2005**

Despite receiving a number of supplemental materials from ICM in support of its application in late 2004, as of early 2005 the ICANN Board was still uncertain that ICM had satisfied the requirements for the .xxx sTLD. On January 24, 2005, the Board held a special meeting to discuss the status of ICM’s application. At this meeting, Kurt Pritz “introduced the .XXX application materials, evaluators’ responses and the applicant’s supplemental materials” and “there was extensive Board discussion regarding the application,” focused on ICM’s proposed sponsored community.<sup>75</sup> According the minutes, the Board determined that it would be useful for ICM to give a presentation and invited ICM to do so at a later Board meeting.<sup>76</sup> ICM delivered the presentation on April 3, 2005 in Mar del Plata, Argentina, a few days prior to the scheduled ICANN Board meeting,<sup>77</sup> to an audience of Board members and a number of Board liaisons, including Tarmizi.<sup>78</sup>

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid., 4 (emphasis in the original).

<sup>75</sup> ICANN, “Special Meeting of the Board,” January 23, 2005, <http://www.icann.org/en/minutes/minutes-24jan05.htm>.

<sup>76</sup> Ibid.

<sup>77</sup> The ICANN Board held its regular meeting in Mar del Plata, Argentina on April 8, 2005.

<sup>78</sup> ICM, “Request for IRP,” June 6, 2008, at 28, <http://www.icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

Concurrently, the GAC convened in Mar del Plata on April 2–5 in 2005 for the first of three scheduled meetings in 2005.<sup>79</sup> The Mar del Plata Communiqué does not indicate that the GAC held any discussions related to the sTLDs or the .xxx application specifically.<sup>80</sup>

On April 3, 2005,<sup>81</sup> Tarmizi sent a letter to Paul Twomey responding to Twomey’s previous request for GAC input on December 1, 2004.<sup>82</sup> In this letter, Tarmizi stated that the GAC had no objections to any of the sTLD applications:

*No GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round. However should sTLDs use ENUM, that should not interfere with established international policies for the E164 numbering system. ICANN should ensure that sponsors of sTLDs encompass the entirety of the relevant user community, and that eventual distortions of competition are effectively avoided.*<sup>83</sup>

Following the April 3 special Board meeting, the Board met again for a regular meeting on April 8, 2005 in Mar del Plata.<sup>84</sup> The meeting minutes reflect that the Board hoped to reach a decision within thirty days:

*We have had a fairly extensive discussion about .ASIA and .XXX. We continue to evaluate those. The others will be attended as we can get to them. But, I want to say for the record, that we will attempt within the next 30 days to come to a conclusion one way or the other about .ASIA and .XXX.*<sup>85</sup>

Approximately one month later, on May 3, 2005, the Board held another special meeting, and had a “broad discussion . . . whether or not the [.xxx application] met the criteria within the RFP particularly relating to the definition and coherence of the ‘sponsored community’.”<sup>86</sup> No conclusion was reached in these meetings, and “the Board agreed it would discuss this issue again at the next Board meeting.”<sup>87</sup>

On June 1, 2005, the Board held another special meeting and discussed the .xxx application at length with a “particular focus on the ‘sponsored community’ issues.”<sup>88</sup> At this meeting, the

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<sup>79</sup> GAC, “Meeting 22: Mar del Plata Communiqué,” April 5, 2005, [http://gac.icann.org/system/files/GAC\\_22\\_Mar\\_del\\_Plata.pdf](http://gac.icann.org/system/files/GAC_22_Mar_del_Plata.pdf). The other meetings scheduled for 2005 included: Meeting 23: Luxembourg on July 9-12, 2005, and Meeting 24: Vancouver on November 28 – December 1, 2005. Cf. GAC, “Meetings,” <http://gac.icann.org/meetings>.

<sup>80</sup> Ibid.

<sup>81</sup> The ICANN meeting minutes on this date and the Tarmizi letter do not indicate whether the letter was written and sent before or after the Board meeting on this date.

<sup>82</sup> Mohamed Sharil Tarmizi to Paul Twomey, April 3, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>.

<sup>83</sup> Ibid.

<sup>84</sup> ICANN, “Mar Del Plata Meeting,” April 8, 2005, <http://www.icann.org/en/meetings/mardelplata/captioning-BoD-meeting-08apr05.htm>.

<sup>85</sup> Ibid.

<sup>86</sup> ICANN, “Special Meeting of the Board,” May 3, 2005, <http://www.icann.org/en/minutes/minutes-03may05.htm>.

<sup>87</sup> Ibid.

<sup>88</sup> ICANN, “Special Meeting of the Board,” June 1, 2005, <http://www.icann.org/en/minutes/minutes-01jun05.htm>.

Board resolved to enter into negotiations with ICM for the technical and commercial terms of a contractual agreement relating to the delegation of the sTLD.<sup>89</sup> Whether this resolution indicated that ICM had adequately met the sTLD sponsorship criteria later became a factual dispute in the arbitration proceedings under the Independent Review Process beginning in 2008.<sup>90</sup>

The GAC held its second meeting of the year in Luxembourg on July 7–12, 2005.<sup>91</sup> The Luxembourg Communiqué does not specifically mention ICM’s application, the proposed .xxx sTLD, or the Board’s June 1, 2005 resolution to enter into contract negotiations with ICM. However, the Luxembourg Communiqué makes the following reference with regard to “new TLDs”:

*The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top-level Domains strategy. The GAC looks forward to providing advice to the process. The GAC also encourages the Board to actively consult all constituencies with regard to the development of this strategy.*<sup>92</sup>

This is the only reference in the Luxembourg Communiqué to the introduction of new TLDs; there are no references to sTLDs specifically.<sup>93</sup> The phrase “significant public policy issues” is not defined further in this document.<sup>94</sup>

Following the Luxembourg meetings, the ICANN Board met in September and resolved that the ICANN General Counsel and the CEO and President, “are directed to discuss possible additional contract provisions or modifications for inclusion in the .xxx registry agreement” which, among other things, ensure the “development and implementation of policies consistent with the principles in the ICM application.”<sup>95</sup> The ICANN Board posted the first draft registry agreement for the .xxx sTLD on the ICANN website for public comment on August 9, 2005.<sup>96</sup>

Three days later, on August 12, in a letter addressed to “the ICANN Board,” Tarmizi expressed the GAC’s discomfort with the possibility of a .xxx sTLD:

*In other GAC sessions, a number of other governments also expressed some concern with the potential introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a*

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<sup>89</sup> Ibid.

<sup>90</sup> See ICM Request for Independent Review Process, June 6, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

<sup>91</sup> GAC, “Meeting 23: Luxembourg Communiqué,” July 12, 2005, [http://gac.icann.org/system/files/GAC\\_23\\_Luxembourg.pdf](http://gac.icann.org/system/files/GAC_23_Luxembourg.pdf).

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/en/minutes/minutes-15sep05.htm>.

<sup>96</sup> ICM and ICANN, “.Draft Sponsored TLD Registry Agreement,” August 1, 2005, <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf>.

*strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.*<sup>97</sup>

Tarmizi disclosed that he had been “approached by some of the [governments with concerns]” and had “advised them that apart from the advice given in relation to the creation of new gTLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about specific concerns.” In the same letter, Tarmizi also asked the Board to “allow time for additional governmental and public policy concerns to be expressed before reaching a final decision.”<sup>98</sup>

Following this, Michael Gallagher, Assistant Secretary of the US Department of Commerce and Administrator of the NTIA, wrote to Vint Cerf “to urge the Board to ensure that the concerns of all members have been adequately heard and resolved before the Board takes action on [the .xxx] application.”<sup>99</sup> The ICANN website’s “Correspondence” page<sup>100</sup> currently dates this letter August 15, 2005.<sup>101</sup> The posted digital copy of this letter has two date stamps on it: August 11 and “received August 15.”<sup>102</sup> This letter additionally noted that the Department of Commerce had received a large number of negative comments from the public regarding the proposed sTLD.<sup>103</sup>

On August 15, the same day the Gallagher letter was posted to ICANN’s website, ICM officially requested an additional month to allow ICANN to address the concerns raised by the GAC.<sup>104</sup> Consequently, consideration of the proposed agreement was postponed until the September 2005 Board meeting.<sup>105</sup>

On September 6, 2005, Marcelo de Carvalho Lopes, the Secretary of Information Technology Policy of Brazil, wrote to Mohamed Sharil Tarmizi and stated that “significant impacts in local concerns have been introduced [as a result of the .xxx proposal] without adequate consultation with national governments.”<sup>106</sup> Lopes also requested that “any new decision concerning the introduction of any other TLDs should only be taken after a careful analysis of the real need for

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<sup>97</sup> Mohamed Sharil Tarmizi to ICANN Board, August 12, 2005, ICANN Correspondence <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm>.

<sup>98</sup> Ibid.

<sup>99</sup> Michael Gallagher to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>.

<sup>100</sup> ICANN, “Correspondence,” <http://www.icann.org/correspondence>.

<sup>101</sup> Ibid.

<sup>102</sup> During the Berkman team’s interview process, some interviewees noted there was confusion as to whether the letter was received on August 11 or on August 15, 2005. Compare <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> with the Correspondence Page date: <http://www.icann.org/correspondence>.

<sup>103</sup> Ibid.

<sup>104</sup> Stuart Lawley to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf>. See also ICM, “Request for Independent Review Process,” June 6, 2010, p 34, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

<sup>105</sup> Ibid.

<sup>106</sup> Marcelo de Carvalho Lopes to Mohamed Sharil Tarmizi, September 6, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

such introduction within the Internet and due consultation” with all affected parties and governments.<sup>107</sup>

In a special meeting on September 15, 2005, the Board resolved to continue discussions with ICM and to address “additional provisions or modifications for inclusion” in the agreement “to ensure there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application.”<sup>108</sup> On September 16, Peter Zangl, Deputy Director of the European Commission’s Information Society, Media Directorate General and a member of the GAC, wrote to Vint Cerf and asked ICANN to allow the GAC to review the independent evaluators’ reports on the sTLD proposals before the Board reached a final decision on .xxx. Zangl also requested that the ICANN Board explain their reasons for accepting the ICM’s application in response to the 2003 RFP round after it was denied in the 2000 “proof of concept” round.<sup>109</sup> A response to this letter was not issued until mid-January 2006.<sup>110</sup>

Although the proposed .xxx registry agreement was again on the agenda for discussion at the special meeting of the Board held on October 12, 2005, the meeting minutes do not recount any discussion concerning the agreement, ICM, or .xxx.<sup>111</sup> However, the minutes note that “there was discussion regarding the nature of other matters on the Board’s agenda and the remaining agenda items were put over until the next possible time for the Board to take up such matters.”<sup>112</sup> Prior to the end of 2005, the ICANN Board held three more meetings: a special meeting on October 24, a special meeting on November 8, and the Vancouver Meeting in early December.<sup>113</sup> The .xxx sTLD and proposed registry agreement were not listed on the agendas for these meetings nor mentioned in the meeting minutes.

In a letter to Paul Twomey dated November 23, 2005, Jonas Bjelfvenstam, the State Secretary for Communications and Regional Policy in Sweden, expressed the Swedish disapproval for the .xxx domain. Bjelfvenstam almost made the following remarks regarding the GAC’s role in the ICANN decision-making process:

*I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time of the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9 - 12,*

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<sup>107</sup> Ibid.

<sup>108</sup> ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

<sup>109</sup> Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>.

<sup>110</sup> Vint Cerf to Peter Zangl, January 30, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>.

<sup>111</sup> ICANN, “Special Meeting of the Board,” October 12, 2005, <http://www.icann.org/en/minutes/minutes-12oct05.htm>.

<sup>112</sup> Ibid.

<sup>113</sup> See ICANN, “2005 Board Meetings,” 2005, <http://www.icann.org/en/minutes/index-2005.html>.



*2005, in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on .xxx, expressed in 2000, would stand.*

*From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting; one month would be insufficient time for governments to independently consider and respond to the subject matter. In this specific case, several countries raised serious concerns at the GAC meeting. However, there was too little information at hand to have an informed and fruitful discussion and hence no conclusions were reached on the subject.<sup>114</sup>*

The letter requested that the ICANN Board “postpone conclusive discussion on .xxx until after the upcoming GAC meeting in November 29–30, 2005, in Vancouver” so that the GAC could discuss matters. Bjelfvenstam asked the Board to provide “in detail how it means .xxx fulfils the criteria set in advance (‘criteria for Independent Evaluators’).”<sup>115</sup>

On the same day, November 23, Paul Twomey responded to Bjelfvenstam’s letter.<sup>116</sup> In his response, Twomey explained that the ICANN Board had put off “any decision on [the .xxx] application until at least the ICANN Board meeting on 4 December 2005.”<sup>117</sup>

The GAC’s third and final meeting in 2005 was held over November 28–December 1 in Vancouver, British Columbia. In the GAC’s Vancouver Communiqué, the only relevant note on the .xxx application was the following:

*The GAC also welcomed a report from ICANN on the status of Board approval of sponsored TLDs, as well as the Evaluation Report requested by GAC members. In that regard, the GAC welcomed the decision to postpone the Board’s consideration of the .XXX application from its December 4th, 2005 meeting until such time as the GAC has been able to review the Evaluation Report and the additional information requested from ICANN.<sup>118</sup>*

## **2.4 The Role of the GAC in the .xxx Process: 2006**

As of January 1, 2006, the Board had not yet voted on the pending .xxx registry agreement. The next significant events occurred following the GAC’s meeting in Wellington in March. Until then, ICANN continued to negotiate the terms for the proposed .xxx registry agreement while responding to written communication from the members of the community.

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<sup>114</sup> Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm>.

<sup>115</sup> Ibid.

<sup>116</sup> Paul Twomey to Jonas Bjelfvenstam, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-bjelfvenstam-23nov05.pdf>.

<sup>117</sup> Ibid.

<sup>118</sup> GAC, “Communiqué 24—Vancouver,” December 1, 2005, [http://gac.icann.org/system/files/GAC\\_24\\_Vancouver\\_Communique.pdf](http://gac.icann.org/system/files/GAC_24_Vancouver_Communique.pdf).

On January 17, 2006, Vint Cerf issued a seven-page letter responding to Peter Zangl's September 16, 2005 letter.<sup>119</sup> In this letter, Cerf highlighted some of the procedural and substantive differences between the 2000 "proof of concept" round and the 2003 RFP and addressed a number of issues related to the GAC that were raised in Zangl's original letter. Cerf explained that the GAC was first formally informed of the pending sTLD applications in a "1 December 2004 letter from Dr. Twomey" to the GAC which "request[ed] input on the public policy elements of a number of issues and highlighting major developments in ICANN."<sup>120</sup> Cerf stated that "the Chairman of the GAC responded to Dr. Twomey on 3 April 2005," and "noted [in this letter] that, as of that date, '[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.'"<sup>121</sup> Cerf then noted that "on 1 June 2005, the Board voted to begin discussion of proposed commercial and technical terms with ICM" and that "this decision generated more GAC interest in the application than had been shown earlier."<sup>122</sup> Cerf also stated that during this time period, Paul Twomey reported to the GAC that "no comments had been received from governments regarding the application" and the GAC had not "raised the issue in any formal comment to ICANN, such as by inclusion in a Communiqué."<sup>123</sup> Finally, Cerf pointed out that the next formal correspondence received by ICANN was the August 12, 2005 letter from the GAC Chairman that described the overall discomfort of the GAC.<sup>124</sup>

On February 11, 2006, Paul Twomey sent Mohamed Sharil Tarmizi a letter that was essentially identical in substance to the letter Vint Cerf sent to Peter Zangl on January 17.<sup>125</sup> In addition to summarizing the Board's interaction with the GAC to date, the Twomey letter also noted that ICANN had "received letters from some members of the Governmental Advisory Committee (GAC) about the . . . application submitted by ICM Registry for .xxx" and summarized the ICM application and the Board's interaction with the GAC since the application was received in 2004.<sup>126</sup>

On March 17, 2006, Peter Zangl replied to Vint Cerf's January 17, 2006 letter.<sup>127</sup> In his letter, Zangl thanked Cerf for the reply and acknowledged that ICANN is responsible for making the final decision. Zangl also made the following remarks:

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<sup>119</sup> Vint Cerf to Peter Zangl, January 17, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>. See also Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-16sep05.pdf>.

<sup>120</sup> *Ibid.*, 2. The letter also includes a hyperlink to the Paul Twomey letter sent to Mohamed Sharil Tarmizi on December 1, 2004.

<sup>121</sup> *Ibid.*, 2-3 (some punctuation omitted).

<sup>122</sup> *Ibid.*, 3.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf>. Cf. Vint Cerf to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

<sup>126</sup> *Ibid.*

<sup>127</sup> Peter Zangl to Vinton Cerf, March 17, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-17mar06.pdf>. See also Vint Cerf, to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

*I would emphasize however that the request for additional information made by the GAC in Vancouver results from the conclusion of the evaluation team that a number of the applications, including .xxx 'do not meet all of the selection criteria' and that, moreover, their 'deficiencies cannot be remedied within the applicant's proposed framework'. Importantly, the evaluators 'recommend that ICANN not consider these applications further'.*

*In order to carry about our duties effectively in the GAC therefore, you will understand why it would be useful to know why the Board decided to proceed with the application, in particular given such explicit advice from the evaluators. I note and appreciate the extensive information you have provided in your letter about the Board's deliberations, but I do not feel that this specific question is succinctly addressed. I would be grateful therefore if there is additional information that you, on behalf of the Board, can share with us on these issues.*

On March 20, 2006, John M. R. Kneuer, the Acting Assistant Secretary at the US Department of Commerce and Acting Assistant Secretary for the NTIA, wrote to Mohamed Sharil Tarmizi.<sup>128</sup> His letter advised the GAC that the proposed .xxx registry agreement did not reflect a number of key commitments offered by ICM within the contract's provisions and requested that the GAC bring this to the attention of the ICANN Board prior to the Wellington, New Zealand meeting.<sup>129</sup> The letter also included a description of the provisions that the NTIA said were not reflected in the agreement.<sup>130</sup>

On March 25, 2006, Stuart Lawley, ICM's CEO, sent a letter to Tarmizi responding to the comments made by the NTIA on March 20.<sup>131</sup> In this letter, Lawley stated that the letter from the NTIA was incorrect and argued that the issues raised by the NTIA were already addressed by a number of specific commitments that had been negotiated between ICANN and ICM.<sup>132</sup>

A few days after the exchange of letters, the GAC met in Wellington, New Zealand.<sup>133</sup> The Wellington Communiqué expressed the most critical remarks with regard to the .xxx application to date by the GAC. In particular, the Communiqué stated that "the GAC does not believe the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application had overcome the deficiencies noted in the Examination Report."<sup>134</sup> The Communiqué further requested "a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top-

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<sup>128</sup> John M. R. Kneuer to Mohamed Sharil Tarmizi, March 20, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf>.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Stuart Lawley to Mohamed Sharil Tarmizi, March 25, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-tarmizi-25mar06.pdf>.

<sup>132</sup> Ibid.

<sup>133</sup> GAC, "Communiqué 25—Wellington," March 28, 2006, [http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf).

<sup>134</sup> Ibid., 3. See also Paul Twomey to Mohamed Sharil Tarmizi, February 16, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

level domain selection criteria.”<sup>135</sup> The Communiqué also stated that ICM committed to “a range of public interest benefits as part of the bid to operate the .xxx domain” and that “these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement.” It also listed a number of such provisions that the GAC wanted to be addressed.<sup>136</sup>

In a separate section of the Wellington Communiqué, titled “GAC–ICANN Board Cooperation,” the Communiqué noted that “the GAC acknowledges that there is a need for the GAC to consider changes in its working methods in order to enable it to interact more routinely with the ICANN Board and the community.”<sup>137</sup>

The day after the GAC Communiqué was issued, the ICANN Board held its regular meeting in Wellington.<sup>138</sup> At this meeting, the Board resolved that “the President and the General Counsel are directed to analyze all publicly received inputs” and “to continue negotiations with [ICM].”<sup>139</sup> The resolution stated that the President and General Counsel also are “to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies,” evaluate the proposed amendments to the registry agreement and provide the Board with recommendations.<sup>140</sup>

On April 28, 2006, the ICANN Board held a special meeting and discussed, among other things, the status of the proposed .xxx sTLD registry agreement.<sup>141</sup> John Jeffrey, the ICANN General Counsel, provided an update on the negotiations and the changes that had been made to the proposed registry agreement since the Wellington meetings. Jeffrey noted that ICM had provided “a final version of their proposal for a response to all concerns from the community and relating to the GAC Communiqué.”<sup>142</sup> Vint Cerf indicated that he would like to “have an up or down vote at the 10 May Meeting.”<sup>143</sup> John Jeffrey also stated that that “the ICM version [of the proposed agreement], including a letter from ICM, would be published later that day for public comment.”<sup>144</sup>

Mohamed Sharil Tarmizi, who was present at this Board meeting, “requested an update on whether there would be a response to the GAC regarding the items that set out in the Communiqué in Wellington.” Paul Twomey stated that “a response would be provided before the 10 May Meeting.”<sup>145</sup> Over the remainder of the Board meeting, the minutes indicate the Board members discussed concerns regarding the proposed registry agreement, including the manner

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<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid., 2-3.

<sup>138</sup> ICANN, “Meeting of the Board, Wellington, NZ,” March 31, 2006, <http://www.icann.org/en/minutes/minutes-31mar06.htm>.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> ICANN, “Special Meeting of the ICANN Board,” 18 April, 2006, <http://www.icann.org/en/minutes/minutes-18apr06.htm>.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

of compliance and whether policy enforcement provisions would be sufficient to cover a community “as complex as the adult entertainment community.”<sup>146</sup>

Paul Twomey sent a letter addressed to Tarmizi and members of the GAC on May 4, 2006.<sup>147</sup> The letter stated that Twomey was writing in response to the GAC’s request for information regarding the decision to proceed with the .xxx negotiations in June 2005. In this letter the ICANN Board again directed the GAC to the “11 February letter to explain ‘the Board decision, particularly with regard to the sponsored community and public interest criteria.’”<sup>148</sup> The letter further stated that “it is important to note that the Board decision as to the .xxx application is still pending” and that the June 2005 decision only permitted the ICANN staff to enter into negotiations for a proposed registry agreement. Twomey explained that this decision did not prejudice “the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as the Board either approves or rejects the registry agreement relating to the .xxx application.”<sup>149</sup> The remainder of the letter explained the process of evaluation again as explained in the February 11 letter and, in particular, noted that “in all instances where the evaluators’ negative reports were reevaluated by the Board of Directors, the applicants answered all questions and clarified issues that had been of concern to the evaluators to the satisfaction of a majority of the Board.”<sup>150</sup>

On May 9, 2006, Martin Boyle, the UK Representative to the GAC, sent a letter to Vint Cerf as a follow-up to the discussions held at the Wellington meeting.<sup>151</sup> The letter describes the “firm view [of the UK] that if the dot.xxx domain name is to be authorized, it would be important that ICANN ensures the benefits and safeguards proposed by the registry, ICM, including the monitoring all dot.xxx content and rating of content on all servers pointed to by dot.xxx, are genuinely achieved from day one.”<sup>152</sup> Boyle also pointed out that “it will be important for the integrity of ICANN’s position as final approving authority. . . to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards.”<sup>153</sup>

Also on May 9, 2006, Tim Ruiz, Vice President of GoDaddy, sent a letter to ICANN to “encourage the ICANN Board to consider the proposed .xxx Registry Agreement only in regards to how it addresses the public policy concerns raised by the GAC.”<sup>154</sup> Ruiz also stated that the current

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<sup>146</sup> Ibid.

<sup>147</sup> John Jeffrey to Mohamed Sharil Tarmizi and members of the GAC, May 4, 2006, ICANN Correspondence, <http://icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>. See also Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, <http://icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Martin Boyle to Vint Cerf, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Tim Ruiz to ICANN, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/ruiz-to-board-09may06.pdf>.

round of TLD expansion was still not complete after two years and notes that “this fact will certainly discourage future applicants for new sponsored or un-sponsored gTLDs.”<sup>155</sup>

On May 10, 2006, the Board held a special meeting and voted on the proposed .xxx registry agreement, following a “detailed discussion” of the agreement terms, including the promises made by ICM in support of the proposal, concerns regarding ICANN’s ability to enforce the terms through a contractual framework, the sponsorship criteria, GAC advice and community input.<sup>156</sup> By a 9–5 vote, the ICANN Board resolved to reject the current draft of the .xxx registry agreement (but not ICM’s application as a whole), citing concerns about the agreement’s enforceability, the sponsorship criteria, and other concerns voiced in the public comments received.<sup>157</sup> ICM filed a Request for Reconsideration on the same day;<sup>158</sup> however, after ICANN invited ICM to submit a revised draft of the registry agreement, ICM withdrew its Request.<sup>159</sup>

Stuart Lawley, President of ICM, sent a letter to Vint Cerf on May 30, 2006 expressing his disappointment at the Board’s decision and at “the lack of communication from ICANN” on the current status of the application. Lawley noted that after reviewing the Board’s voting transcript he was “convinced” that “certain misconceptions prevented the Board from reaching a balanced and equitable judgment on the agreement.” In particular, Lawley described the May 9 letter from Martin Boyle, the UK GAC representative, as being “mischaracterized.” Lawley also stated that ICM was still committed to the project and had filed an expedited request for reconsideration. Finally, Lawley outlined an ICM initiative that “enable[s] certain responsible members of the online adult entertainment community . . . to submit a request to reserve a particular domain for their subsequent registration should ICANN authorize ICM to operate .XXX”<sup>160</sup>

Between June 2006 and January 1, 2007, ICANN has no public records of GAC correspondence regarding the proposed .xxx registry agreement or the sTLD application. Additionally, the .xxx proposed registry agreement was not mentioned in any Board meeting minutes during this time period.

## ***2.5 The Role of the GAC in the .xxx Process: 2007***

On January 5, 2007, ICANN posted a “revised proposed” .xxx registry agreement between ICANN and ICM for public comments until February 5, 2007.<sup>161</sup> On February 2, 2007, Tarmizi sent a letter to Vint Cerf in response to the January 5 announcement.<sup>162</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> ICANN, “Special Meeting of the Board,” May 10, 2006, <http://www.icann.org/en/minutes/minutes-10may06.htm>.

<sup>157</sup> ICANN, “Voting Transcript of Board Meeting,” May 10, 2006, <http://www.icann.org/en/minutes/voting-transcript-10may06.htm>.

<sup>158</sup> ICM, “Request for Reconsideration of Board Action,” May 10, 2006, <http://www.icann.org/en/committees/reconsideration/icm-06-4/petition-20may06.pdf>.

<sup>159</sup> ICM, “Request for Reconsideration 06-4: Letter from J. Beckwith Burr to Reconsideration Committee,” October 29, 2006, <http://www.icann.org/en/committees/reconsideration/withdrawal-of-request-06-4-29oct06.htm>.

<sup>160</sup> Stewart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.htm>.

<sup>161</sup> ICANN Announcement, “ICANN Publishes Revised Proposed Agreement on .XXX,” January 5, 2007, <http://www.icann.org/en/announcements/announcement-05jan07.htm>.

The letter stated that the “GAC convened a teleconference on 17 January 2007 to discuss its reaction to [the call for comments]” and that the participating GAC members on the call “noted that the modifications to the proposed agreement are intended to address public policy issues raised by the GAC in its Wellington, New Zealand Communiqué of March 2006.” The letter also pointed out that “it is unlikely that the GAC will be in a position to provide any comments on .xxx, above and beyond that provided in the Wellington Communiqué, before the next meeting in Lisbon.”<sup>163</sup>

The letter also stated that, despite the ICANN President’s letters sent on February 11 and May 4, 2006, the GAC had requested “written clarification from the ICANN Board regarding its decision June 1 2005” and “reiterate[s] the GAC’s request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.”<sup>164</sup> The letter also requested that ICANN provide the GAC with confirmation that the proposed .xxx registry agreement contained enforceable provisions covering “all of ICM Registry’s commitments.”

Finally, Tarmizi’s letter suggested that it would be appropriate for the GAC and the ICANN Board to hold “face-to-face discussions” in Lisbon in March 2007. In his concluding remarks, Tarmizi again stated that several GAC members remained “emphatically opposed from the public policy perspective to the introduction of an .xxx sTLD”—as was noted in the Wellington Communiqué—and that such sentiments were not contingent on the “specificities of the agreement.”<sup>165</sup>

Two special meetings of the ICANN Board were held between February 5, 2007 and the March 2007 Lisbon meetings. The first meeting, held on February 12, 2007, included a lengthy discussion of the proposed .xxx agreement, which covered community and public comments, status of advice from the GAC, including a “clarification of the letter from the GAC Chair and Chair-Elect” and whether additional public policy advice was to be expected, and how ICM measures up to the RFP criteria.<sup>166</sup>

Some of the notable points raised during this meeting were that more than 200,000 emails had been sent to ICANN and more than 1,300 comments had been submitted to the public comment forums since the initial ICM application. Of these, 600 comments and 55,579 emails had been received since the January 5, 2007 posting of the proposed registry agreement. The Board also discussed the extent of the burden being placed on ICM to show that the entire sponsoring community supports the creation of the .xxx domain. Some Board members raised what they described as a recent lack of support for the defined community observed in negative emails and public comments. Ultimately, the Board resolved that “a majority of the Board has serious concerns” about the underlying sponsored community support, and that ICM should provide

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<sup>162</sup> Mohamed Sharil Tarmizi to Vint Cerf, February 2, 2007, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-cerf-02feb07.pdf>.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> ICANN, “Special Meeting of the Board,” February 12, 2007, <http://www.icann.org/en/minutes/minutes-12feb07.htm>.

further information to ICANN to help determine whether the sponsorship criteria had been met. Tarmizi stated during this meeting that the February 2, 2007 letter sent to Vint Cerf served as the GAC's official advice on the current proposed registry agreement.

ICM responded on March 8, 2007 to the Board's request for information and provided a list of "pre-reservants" compiled from the last six months.<sup>167</sup> This list was generated through ICM's "pre-reservation" initiative, which Stuart Lawley had discussed in his May 30, 2006 letter to Vint Cerf.<sup>168</sup> Attached to the letter were over 75,000 pre-reservations of domain name strings specifically requested by webmasters, totaling 546 pages. A number of statistics in favor of community sponsorship were also noted in this letter.

The Board held its next special meeting on March 12, 2007. At this meeting, the Board engaged in another lengthy discussion concerning the proposed .xxx registry agreement and whether the sponsorship criteria had been met. The Board meeting minutes noted that most members felt the Board should hold off voting on the application until, or after, the Lisbon meeting, which was two weeks away. The minutes also indicated that, again, Tarmizi noted that the Board could seek "additional advice from the GAC" prior to the Lisbon meetings, but such a request would need to be made "expeditiously." Tarmizi also noted that some GAC members remained adamantly against the creation of the .xxx sTLD.<sup>169</sup>

The GAC representatives at this meeting (Tarmizi and Janis Karklins) asked if a response to the GAC's request for more information on the Board's June 2005 decision would be provided prior to the Lisbon meetings. In response, "the Chairman said that a response would be provided"; the minutes stated that "this was confirmed by Paul Twomey," who pointed out that some previous letters were responsive to the GAC's requests and some "additional clarity around the GAC's advice could be presented on this matter."<sup>170</sup>

The GAC request was answered on March 14, 2007, in a one-page letter from Vint Cerf.<sup>171</sup> Cerf again noted that the communications from ICANN on February 11 and May 4, 2006 contained the information the GAC requested. Cerf also stated that the Board was "still reviewing the materials and ha[d] not made a determination as to whether the revisions to the ICM Registry contract contain the necessary enforceable provisions." Cerf acknowledged that some members of the GAC were opposed to the creation of the .xxx sTLD and that they had requested that the final decision be delayed until the Lisbon meetings.

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<sup>167</sup> Stuart Lawley to Vint Cerf and ICANN Board, March 8, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cover-letter-pre-reservation-aatt.pdf>.

<sup>168</sup> Stuart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.pdf>.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Vint Cerf to Mohamed Sharil Tarmizi, March 14, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-tarmizi-karklins-14Mar07.pdf>.



The GAC Lisbon meetings were held in late March. The Lisbon Communiqué was issued on March 28, 2007.<sup>172</sup> With regard to .xxx, the Lisbon Communiqué remarked that the “Wellington Communiqué remains a valid and important expression of the GAC’s views on .xxx” and that the GAC “does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.”<sup>173</sup>

The Communiqué also brings attention to the Canadian government’s comments, which had been posted to the ICANN public forums. These comments raised concerns that ICANN was moving towards an “ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.”<sup>174</sup>

Following the GAC meetings in Lisbon, the ICANN Board also held a meeting on March 30, 2007.<sup>175</sup> During this meeting, the Board determined that the ICM application failed to meet the sponsored community criteria in the RFP specification and, based on the extensive public policy issues raised in the GAC Communiqués, it would not be appropriate for the Board to approve the ICM application or the revised agreement. Consequently, the Board voted to reject the ICM application in its entirety.

## ***2.6 Perceptions of the GAC’s Role in the .xxx Process Based on Berkman Case Study Interviews***

Individuals who have been interviewed in the course of developing this case study shared different observations regarding the interaction between the GAC and the ICANN Board during the evaluation of the .xxx application. Some interviewees suggested a clash of institutional cultures that inhibited better communication. Others cited a lack of appreciation on the part of the ICANN Board for the role of the GAC and the difficult political challenges faced by an inter-governmental body, all with domestic constituencies to which they must answer. Other observers indicated that the schedule of the policy-making process did not allow sufficient time for GAC to offer advice to the ICANN Board. Some of those interviewees described a lack of clarity regarding what constituted GAC advice to the ICANN Board. Others suggested that the GAC did not offer timely advice on the .xxx decision because members believed that the case was closed.<sup>176</sup>

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<sup>172</sup> GAC, “Communiqué 28—Lisbon,” March 28, 2007, 4, [http://gac.icann.org/system/files/GAC\\_28\\_Lisbon\\_Communique.pdf](http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf).

<sup>173</sup> Ibid.

<sup>174</sup> Ibid. at 5.

<sup>175</sup> ICANN, “Meeting of the ICANN Board, Lisbon,” March 28, 2007, [http://www.icann.org/en/minutes/resolutions-30mar07.htm#\\_Toc36876524](http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524).

<sup>176</sup> Interviews, September and October 2010.

### 3 The Independent Review Panel: ICM v. ICANN

#### 3.1 Independent Review Requests and the Independent Review Panel in ICANN's Bylaws

The Independent Review Panel (IRP) is one of three existing mechanisms purposed for the review of ICANN Board activities and decisions (the other two mechanisms are the Ombudsman and Reconsideration Requests). Article IV, Section 3 of the ICANN Bylaws states that, “any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review.”<sup>177</sup> Once submitted, a request for independent review is “referred to an Independent Review Panel (IRP)” which compares the “contested actions of the Board to the Articles of Incorporation and Bylaws” and ultimately declares “whether the Board has acted consistently with” the provisions contained therein.<sup>178</sup>

At the request of either disputing party, the request for independent review can be heard by a three-member panel of arbiters; however, if the parties do not opt for a three-member panel, the request is considered by a one-member panel.<sup>179</sup> In either case, the panel that considers the request for independent review has the power to:

- a) request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- b) declare that an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- c) 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 opinion of the IRP.<sup>180</sup>

The IRP makes “its final declaration based solely on the documentation, supporting materials, and arguments submitted by the parties” and “specifically designate[s] a prevailing party.”<sup>181</sup> The “party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider,” and “each party shall bear its own expenses.”<sup>182</sup>

To date, ICM v. ICANN is the only request for independent review that has been heard by an IRP on the merits.<sup>183</sup> In this case, the IRP consisted of a three-member panel of arbitrators contracted

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<sup>177</sup> ICANN Bylaws, Article IV, Section 3(2), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

<sup>178</sup> *Ibid.*, Article IV, Section 3. As a side note, use of the term “IRP” appears to be used differently in documents and either refers to the “Independent Review Process” or the “Independent Review Panel.” Except where otherwise noted, this report intends the term IRP to refer to the Independent Review Panel.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, Article IV, Section 3(8).

<sup>181</sup> *Ibid.*, Article IV, Section 3(12).

<sup>182</sup> *Ibid.*, Article IV, Section 3(12).

<sup>183</sup> See ICANN, “IRP,” <http://www.icann.org/en/irp>

by the International Centre for Dispute Resolution.<sup>184</sup> The panel included Judge Stephen M. Schwebel, Jan Paulson, and Judge Dickran Tevrizian.<sup>185</sup>

### 3.2 ICM's Request for Independent Review

On June 6, 2008, ICM submitted a request for independent review, alleging that ICANN acted in a manner “inconsistent with its Articles of Incorporation and Bylaws” by improperly administering the 2003 RFP and rejecting ICM’s .xxx application in March 2007.<sup>186</sup> ICM requested for the IRP to declare that: (1) ICANN’s March 2007 rejection of the ICM application was inconsistent with the ICANN Bylaws and Articles of Incorporation, (2) ICANN “must immediately execute a registry agreement on terms and conditions substantially similar to ICM’s draft registry agreement posted on ICANN’s website on February 6, 2007,” and (3) the IRP’s “determination regarding whether any of ICANN’s actions were inconsistent with ICANN’s Articles of Incorporation and Bylaws is *binding* on ICANN.”<sup>187</sup>

In support of these allegations, ICM argued that several events throughout ICANN’s evaluation of the .xxx application were inconsistent with the Articles of Incorporation and Bylaws. Additionally, ICM argued that the five reasons ICANN gave in support of its rejection were inconsistent with the Articles of Incorporation, Bylaws, and the way the other applicants were treated.<sup>188</sup>

Primarily, ICM argued that the June 1, 2005 Board decision constituted an approval of the ICM proposal in light of the RFP criteria, including the sponsorship criteria.<sup>189</sup> ICM argued that ICANN had used a “two-step” process with the other applicants, whereby applicants were first approved on the merits of the RFP criteria, “followed by registry agreement negotiation” and execution.<sup>190</sup> According to ICM, the .xxx application was the only application that deviated from this process by reopening the sponsorship criteria.<sup>191</sup> ICM also stated that there was a lack of “evidence before the Board that ICM’s support in the community was eroding.”<sup>192</sup> Ultimately, ICM claimed that “ICANN’s reopening of the sponsorship criteria—which it did only to ICM—was unfair, discriminatory, and pretextual, and a departure from transparent, fair, and well documented policies.”

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<sup>184</sup> See ICANN, “Resolutions Adopted at Special ICANN Board Meeting” Special Meeting of the Board via Telephone 19 April 2004 <http://www.icann.org/en/minutes/resolutions-19apr04.htm>, when the ICANN Board designated the International Centre for Dispute Resolution as the Independent Review Provider..

<sup>185</sup> Declaration of the Independent Review Panel, ICDR. Case No. 50 117 T 00224 08, (February 19, 2010) (hereinafter referred to as the “IRP Declaration”), available at <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>.

<sup>186</sup> ICM, “Request for Independent Review Process,” June 8, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

<sup>187</sup> *Ibid.*, 1-2 (emphasis added).

<sup>188</sup> IRP Declaration, 45.

<sup>189</sup> *Ibid.* See also ICM, “Request for Independent Review Process.”

<sup>190</sup> ICM, “Request for Independent Review Process,” 25-26.

<sup>191</sup> *Ibid.*

<sup>192</sup> IRP Declaration, 45.

The IRP request also claimed that the independent evaluations identified greater deficiencies in other sTLD applications (including .jobs and .mobi) and accepted those proposals with comparatively little resistance from ICANN.<sup>193</sup> For example, ICM stated that “following the negotiations, the proposed .travel and .jobs registry agreements were posted on the ICANN website on 24 March 2005, and were approved two weeks later, on 8 April 2005.”<sup>194</sup> According to the IRP request, “the process for each application still followed the original two-step process of criteria approval followed by registry agreement negotiation” and in “no case other than with the .xxx application” did the Board later reverse its decision after it had voted in favor of negotiations.<sup>195</sup>

As additional evidence, ICM claimed “several ICANN senior officials and Board members,” including Vint Cerf, Kurt Pritz, and Joichi Ito made comments that reflected that the June 1, 2005 decision was a determination that ICM had satisfied the RFP criteria.<sup>196</sup> In particular, ICM claimed that Cerf had “informed the GAC that ICM’s application had satisfied the selection criteria” at the July 2005 ICANN meeting in Luxembourg.<sup>197</sup>

Finally, the IRP request pointed out that “the GAC was invited to and was often represented at meeting in which ICM’s application (and others) were discussed and debated” and furthermore “[the GAC] was regularly provided with briefing papers regarding the sTLD RFP process, and it was permitted to participate in the Board’s discussions regarding ICM’s application.”<sup>198</sup> The core of this argument focuses on the lack of “any objects to the .xxx sTLD . . . at the outset, when the sTLD evaluation criteria were debated and ultimately approved” and when “ICANN resolved to commence registry agreement negotiations with ICM.”<sup>199</sup> ICM alleged in the IRP Request that the GAC raised no objections to the creation of .xxx and that it was only after the United States Department of Commerce began voicing its concerns in March 2006 that the GAC began to take a dissenting view, expressed mainly in its correspondence with ICANN and in the Wellington and Lisbon Communiqués.<sup>200</sup>

The IRP request also referenced statements from ICANN Board members who raised doubts about the decision on March 30, 2007 to reject ICM’s proposal. Peter Dengate Thrush was quoted as saying that ICANN’s argument that .xxx does not represent a “sponsored community” was “particularly thin,” and that “if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.”<sup>201</sup> Similarly, Susan Crawford argued that if no consensus existed against the .xxx TLD in the adult community,

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<sup>193</sup> Ibid., 25.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid., 25-26.

<sup>196</sup> Ibid., 29.

<sup>197</sup> Ibid., 29.

<sup>198</sup> Ibid., 30.

<sup>199</sup> Ibid., 31.

<sup>200</sup> Ibid., 37.

<sup>201</sup> Ibid., 46.

then, “given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root.”<sup>202</sup>

ICM also argued that ICANN had never precisely identified what “public policy” issues were raised by the ICM agreement that would warrant the rejection of the application in its entirety.<sup>203</sup> In particular, ICM claimed that ICANN’s interpretation of the Wellington Communiqué and governmental correspondence, which had asserted that ICM was to take responsibility for “enforcing the world’s various and different laws concerning pornography” was “sufficiently absurd as to have been made in bad faith” and discriminatory.<sup>204</sup>

Among the remaining arguments, ICM also contended that its proposed registry agreement contained sufficient provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of illegal or offensive content. Moreover, ICM claimed that ICANN’s view that the ICM proposal raised “significant law enforcement compliance issues” indicated that the “GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if [ICM] proved unable to, ICANN would have to do so.” According to ICM, the GAC’s advice required ICANN to impose responsibilities on ICM that were inconsistent with ICANN’s technical mandate.

### ***3.3 ICANN’s Response to ICM’s Request for Independent Review***

ICANN filed its “Response to ICM’s Request for Independent Review” on September 8, 2008.<sup>205</sup> In response to ICM’s allegations of inconsistency, ICANN argued that: (1) ICANN’s consideration of the ICM proposal was “*more* open and transparent than one would find in virtually any other context in conjunction with any other organization”; (2) the June 1, 2005 decision to enter into negotiations did not bind ICANN to award ICM a registry agreement and retained the ability to reject ICM’s application; and (3) ICANN could have rejected the application solely based on the recommendations from the Independent Evaluation Panel, but instead attempted to work “closely and in good faith with ICM to cure apparent problems with the application and ultimately decided such problems could not be addressed by the agreement.”<sup>206</sup>

Additionally, ICANN argued that the “Bylaws support a deferential standard of review” to be applied in the Independent Review Process, “particularly with respect to ICM’s claims.”<sup>207</sup> On this point, ICANN argued that “as long as the Board’s discussions are open and transparent, its

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<sup>202</sup> Ibid., 47.

<sup>203</sup> Ibid., 46.

<sup>204</sup> Ibid.

<sup>205</sup> ICANN, “ICANN’s Response to ICM’s IRP Request,” September, 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-response-to-icm-request-08sep08.pdf>.

<sup>206</sup> Ibid., 3-4.

<sup>207</sup> Ibid., 4.

decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there is a strong presumption that the Board’s decisions are appropriate.”<sup>208</sup>

In support of these arguments, ICANN included an explanation of its “decision-making processes” and “process for independent review” within its response.<sup>209</sup> In this section, ICANN argued that “the Independent Review Process is not a form of traditional dispute resolution, i.e., mediation or arbitration,” and described the Independent Review Process as a mechanism “intended to provide the community with a formal process for reviewing specific decisions of the ICANN Board.” ICANN pointed to Article IV, Section 3(15) of its Bylaws and claimed that the “IRP’s declaration is not binding on the parties” and “the Board, ‘where feasible,’ is only required to “consider the IRP’s declaration at the Board’s next meeting.”<sup>210</sup> ICANN also pointed out that “the Bylaws expressly provide that the Independent Review should be conducted via ‘email and otherwise via the Internet to the maximum extent feasible.” On this point, ICANN argued that “the Independent Review Process does not specifically contemplate the need for a live hearing.”<sup>211</sup>

ICANN’s central factual contention was that its initial approval of the ICM proposal in 2005 and the subsequent contract negotiations were tentative and did not constitute a commitment to award a registry agreement. ICANN argued that its negotiations with ICM were intended to determine whether the terms of a registry agreement could satisfy the ICANN Board’s concerns about the proposal’s compliance with the sTLD sponsorship criteria. “The entire premise of ICM’s request—that proceeding to contract negotiations amounted to a guarantee that ICM would obtain a contract for the .XXX TLD—is simply false.”<sup>212</sup>

ICANN argued further that its final rejection of ICM’s proposal in 2007 “came after extensive review, analysis and debate among ICANN Board members” and was not a sign of capriciousness in its decision-making processes. Instead, ICANN argued its decision reflected the following reasons:

- a) ICM’s application and revised agreement failed to meet, among other things, the “sponsored community” requirement of the RFP specification;
- b) [The Board’s decision was based] on the extensive public comment and the GAC’s Communiqués, the agreement raised considerable public policy issues/concerns. The application and agreement did not resolve the issues raised by the GAC’s Communiqués, and the Board did not believe the public policy concerns could be credibly resolved with the mechanisms proposed by ICM;
- c) The application raised significant law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application; and

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<sup>208</sup> Ibid.

<sup>209</sup> Ibid., 5.

<sup>210</sup> Ibid., 9.

<sup>211</sup> Ibid., 9.

<sup>212</sup> Ibid., 4.

- d) The Board agreed with the GAC's Lisbon Communiqué, that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with its technical mandate.<sup>213</sup>

ICANN requested that the IRP declare that the ICANN Board's decisions, "absent a showing of bad faith," are entitled to deference from ICM and the IRP.<sup>214</sup> Additionally, ICANN argued that, contrary to ICM's claims, it acted in full accord with its Bylaws and its Articles of Incorporation.<sup>215</sup>

### **3.4 Establishing the IRP Process**

The IRP process is governed by the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (ICDR) with supplementary procedural modifications specifically tailored to ICANN.<sup>216</sup> The ICANN Bylaws offer the IRP provider, ICDR, considerable latitude to "establish operating rules and procedures." In terms of the procedural aspects of the Independent Review, the ICANN Bylaws state the following:

*In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.*<sup>217</sup>

In its "Response to ICM's Request for Independent Review," ICANN argued that this provision indicated that the "Independent Review Process does not specifically contemplate the need for a live hearing."<sup>218</sup> Additionally, ICANN argued that this provision also provided the option for a quick, low cost review, conducted over telephone and email.

The Berkman team was unable to locate an official document on record in which the IRP, ICM, or ICANN acknowledge a resolution to these questions raised by ICANN. However, according to interviewees, the IRP apparently determined in an unpublished decision that although the Bylaws and Supplementary Procedures encourage conducting the Independent Review quickly over telephone, Internet, and other electronic means, the procedures give the ICDR panelists clear discretion to hold live hearings.<sup>219</sup> Indeed, what followed was a twenty-month full arbitration process with full documentation, witness testimony, expert opinion and cross-examination.

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<sup>213</sup> Ibid., 38–39.

<sup>214</sup> Ibid., 39 ff.

<sup>215</sup> Ibid., 43 ff.

<sup>216</sup> ICDR, "Supplementary Procedures for ICANN Independent Review Process," <http://www.adr.org/sp.asp?id=32197>.

<sup>217</sup> ICANN Bylaws, Article IV, Section 3(10), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

<sup>218</sup> ICANN, "ICANN's Response to ICM's IRP Request," September 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-reponse-to-icm-request-08sep08.pdf>.

<sup>219</sup> Interviews, September and October 2010.

### ***3.5 Memorial on the Merits, Witness Statements, and Expert Reports***

On January 22, 2008, ICM filed its memorial on the merits, outlining ICANN's organizational history and its successive calls for proposals for new TLDs. ICM reaffirmed its argument that ICANN had violated its Articles of Incorporation and its Bylaws and that ICANN's actions were inconsistent with "relevant principles of International Law" and "relevant principles of California law."<sup>220</sup> ICM also submitted testimony from Stuart Lawley (Chairman and President of ICM), J. Beckwith ("Becky") Burr (former advisor to the FTC, former advisor to the NTIA, and legal counsel to ICM in connection with its 2004 sTLD submission), Elizabeth Williams (consultant to ICANN during its solicitations for TLD proposals), Milton Mueller (professor at the Syracuse University School of Information Studies), and Jack Goldsmith (professor at Harvard Law School).<sup>221</sup>

In its response to ICM's memorial on the merits, ICANN argued that ICM had mischaracterized the laws applying to the IRP proceedings, that ICM's factual claims were incorrect, and that ICANN had acted in complete accord with its Articles of Incorporation and its Bylaws.<sup>222</sup> ICANN also submitted testimony from Vint Cerf (then-VP at Google, former Chairman of the Board at ICANN), Paul Twomey (then-CEO and President of ICANN, former Chairman of the GAC), Alejandro Pisanty (former Board member of ICANN), and David Caron (professor of law at UC Berkeley, arbitrator).<sup>223</sup>

### ***3.6 The IRP's Declaration***

On February 19, 2010, the IRP decided 2–1 in favor of ICM.<sup>224</sup> Three key holdings came from this decision. First, the panel determined that the holdings of the IRP are advisory in nature and do not constitute binding arbitral awards.<sup>225</sup> Second, the panel determined that "the actions and decisions of the ICANN Board are not entitled to deference whether by application of the 'business judgment rule' or otherwise; they are to be appraised not deferentially but objectively."<sup>226</sup> Finally, the IRP also determined that "the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .xxx TLD met the required sponsorship criteria."<sup>227</sup>

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<sup>220</sup> ICANN, "ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/icm-memorial-on-merits-22jan09-en.pdf>, iv – v.

<sup>221</sup> ICANN, "Witness Statements and Expert Report Submitted in Support of ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-for-icmmemorial-22jan09-en.pdf>.

<sup>222</sup> ICANN, "ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>.

<sup>223</sup> ICANN, "Witness Statements and Expert Report submitted in support of ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-icann-response-08may09-en.pdf>.

<sup>224</sup> ICANN, "Independent Review Panel Declaration," February 19, 2010, <http://www.icann.org/en/irp/icmv-icann/irp-panel-declaration-19feb10-en.pdf>.

<sup>225</sup> *Ibid.*, 70.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*



The IRP noted that although there “is a measure of ambiguity in the pertinent provisions of the Bylaws,” the use of the phrase “*to declare* whether an action or inaction of the Board was inconsistent” supported an interpretation that IRP decisions were intended to be advisory, and not binding on the ICANN Board. In particular, the IRP likened this to a recommendation rather than a binding order. Moreover, the IRP also described the provision of Article IV, Section 3(15), which states, “where feasible, the Board shall consider the IRP declaration at the Board’s next meeting” as a “relaxed temporal proviso” where the Board has “to do no more than *consider* the IRP declaration.”<sup>228</sup> Ultimately, the Board found that the loose nature of the language “emphasize[d] that [the IRP declaration] is not binding.”<sup>229</sup> Next, the IRP determined that Independent Review is conducted *de novo* and, thus, “ICANN Board decisions do not enjoy a deferential standard of review.”<sup>230</sup> On this point, the IRP determined that the Articles of Incorporation and Bylaws, which require, among other things, “ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to decisions of the ICANN Board.” The IRP also found that that as a California corporation, ICANN may call on the “business judgment rule” when relevant provisions in the Articles of Incorporation and Bylaws are otherwise absent.<sup>231</sup>

After analyzing the events surrounding the June 1, 2005 Board decision to enter into negotiations with ICM, the IRP determined that the “reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy.”<sup>232</sup>

### **3.7 IRP Process Observations Based on Berkman Case Study Interviews**

As previously noted, the ICM request for independent review was the first to be heard by an IRP. The case poses several questions related to the IRP process and the interpretation of the relevant sections of the Bylaws.

Given the cost and lengthiness of the IRP proceedings, several interviewees questioned whether the IRP provides an accessible and widely applicable means for reviewing the ICANN Board’s decisions. Some interviewees stated that the high cost of the proceedings meant that it offers a venue for only the wealthiest of participants and is not a viable option for the vast majority of ICANN stakeholders. Others asserted that the cost, risk, and duration of the IRP will mean that no others will be likely to appeal ICANN decisions via this mechanism, even among those with the financial resources to do so.<sup>233</sup>

In addition to the questions raised about limits of the IRP as an accountability mechanism, others questioned how ICANN’s interpretation of the process reflects on ICANN’s commitment to

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<sup>228</sup> Ibid., 61 (emphasis added).

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid., 62.

<sup>232</sup> Ibid., 68.

<sup>233</sup> Interviews, September and October 2010.

accountability. Some interviewees expressed the belief that ICANN's interpretation of the IRP—that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the IRP's decision should not be binding on the ICANN Board—was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.<sup>234</sup>

Perceptions also varied with regard to the ultimate effectiveness of the IRP as an accountability mechanism in this specific case. Some asserted that this process demonstrated accountability, given that an applicant for a new TLD was able to initiate the review process and argue their case on the merits before independent arbitrators, and in doing so compelled ICANN to defend the basis of its actions. Moreover, IRP's decision appears to have convinced ICANN to reverse its decision. Other interviewees expressed the opinion that the absence of a binding resolution from the IRP is indicative of the fundamental lack of accountability at ICANN.<sup>235</sup>

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<sup>234</sup> Interviews, September and October 2010.

<sup>235</sup> Interviews, September and October 2010.

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RESPONDENT'S EXHIBIT

# Accountability and Transparency Review Team 2

Report and Recommendations

31 December 2013

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## EXECUTIVE SUMMARY

The Affirmation of Commitments (AoC)<sup>1</sup> requires ICANN to conduct recurring reviews of its deliberations and operations “to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.” To date, reviews have been conducted and Recommendations presented to the ICANN Board of Directors (the Board) by the first Accountability and Transparency Review Team (ATRT1),<sup>2</sup> the WHOIS Review Team (WHOIS-RT)<sup>3</sup> and the Security Stability and Resiliency Review Team (SSR-RT).<sup>4</sup>

As the AoC mandates, a second Accountability and Transparency Review Team (ATRT2) was convened in 2013 and hereby presents Final Report and Recommendations Public Comment. ATRT2 performed three fundamental tasks under the AoC:

- a. assessed ICANN’s implementation of Recommendations of the three prior AoC Review Teams;
- b. offered new Recommendations to the ICANN Board to further improve ICANN’s accountability and transparency;<sup>5</sup> and
- c. offered Recommendations concerning improvements to the Review process itself.

In conducting its review, ATRT2 engaged an Independent Expert, InterConnect Communications (ICC), to provide analysis and recommendations concerning the Generic Names Supporting Organization (GNSO) Policy Development Process (PDP). ICC’s final report (attached as Appendix A) helped inform ATRT2’s understanding of this important aspect of bottom up, multistakeholder governance. For clarity, the ICANN Board is required to act only on Recommendations offered by ATRT2.

### ATRT2 OBSERVATIONS

The following questions guided ATRT2 assessment of ICANN’s accountability and transparency:

#### A. What is the objective of this Review?

<sup>1</sup> <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>

<sup>2</sup> <http://www.icann.org/en/about/aoc-review/atrt/1>, December 2010.

<sup>3</sup> <http://www.icann.org/en/about/aoc-review/whois>, May 2012.

<sup>4</sup> <http://www.icann.org/en/about/aoc-review/ssr>, June 2012.

<sup>5</sup> Specifically, the AoC states that “each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews.”

The ultimate purpose of successfully implementing AoC Review Team Recommendations is to create a “culture of accountability and transparency” throughout ICANN. ATRT2 endeavored to identify how clearly ICANN employees and Directors understand how their respective roles, responsibilities and daily activities relate directly to accountability and transparency. ATRT2 also examined the effect that implementation of Recommendations has had on the perspective of ICANN’s Board and staff and on the work of the community.

## **B. What is the current environment?**

ICANN is experiencing significant growth in resources, global engagement and geographic presence. Such growth creates fundamental challenges for any organization. ICANN is also in the process of launching over 1,000 new generic Top Level Domains (gTLDs), and the community is engrossed in related policy and implementation processes.

For ICANN, which is somewhat unique as a bottom-up, multistakeholder organization that coordinates a global resource and whose decisions must take into account the public interest, a deepening of accountability and transparency at this time is essential not only to its successful growth but also to its long term viability.

## **C. Where does ICANN need to go from here?**

In an increasingly challenging global Internet governance environment, ICANN should strive to establish itself as the benchmark of accountability and transparency. The AoC Review Teams are an example of stakeholders working together on equal footing. As such, they provide ICANN with an opportunity to set a global standard of multistakeholder governance.

Going forward, ATRT2 believes that ICANN must:

- a.* establish and apply clear metrics and benchmarks against which improvements in accountability and transparency can be measured;
- b.* communicate clearly and consistently about its accountability and transparency mechanisms and performance; and
- c.* improve and prioritize its AoC Review processes.

## **ATRT2 RECOMMENDATIONS**

ATRT2 offers the following Final Recommendations for Public Comment. These Recommendations fall into two categories: 1) “New” Recommendations arising from issues that were addressed by ATRT1; and 2) “New” Recommendations arising from issues that were not addressed by ATRT1 Recommendations. With respect to WHOIS-RT and SSR-RT Recommendations, ATRT2 provides only an assessment of ICANN’s implementation of those Recommendations (see Appendix B and Appendix C, respectively). Any “new” Recommendations on the substance of those reviews will be offered by the forthcoming WHOIS-RT2 and SSR-RT2.

All of the following Recommendations focus on issues that should be addressed by the ICANN Board, but they are not necessarily presented in a hierarchical order. ATRT2 believes that these Recommendations are important and, to the extent accepted by the Board, should be treated as a strategic priority. To that end, ICANN should create an implementation plan and publish it to the Community. ATRT2 wishes to emphasize that the observations appearing in ATRT2's assessments and elsewhere in the body of the Report should be duly considered by the Board and afforded all due weight in ongoing and future implementation efforts.

#### **New ATRT2 Recommendations arising from issues addressed by ATRT1**

1. The Board should develop objective measures for determining the quality of ICANN Board members and the success of Board improvement efforts, and analyze those findings over time.

Category: Board Performance and Work Practices; see [Report Section 1](#)

2. The Board should develop metrics to measure the effectiveness of the Board's functioning and improvement efforts, and publish the materials used for training to gauge levels of improvement.

Category: Board Performance and Work Practices; see [Report Section 3](#)

3. The Board should conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time, and should regularly assess Director's compensation levels against prevailing standards.

Category: Board Performance and Work Practices; see [Report Section 4](#)

4. The Board should continue supporting cross-community engagement aimed at developing an understanding of the distinction between policy development and policy implementation. Develop complementary mechanisms whereby the Supporting Organizations and Advisory Committees (SO/AC) can consult with the Board on matters, including but not limited to policy, implementation and administrative matters, on which the Board makes decisions.

Category: Policy/ Implementation/ Executive Function Distinction; see [Report Section 5](#) (ATRT2 suggests that the terminology "policy v. implementation" be consistently used and that reference to "executive function" or "administrative function" be dropped for purpose of clarity.)

5. The Board should review redaction standards for Board documents, Document Information Disclosure Policy (DIDP) and any other ICANN documents to create a single published redaction policy. Institute a process to regularly evaluate redacted material to determine if redactions are still required and if not, ensure that redactions are removed.

Category: Decision Making Transparency and Appeals Processes; see [Report Section 6](#)

## 6. Governmental Advisory Committee (GAC)-related recommendation

### *Increased transparency of GAC-related activities*

6.1. ATRT2 recommends that the Board work jointly with the GAC, through the Board-GAC Recommendation Implementation Working Group (BGRI working group), to consider a number of actions to make its deliberations more transparent and better understood to the ICANN community. Where appropriate, ICANN should provide the necessary resources to facilitate the implementation of specific activities in this regard. Examples of activities that the GAC could consider to improve transparency and understanding include:

- a. Convening “GAC 101” or information sessions for the ICANN community, to provide greater insight into how individual GAC members prepare for ICANN meetings in national capitals, how the GAC agenda and work priorities are established, and how GAC members interact intersessionally and during GAC meetings to arrive at consensus GAC positions that ultimately are forwarded to the ICANN Board as advice;
- b. Publishing agendas for GAC meetings, conference calls, etc., on the GAC website seven days in advance of the meetings and publishing meeting minutes on the GAC website within seven days after each meeting or conference call;
- c. Updating and improving the GAC website to more accurately describe GAC activities, including intersessional activities, as well as publishing all relevant GAC transcripts, positions and correspondence;
- d. Considering whether and how to open GAC conference calls to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the participation of liaisons from other ACs and SOs to the GAC, once that mechanism has been agreed upon and implemented;
- e. Considering how to structure GAC meetings and work intersessionally so that during the three public ICANN meetings a year the GAC is engaging with the community and not sitting in a room debating itself;
- f. Establishing as a routine practice agenda setting calls for the next meeting at the conclusion of the previous meeting;
- g. Providing clarity regarding the role of the leadership of the GAC; and,
- h. When deliberating on matters affecting particular entities, to the extent reasonable and practical, give those entities the opportunity to present to the GAC as a whole prior to its deliberations.

6.2. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI, to facilitate the GAC formally adopting a policy of open meetings to increase transparency into GAC deliberations and to establish and publish clear criteria for closed sessions.

6.3. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI, to facilitate the GAC developing and publishing rationales for GAC Advice at the time Advice is provided. Such rationales should be recorded in the

GAC register. The register should also include a record of how the ICANN Board responded to each item of advice.

6.4. The Board, working through the BGRI working group, should develop and document a formal process for notifying and requesting GAC advice (see ATRT1 Recommendation 10).

6.5. The Board should propose and vote on appropriate bylaw changes to formally implement the documented process for Board-GAC bylaws consultation as developed by the BGRI working group as soon as practicable (see ATRT1 Recommendation 11).

*Increase support and resource commitments of government to the GAC (see ATRT 1 Recommendation 14)*

6.6. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to identify and implement initiatives that can remove barriers for participation, including language barriers, and improve understanding of the ICANN model and access to relevant ICANN information for GAC members. The BGRI working group should consider how the GAC can improve its procedures to ensure more efficient, transparent and inclusive decision-making. The BGRI working group should develop GAC engagement best practices for its members that could include issues such as: conflict of interest; transparency and accountability; adequate domestic resource commitments; routine consultation with local Domain Name System (DNS) stakeholder and interest groups; and an expectation that positions taken within the GAC reflect the fully coordinated domestic government position and are consistent with existing relevant national and international laws.

6.7. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to regularize senior officials' meetings by asking the GAC to convene a High Level meeting on a regular basis, preferably at least once every two years. Countries and territories that do not currently have GAC representatives should also be invited and a stock-taking after each High Level meeting should occur.

6.8. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to work with ICANN's Global Stakeholder Engagement group (GSE) to develop guidelines for engaging governments, both current and non-GAC members, to ensure coordination and synergy of efforts.

6.9. The Board should instruct the GSE group to develop, with community input, a baseline and set of measurable goals for stakeholder engagement that addresses the following:

- a. Relationships with GAC and non-GAC member countries, including the development of a database of contact information for relevant government ministers;
- b. Tools to summarize and communicate in a more structured manner government involvement in ICANN, via the GAC, as a way to increase the

transparency on how ICANN reacts to GAC advice (e.g. by using information in the GAC advice register);

- c. Making ICANN's work relevant for stakeholders in those parts of the world with limited participation; and,
- d. Develop and execute for each region of the world a plan to ensure that local enterprises and entrepreneurs fully and on equal terms can make use of ICANN's services including new gTLD's.

Category: GAC Operations and Interactions; see [Report Section 8](#)

## 7. Public Comment Process

7.1. The Board should explore mechanisms to improve Public Comment through adjusted time allotments, forward planning regarding the number of consultations given anticipated growth in participation, and new tools that facilitate participation.

7.2. The Board should establish a process under the Public Comment Process where those who commented or replied during the Public Comment and/or Reply Comment period(s) can request changes to the synthesis reports in cases where they believe the staff incorrectly summarized their comment(s).

Category: Decision Making Transparency and Appeals Process; see [Report Section 9](#)

8. To support public participation, the Board should review the capacity of the language services department versus the community need for the service using Key Performance Indicators (KPIs) and make relevant adjustments such as improving translation quality and timeliness and interpretation quality. ICANN should implement continuous improvement of translation and interpretation services including benchmarking of procedures used by international organizations such as the United Nations.

Category: Multilingualism; see [Report Section 10](#)

## 9. Consideration of decision-making inputs and appeals processes

9.1. ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:

*The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.*

### 9.2. Explore Options for Restructuring Current Review Mechanisms

The ICANN Board should convene a Special Community Group, which should also include governance and dispute resolution expertise, to discuss options for improving Board accountability with regard to restructuring of the Independent Review Process (IRP) and the Reconsideration Process. The

Special Community Group will use the 2012 Report of the Accountability Structures Expert Panel (ASEP) as one basis for its discussions. All recommendations of this Special Community Group would be subject to full community participation, consultation and review, and must take into account any limitations that may be imposed by ICANN's structure, including the degree to which the ICANN Board cannot legally cede its decision-making to, or otherwise be bound by, a third party.

### 9.3. Review Ombudsman Role

The Board should review the Ombudsman role as defined in the bylaws to determine whether it is still appropriate as defined, or whether it needs to be expanded or otherwise revised to help deal with the issues such as:

- a. A role in the continued process of review and reporting on Board and staff transparency.
- b. A role in helping employees deal with issues related to the public policy functions of ICANN, including policy, implementation and administration related to policy and operational matters.
- c. A role in fair treatment of ICANN Anonymous Hotline users and other whistleblowers, and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment.

### 9.4. Develop Transparency Metrics and Reporting

The Board should ensure that as part of its yearly report, ICANN include, among other things, but not be limited to:

- a. A report on the broad range of Transparency issues with supporting metrics to facilitate accountability.
- b. A discussion of the degree to which ICANN, both staff and community, are adhering to a default standard of transparency in all policy, implementation and administrative actions; as well as the degree to which all narratives, redaction, or other practices used to not disclose information to the ICANN community are documented in a transparent manner.
- c. Statistical reporting to include at least the following elements:
  - i. requests of the Documentary Information Disclosure Policy (DIDP) process and the disposition of requests.
  - ii. percentage of redacted-to-unredacted Board briefing materials released to the general public.
  - iii. number and nature of issues that the Board determined should be treated confidentially.
  - iv. other ICANN usage of redaction and other methods to not disclose information to the community and statistics on reasons given for usage of such methods.



- d. A section on employee “Anonymous Hotline” and/or other whistleblowing activity, to include metrics on:
  - i. Reports submitted.
  - ii. Reports verified as containing issues requiring action.
  - iii. Reports that resulted in change to ICANN practices.
- e. An analysis of the continued relevance and usefulness of existing transparency metrics, including
  - i. Considerations on whether activities are being geared toward the metrics (i.e. “teaching to the test”) without contributing toward the goal of genuine transparency.
  - ii. Recommendations for new metrics.

9.5. The Board should arrange an audit to determine the viability of the ICANN Anonymous Hotline as a whistleblowing mechanism and implement any necessary improvements.

The professional external audit should be based on the Section 7.1 and Appendix 5 - Whistleblower Policy of the One World Trust Independent Review of 2007<sup>6</sup> recommendations to establish a viable whistleblower program, including protections for employees who use such a program, and any recent developments in areas of support and protection for the whistleblower. The professional audit should be done on a recurring basis, with the period (annual or bi-annual, for example) determined upon recommendation by the professional audit.

The processes for ICANN employee transparency and whistleblowing should be made public.

Category: Decision Making Transparency and Appeals Processes; [see Report Section 11](#)

### **New Recommendations from ATRT2**

- 10. The Board should improve the effectiveness of cross-community deliberations.
  - 10.1. To enhance GNSO policy development processes and methodologies to better meet community needs and be more suitable for addressing complex problems, ICANN should:
    - a. In line with ongoing discussions within the GNSO, the Board should develop funded options for professional services to assist GNSO policy development WGs. Such services could include training to enhance work group leaders' and participants' ability to address difficult problems and situations, professional facilitation, mediation, negotiation. The GNSO should develop guidelines for when such options may be invoked.

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<sup>6</sup> <http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf>

- b. The Board should provide adequate funding for face-to-face meetings to augment e-mail, wiki and teleconferences for GNSO policy development processes. Such face-to-face meeting must also accommodate remote participation, and consideration should also be given to using regional ICANN facilities (regional hubs and engagement centers) to support intersessional meetings. Moreover, the possibility of meetings added on to the start or end of ICANN meetings could also be considered. The GNSO must develop guidelines for when such meetings are required and justified, and who should participate in such meetings.
- c. The Board should work with the GNSO and the wider ICANN community to develop methodologies and tools to allow the GNSO policy development processes to utilize volunteer time more effectively, increasing the ability to attract busy community participants into the process and also resulting in quicker policy development.

10.2. The GAC, in conjunction with the GNSO, must develop methodologies to ensure that GAC and government input is provided to ICANN policy development processes and that the GAC has effective opportunities to provide input and guidance on draft policy development outcomes. Such opportunities could be entirely new mechanisms or utilization of those already used by other stakeholders in the ICANN environment. Such interactions should encourage information exchanges and sharing of ideas/opinions, both in face-to-face meetings and intersessionally, and should institutionalize the cross-community deliberations foreseen by the AoC.

10.3. The Board and the GNSO should charter a strategic initiative addressing the need for ensuring more global participation in GNSO policy development processes, as well as other GNSO processes. The focus should be on the viability and methodology of having the opportunity for equitable, substantive and robust participation from and representing:

- a. All ICANN communities with an interest in gTLD policy and in particular, those represented within the GNSO;
- b. Under-represented geographical regions;
- c. Non-English speaking linguistic groups;
- d. Those with non-Western cultural traditions; and
- e. Those with a vital interest in gTLD policy issues but who lack the financial support of industry players.

10.4. To improve the transparency and predictability of the policy development process the Board should clearly state to what degree it believes that it may establish gTLD policy<sup>7</sup> in the event that the GNSO cannot come to closure on a

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<sup>7</sup> This is not referring to Temporary Policies established on an emergency basis to address security or stability issues, a right that the Board has under ICANN agreements with contracted parties.

specific issue, in a specified time-frame if applicable, and to the extent that it may do so, the process for establishing such gTLD policies. This statement should also note under what conditions the Board believes it may alter GNSO Policy Recommendations, either before or after formal Board acceptance.

10.5. The Board must facilitate the equitable participation in applicable ICANN activities, of those ICANN stakeholders who lack the financial support of industry players.

Category: Cross-Community Deliberations; [See Report Section 13](#)

## 11. Effectiveness of the Review Process

### 11.1. Institutionalization of the Review Process

The Board should ensure that the ongoing work of the AoC reviews, including implementation, is fed into the work of other ICANN strategic activities wherever appropriate.

### 11.2. Coordination of Reviews

The Board should ensure strict coordination of the various review processes so as to have all reviews complete before next ATRT review begins, and with the proper linkage of issues as framed by the AoC.

### 11.3. Appointment of Review Teams

The Board should ensure that AoC Review Teams are appointed in a timely fashion, allowing them to complete their work in the minimum one (1) year period that the review is supposed to take place, regardless of the time when the team is established. It is important for ICANN to factor in the cycle of AoC reviews; the Review Team selection process should begin at the earliest point in time possible given its mandate.

### 11.4. Complete implementation reports

The Board should prepare a complete implementation report to be ready by review kick-off. This report should be submitted for public consultation, and relevant benchmarks and metrics must be incorporated in the report.

### 11.5. Budget transparency and accountability

The ICANN Board should ensure in its budget that sufficient resources are allocated for Review Teams to fulfill their mandates. This should include, but is not limited to, accommodation of Review Team requests to appoint independent experts/consultants if deemed necessary by the teams. Before a review is commenced, ICANN should publish the budget for the review, together with a rationale for the amount allocated that is based on the experiences of the previous teams, including ensuring a continuous assessment and adjustment of the budget according to the needs of the different reviews.

### 11.6. Board action on Recommendations

The Board should address all AoC Review Team recommendations in a clear and unambiguous manner, indicating to what extent they are accepting each recommendation.

### 11.7. Implementation Timeframes

In responding to Review Team recommendations, the Board should provide an expected time frame for implementation, and if that time frame is different from one given by the Review Team, the rationale should address the difference.

Category: AoC Review Process Effectiveness; [see Report Section 14](#)

## 12. Financial Accountability and Transparency

In light of the significant growth in the organization, the Board should undertake a special scrutiny of its financial governance structure regarding its overall principles, methods applied and decision-making procedures, to include engaging stakeholders.

12.1. The Board should implement new financial procedures in ICANN that can effectively ensure that the ICANN community, including all SOs and ACs, can participate and assist the ICANN Board in planning and prioritizing the work and development of the organization.

12.2. The Board should explicitly consider the cost-effectiveness of ICANN's operations when preparing its budget for the coming year, in keeping with ICANN's status as a non-profit organization operating and delivering services in a non-competitive environment. This should include how expected increases in the income of ICANN could be reflected in the priority of activities and pricing of services. These considerations should be subject of a separate consultation.

12.3. Every three years the Board should conduct a benchmark study on relevant parameters, (e.g. size of organization, levels of staff compensation and benefits, cost of living adjustments, etc.) suitable for a non-profit organization. If the result of the benchmark is that ICANN as an organization is not in line with the standards of comparable organizations, the Board should consider aligning the deviation. In cases where the Board chooses not to align, this has to be reasoned in the Board decision and published to the Internet community.

12.4. In order to improve accountability and transparency ICANN's Board should base the yearly budgets on a multi-annual strategic plan and corresponding financial framework (covering e.g. a three-year period). This rolling plan and framework should reflect the planned activities and the corresponding expenses in that multi-annual period. This should include specified budgets for the ACs and SOs. ICANN's (yearly) financial reporting shall ensure that it is possible to track ICANN's activities and the related expenses with particular focus on the implementation of the (yearly) budget. The financial report shall be subject to public consultation.

12.5. In order to ensure that the budget reflects the views of the ICANN community, the Board shall improve the budget consultation process by i.e. ensuring that sufficient time is given to the community to provide their views on the proposed budget and sufficient time is allocated for the Board to take into account all input before approving the budget. The budget consultation process shall also include time for an open meeting between the Board and the Supporting Organizations and Advisory Committees to discuss the proposed budget.

Category: Financial Accountability and Transparency; [see Report Section 15](#)

Observations concerning the ATRT2 review process are included in Appendix E.

## **ATRT2's ASSESSMENT OF RECOMMENDATION IMPLEMENTATION**

ATRT2 provides the following assessment of ICANN's implementation of the Recommendations of ATRT1. ATRT2's assessments regarding WHOIS-RT and SSR-RT are found in Appendix B and Appendix C, respectively. In assessing ICANN's implementation of Recommendations, ATRT2 examined a variety of inputs, including replies to requests for Public Comment and direct interaction with the ICANN community. Taking into account ATRT1 Recommendation 27 that called on the Board to regularly evaluate progress against these recommendations and the accountability and transparency commitments in the AoC, ATRT2 took into account reports from the ICANN staff, ICANN Board resolutions and interviews with members of the staff and Board.

### **Report Section 1. BOARD PERFORMANCE AND WORK PRACTICES: ATRT2 Recommendation #1 (Assessment of ATRT1 Recommendations 1 & 2)**

#### **Findings of ATRT1**

In the course of its deliberations, ATRT1 found that recommendations from Interisle Consulting Group (2007) and the Boston Consulting Group (2008) to improve the Board selection process had not been implemented, that the NomCom did not have effective operating methods or Board Member selection criteria, and was not serving to increase transparency of the Board member selection process. To address this, ATRT1 offered recommendations calling for continually assessing and improving ICANN Board governance, including ongoing evaluation of Board performance, the Board selection process, and the extent to which the Board's composition meets ICANN's present and future needs. These can be considered as a group and called Recommendation 1. Furthermore, ATRT1 Recommendation 2 called for a continual assessment of existing Board member skills, the programs for improving those skill sets, and ways to identify necessary skills during the selection of new Board members. The ICANN Board adopted all of these Recommendations in June 2011.

#### **ATRT1 Recommendation 1<sup>8</sup>**

*Recognizing the work of the Board Governance committee on Board training and skills building, pursuant to the advice of both the 2007 Nominating Committee Review and 2008 Board review, the Board should establish (in time to enable the integration of these recommendations into the Nominating Committee process commencing in late 2011) formal mechanisms for identifying the collective skill-set required by the ICANN Board including such skills as public policy, finance, strategic planning, corporate governance, negotiation, and dispute resolution. Emphasis should be placed upon ensuring the Board has the skills and experience to effectively provide oversight of ICANN operations consistent with the global public interest and deliver*

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<sup>8</sup> ATRT Final Report, <http://www.icann.org/en/news/public-comment/atrt-final-31dec10-en.htm>, December 2011.

*best practice in corporate governance. This should build upon the initial work undertaken in the independent reviews and involve:*

- a. Benchmarking Board skill sets against similar corporate and other governance structures;
- b. Tailoring the required skills to suit ICANN's unique structure and mission, through an open consultation process, including direct consultation with the leadership of the SOs and ACs;
- c. Reviewing these requirements annually, delivering a formalized starting point for the NomCom each year; and
- d. From the Nominating Committee process commencing in late 2011, publishing the outcomes and requirements as part of the Nominating Committee's call-for-nominations.

### **ATRT1 Recommendation 2<sup>9</sup>**

*The Board should reinforce and review on a regular basis (but no less than every 3 years) the training and skills building programs established pursuant to Recommendation #1.*

### **Summary of ICANN's Assessment of Implementation**

To implement the core of ATRT1 Recommendation 1, ICANN undertook several actions in cooperation and collaboration with the NomCom. It was generally understood by ICANN staff that these recommendations were meant to not only ensure selection of individuals with the appropriate skills, but also to address "concerns of undue secrecy in the NomCom process and requests for more expansive explanations of NomCom selections."<sup>10</sup>

To improve the process for selecting ICANN Directors and to address Recommendations on Board composition, the NomCom examined its operating procedures to establish clear and transparent skill sets, qualifications and criteria for Board Member selection; improve transparency; and establish and publish the selection procedures and processes the NomCom employs.<sup>11</sup> The new NomCom guidelines, including internal NomCom procedures and a Code of Conduct, were approved by the Board and put into action.<sup>12</sup> The NomCom now annually consults with the ICANN community and public on skill set requirements to consider when making appointments to leadership positions. The Board also embedded in its standard operating procedures a process to inform the NomCom annually by providing information on the existing Board's skill sets.<sup>13</sup> Finally, the Board now

<sup>9</sup> ATRT1 Final Report.

<sup>10</sup> Staff Input Document to the ATRT2, Comments of Amy Stathos; Samantha Eisner; Diane Schroeder, <https://community.icann.org/download/attachments/41880363/Consolidated+Responses+to+ATRT2+Questions-ATRT+1+Recommendations+Implementation+%2830Apr%29+Final.xlsx>

<sup>11</sup> NomCom Transparency Guidelines, <http://nomcom.icann.org/nomcom-transparency-08oct12-en.pdf>

<sup>12</sup> NomCom Code of Conduct, <http://nomcom.icann.org/conduct-2013.htm>

<sup>13</sup> 2012 Annual Report; Implementation of the Accountability & Transparency Review Team Report,

engages in interim training and orientations. To assess the Board's performance in the areas addressed by NomCom's implementation efforts, progress is tracked against skill set benchmarks and training and work program results.<sup>14</sup>

### Summary of Community Input on Implementation

There was limited community input on the implementation of Recommendations 1 and 2. In general, the community indicates awareness of the methods and processes for nominating and electing Board members and general satisfaction with their terms. Some comments did note, however, that potential conflicts of interest with the community remain.<sup>15</sup>

Some noted that it's important to draw Board members from existing community groups to ensure the knowledge and understanding of ICANN and technical expertise to serve effectively. One commenter suggested that Board service could be used as a mechanism to grow the community by creating initiatives to recruit from a wider community of participants. This commenter also underscored the importance of clearly demonstrating or articulating the traditionally high professional standard to which the Board works.<sup>16</sup>

In contrast to comments in support of the existing Board selection processes, one commenter asked, "Is it reasonable that the Board should provide to the Nominating Committee the 'profile' of the Board Members it claims it requires in the next turnover?"<sup>17</sup>

Additional public input posed some questions for future work that were not addressed by the ATRT1 recommendation in this area. Specifically, commenters asked about the importance of having an appropriately international Board, as well as one that represents the ICANN community and groups. These comments also delve further into how the Board itself selects Committee Chairs and Board Governance Committee members as important to transparency into Board selection and operations as those committees are the ones that recommend and approve bylaw changes.<sup>18</sup>

### ATRT2 Analysis of Recommendation Implementation

Recommendation (s)	Assessment
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<http://www.icann.org/en/news/in-focus/accountability/atrt-implementation-report-29jan13-en.pdf>, January 2013.

<sup>14</sup> 2012 Annual Report; Implementation of the Accountability & Transparency Review Team Report, <http://www.icann.org/en/news/in-focus/accountability/atrt-implementation-report-29jan13-en.pdf>, January 2013.

<sup>15</sup> Comments submitted in response to ATRT2 Questions to the Community, Vasily Dolmatov, Alejandro Pisanty, Maria Farell (NCUC), Christopher Wilkinson, Nominet, <http://forum.icann.org/lists/comments-atrt2-02apr13/>

<sup>16</sup> Comments submitted in response to ATRT2 Questions to the Community, Nominet, <http://forum.icann.org/lists/comments-atrt2-02apr13/>

<sup>17</sup> Comments submitted in response to ATRT2 Questions to the Community, Jean-Jacques Subrenat, (ALAC), <http://forum.icann.org/lists/comments-atrt2-02apr13/>

<sup>18</sup> Comments submitted in response to ATRT2 Questions to the Community, Jean-Jacques Subrenat, (ALAC), <http://forum.icann.org/lists/comments-atrt2-02apr13/>



1a Document the methodology used to identify and choose “similar corporate and other governance structures”	Done
1b Document benchmarks used	Incomplete
1c Improve NomCom outreach/PR	Done
1d Expand the skills survey and benchmarking to include NomCom selections in GNSO, Country Code Names Supporting Organizations (ccNSO), and At-Large Advisory Committees (ALAC)	Done
2(a) Metrics should be defined by which effectiveness of board training programs can be measured.	Incomplete
2(b) Board training materials should be made public.	Incomplete

### **ATRT2 Assessment of Recommendation Effectiveness**

While most of the issues in ATRT1's Recommendation 1 and Recommendation 2 have been addressed, several key concerns remain outstanding:

- a. To what degree can the changes be said to have improved the quality of Board members?
- b. To date, there are no objective measures for determining the quality of the ICANN Board membership. ICANN community evaluations have neither been discussed nor implemented, yet they may be among the few statistical measures that could be developed.
- c. A report on the benchmarks used by the NomCom is needed, and the issue needs to be reviewed after there are more years' experience with the Board under the current NomCom conditions.
- d. Metrics are still needed for evaluating the success of Board improvement efforts.

### **Final Recommendation #1**

The Board should develop objective measures for determining the quality of ICANN Board members and the success of Board improvement efforts, and analyze those findings over time.

## **Report Section 2. No New ATRT2 Recommendation (Assessment of ATRT1 Recommendation 3)**

### **Findings of ATRT1**

This issue of Board composition and selection had been the subject of two independent reviews that predated ATRT1. ATRT1 found that the greatest relevance to its review process was the recommendation for ICANN to recruit and select based upon clear skill set requirements. This included the establishment of a formal procedure by which the Nominating Committee (NomCom) would discover and understand the requirements of each body to which it makes appointments. ATRT1 found that, “[a]s such, codifying the processes for identifying, defining and reviewing

these skills requirements, as well as the mechanisms by which stakeholders are consulted, could assist in improving the Board's overall performance."

### **ATRT1 Recommendation 3**

*The Board and Nominating Committee should, subject to the caveat that all deliberations and decisions about candidates must remain confidential, as soon as possible but no later than the Nominating Committee process commencing in late 2011, increase the transparency of the Nominating Committee's deliberations and decision-making process by doing such things as clearly articulating the timeline and skill set criteria at the earliest stage possible before the process starts and, once the process is complete, explain the choices made.*

### **Summary of ICANN's Assessment of Implementation**

ICANN staff reported to ATRT2 on implementation efforts undertaken by both the Board and NomCom. It has become standard operating procedure for the Board and NomCom to have consultations and information-sharing sessions with respect to the Board skill-set requirements. The Board also implemented transparency guidelines for all NomComs, and compliance with the transparency guidelines is standard operating procedure. The NomCom provides a post-selection report where it justifies its selections as standard operating procedure. These implementation measures and background documentation can be found at <http://nomcom.icann.org>.

### **Summary of Community Input on Implementation**

ATRT2 did not receive significant comment on implementation of this Recommendation. Nominet stated that it supported the mechanism for nominating and electing ICANN Board members, and it believes that it is a good example of a bottom-up mechanism for community input. Some commenters indicated they were not aware of the mechanisms for nominating and electing Board members, while others indicated their awareness as well as their opinion that the term length for Directors was satisfactory.

### **Summary of Other Relevant Information**

Implementation of this Recommendation involved not only ICANN Board and staff but also the NomCom itself. Two former NomCom Chairs, Vanda Scartezini (2012 term) and Adam Peake (2011 term), responded to ATRT2's questionnaire and provided a substantial overview of the efforts undertaken by the NomCom in implementation. Both Chairs recognized the intent of ATRT1 to bring greater transparency and accountability to the Director nomination process while at the same time respecting fundamental aspects of the process (e.g. confidentiality of candidates). They also recognized that it was important for the NomCom to maintain an independent role in the selection process.

Adam Peake reported that ATRT1's Recommendations suggested a general feeling that the NomCom needn't be so obsessed by secrecy and that this was positive. He also noted that some core ATRT1 recommendations were already NomCom practice, but the ATRT1 gave impetus to take improvements seriously. In 2011, NomCom

held workshops with the community that he judged to be quite successful, and he said that there was an attempt to improve communication throughout the process with the community (e.g. more email to lists, a blog) and with candidates (e.g. more information about the process, some communication conveying the stage of the process). Peake notes, however, that in 2011 these communications efforts were mostly not realized (i.e. ideas that were not put into practice). In general, though, he found that the implementation efforts were worthwhile, as shown by improvements in 2013.

Vanda Scartezini noted a number of specific implementation activities that took place during the 2012 term. In implementing the Recommendations, the NomCom:

- a. Published and updated the timeline for NomCom activities during the whole cycle of a NomCom to provide transparency to the community and to candidates;
- b. Held formal consultations with all ACs and SOs and their constituencies during the 2011 Annual General Meeting to identify all the profiles needed for the Board and their own leadership positions, and published all of the presentations used;
- c. Held public meetings about ATRT1 recommendations and other relevant aspects of the NomCom process during ICANN's Annual General Meeting in 2012;
- d. Had a formal meeting with ICANN's Board chair, the CEO and the Board Governance Committee to collect their opinions about Board member skill sets needed for the next selection;
- e. Met with ICANN's General Counsel to ensure that all members inside the NomCom understand the requirements regarding privacy of candidate information;
- f. Published the identified profile characteristics for all leadership positions as a guideline for candidate application information;<sup>19</sup>
- g. Held a session during the first ICANN international meeting of 2012 in San Jose, Costa Rica to recheck with the ACs and SOs and constituencies and to orient the NomCom's members on the selection process;
- h. After the selection process, published a final report<sup>20</sup> for the October 2012 Annual General Meeting in Toronto, Canada that included all statistics related to NomCom 2012 (e.g. number of the candidates, gender, and geographic distribution, etc.) as well as a "matching matrix" with the community's and Board's requested candidate skill sets and selectee profiles; and
- i. At the October 2012 meeting in Toronto, conducted additional meetings with

<sup>19</sup> <http://nomcom.icann.org/index-2012.htm#archives>

<sup>20</sup> <http://nomcom.icann.org/nomcom-final-report-08oct12-en.pdf>

the ACs, SOs and their constituencies to provide feedback about the NomCom's activities and how their requirements for the Board and their own organizations' positions were addressed.

Both former Chairs believe that continued improvement is possible, such as monthly report cards and having a standard matrix to use during and after the process. Scartezini maintains that within the ICANN community there is now a clearer vision about the NomCom process, as well as a clearer view of the selection process and requirements for someone interested in becoming a Board member. She also notes a sense of improvement regarding transparency in ICANN's relationship with the community and the external world. Peake also believes that candidates have a better understanding of what's required, and that there is a better knowledge of what the Board needs in terms of candidate skills and the "gaps" in the Board's collective skill-set. He noted that an indirect benefit of these implementation efforts has been that the improved information about desired candidate profiles has helped a professional recruitment company assist the NomCom in identifying potential candidates.

### **ATRT2 Analysis of Recommendation Implementation**

Implementation of ATRT1 Recommendation 3 appears largely successful. There is improvement in the transparency of the NomCom's processes and in the adoption of standard operating procedures designed to enhance transparency. Importantly, implementation of ATRT1 Recommendation 3 fostered dialogue across the community and had the NomCom interacting with the Board, the staff and ACs and SOs as it went about the business of implementation. In fact, implementation of this Recommendation was not uniquely the responsibility of the ICANN Board or staff. Rather, it required the interaction of the NomCom and the Board, as well as members of the community, to successfully execute all of these tasks. It appears that the multiple bodies undertook individual tasks and interacted successfully to implement ATRT1 Recommendation 3 as a whole.

### **ATRT2 Assessment of Recommendation Effectiveness**

ATRT1 Recommendation 3 has been effective in creating a regular and open exchange of information between the Board and the NomCom for identifying necessary skill sets for Directors and for incorporating these desired attributes into the nominating process. Implementation of the Recommendation has also had the effect of creating more transparent NomCom standard operating procedures. For example, the NomCom now regularly holds open sessions at ICANN meetings. Additionally, post-selection reporting by the NomCom that provides a rationale for selection is consistent with spirit of the AoC.

### **Report Section 3. BOARD PERFORMANCE AND WORK PRACTICES: ATRT2 Recommendation #2 (Assessment of ATRT1 Recommendation 4)**

#### **Findings of ATRT1**

ATRT1 found that, based on its review and two prior independent reviews, there was a clear need to improve both the individual and collective skill of the Board of Directors. While ATRT1 Recommendation 3 focused on the identification of required skill sets and incorporation of those skill sets as part of the Nominating Committee process, Recommendation 4 called on the Board to enhance its performance and work practices.

#### **ATRT1 Recommendation 4**

*“Building on the work of the Board Governance Committee, the Board should continue to enhance Board performance and work practices.”*

#### **Summary of ICANN’s Assessment of Implementation**

The Board has undertaken a number of activities to enhance its performance and work practices. Those activities include developing work plans that incorporate Recommendation 4 objectives; conducting two “effectiveness” training sessions in 2012; establishing Director performance evaluations that are provided to the Board “appointing” bodies; synchronizing Directors’ terms for working efficiency; and creation of a Board Procedure Manual (<http://www.icann.org/en/groups/board/documents/draft-procedure-manual-09oct12-en.pdf>).

#### **Summary of Community Input on Implementation**

Public Comments focused on aspects of Board work practices. Nominet noted work done to improve Board governance (e.g. Conflict of Interest and Ethics Review) and pointed out that the Board had established codes of behavior.<sup>21</sup> The U.K. government called for metrics for Board performance to be implemented, reviewed and monitored independently.<sup>22</sup> Darlene Thompson of At Large noted that more information needs to be available to the public as to what methods are being used by the Board to assess its governance.<sup>23</sup> There was general support for the term for Directors.

#### **Summary of Other Relevant Information**

ICANN Board Chair Steve Crocker noted that the ICANN Board is in the process of adding Secretariat support to the Board. This new resource will be charged, in part,

<sup>21</sup> Comments submitted by Nominet: <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00010.html>

<sup>22</sup> Comments submitted by Mark Carvell, U.K. government: <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00014.html>

<sup>23</sup> Comments submitted by Darlene Thompson: <http://forum.icann.org/lists/comments-atrt2-02apr13/pdf9UP7si771p.pdf>

with addressing improvements to Board work plans and processes. Crocker noted that this is an area of distinct interest to him and that ongoing improvements must be achieved.

### **ATRT2 Analysis of Recommendation Implementation**

The Board has clearly taken a number of steps to implement Recommendation 4. While some related tasks have been completed, the nature of that implementation is “ongoing.” While there is clear evidence of work undertaken on this front, effectiveness of the work is still difficult to measure.

### **ATRT2 Assessment of Recommendation Effectiveness**

Based on reporting from the ICANN Board and staff, there has been progress on a number of areas in terms of the Board’s functioning. However, one challenge to a full assessment of the Recommendation’s effectiveness is the lack of benchmarks/metrics against which ATRT2 might be able to measure the effectiveness on implementation. While some of the improvements may be difficult to measure, metrics would assist in drawing qualitative and quantitative conclusions going forward. It is the view of ATRT2 that these activities generally should be visible to the community (unless dealing with Human Resources or other confidential issues). With respect to Board training in particular, ATRT2 has asked whether training materials could be made publicly available as a matter of transparency. The Board has indicated that some training materials are proprietary to the third party providing the training and that the Board may not be able to release them to the community. As a matter of course, the Board Secretariat should be briefed on ATRT1 Recommendations and ATRT2 assessment and integrate that input into its support processes.

### **Final Recommendation #2**

The Board should develop metrics to measure the effectiveness of the Board’s functioning and improvement efforts, and publish the materials used for training to gauge levels of improvement.

## **Report Section 4. BOARD PERFORMANCE AND WORK PRACTICES: ATRT2 Recommendation #3 (Assessment of ATRT1 Recommendation 5)**

### **Findings of ATRT1**

ATRT1 found that compensation of Directors was an issue closely associated with the theme of developing the ICANN Boards’ experience and collective skill set. Furthermore, this issue had been the subject of independent review, Board Governance Committee discussion, and ongoing Board consideration. At the time of the ATRT1 review, only compensation for the Board Chair has been decided.

## **ATRT1 Recommendation 5**

*Recommendation 5: “The Board should expeditiously implement the compensation scheme for voting Directors as recommended by the Boston Consulting Group, adjusted as necessary to address international payment issues, if any.”*

### **Summary of ICANN’s Assessment of Implementation**

Upon the advice of the ICANN General Counsel, the Board delayed implementation of Recommendation 5 to allow for independent study and review. Beginning in June 2011, a compensation plan was developed and the Board engaged an Independent Valuation Expert. The Expert’s report<sup>24</sup> concluded that compensating the Board was reasonable. Because instituting compensation for Directors would require revision to the Board Conflict of Interest policy as well as to the bylaws, a Public Comment period on these issues was held in September 2011. Commenters generally supported the Recommendation to compensate Directors and also offered input on other aspects of ICANN’s Conflicts of Interest policy. On December 8, 2011, the Board voted in favor of implementing compensation to voting Directors. ATRT2 notes that payments were not offered to some Directors until August 2012, a significant delay from the date of approval to implementation, but that there were extenuating circumstances in these cases. Today, voting Board members have the opportunity to elect compensation and the Director’s election to accept or decline compensation is posted on the ICANN website.<sup>25</sup>

### **Summary of Community Input on Implementation**

ATRT2 did not receive community feedback concerning implementation of Recommendation.

### **ATRT2 Analysis of Recommendation Implementation**

Implementation of Recommendation 5 is complete.

### **ATRT2 Assessment of Recommendation Effectiveness**

Gauging the “success” or effectiveness of Recommendation 5 is challenging but not impossible. One aspect of the Recommendation’s rationale was the assumption that compensation could influence the interest of qualified candidates given the responsibilities and workload of an ICANN Director. ATRT2 is unaware of any qualitative or quantitative studies of the Board candidate pools over time or of any feedback that speaks to the effect of implementing the Recommendation. Perhaps that analysis could become input for future Review Teams. ATRT2 envisions regular assessment of Director compensation levels at a responsible frequency over the course of time.

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<sup>24</sup> <http://www.icann.org/en/general/report-board-directors-compensation-considerations-13oct11-en.pdf>

<sup>25</sup> <http://www.icann.org/en/groups/board/documents/ce>

### **Final Recommendation #3**

The Board should conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time, and should regularly assess Director's compensation levels against prevailing standards.

## **Report Section 5. POLICY / IMPLEMENTATION / EXECUTIVE FUNCTION DISTINCTION: ATRT2 Recommendation #4 (Assessment of ATRT1 Recommendation 6)**

### **Findings of ATRT1**

ATRT1 found significant concern across the community about the way in which issues were identified for Board consideration, how and why particular decisions were taken, and how the outcomes were conveyed to stakeholders. ATRT1 also found that the Board's deliberations were infrequently based on codified procedures or requirements, but rather were driven by organizational conventions based merely on precedent. This lack of clarity about the distinction between policy and "executive function" (or "implementation" or "organizational administrative function") fed confusion in the community about whether the Board and staff were acting in their proper capacity with respect to the bottom-up policy-making process.

### **ATRT1 Recommendation 6**

*Recommendation 6: The Board should clarify, as soon as possible but no later than June 2011, the distinction between issues that are properly subject to ICANN's policy development processes and those matters that are properly within the executive functions performed by the ICANN staff and Board and, as soon as practicable, develop complementary mechanisms for consultation in appropriate circumstances with the relevant SOs and ACs on administrative and executive issues that will be addressed at Board level.*

### **Summary of ICANN's Assessment of Implementation**

ICANN staff recommended that the Board adopt ATRT1 Recommendation 6, but with an implementation date later than the June 2011 target put forward by ATRT1. Staff maintained that it was important to establish a baseline of understanding about this topic with the community before implementation could be completed.<sup>26</sup> Staff noted that it would immediately undertake a "categorization exercise" using the Resolution wiki. Staff then set out to categorize Board action into policy/executive/administrative and other categories, and then review whether Public Comment was received on those items.

In its response to ATRT2, staff reported that,

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<sup>26</sup> <http://www.icann.org/en/news/in-focus/accountability/atrt-recommendations-implementation-plans-22oct11-en>



ICANN addressed all portions of this recommendation in implementation. Please see 2012 ATRT Implementation Summary<sup>27</sup> and the 2012 Annual Report on ATRT Implementation.<sup>28</sup> Completion of this implementation project inspired further discussion about the distinction between policy and implementation issues that is still ongoing within the community, most recently in a public session in Beijing.

Because of the work undertaken for Recommendation 6, ICANN also published a paper on the Community Input and Advice Function,<sup>29</sup> which has led to an ongoing dialogue in the community. There were sessions in both Toronto and Beijing on this topic, and ICANN staff has since produced a paper for Public Comment on Policy v. Implementation<sup>30</sup> to help frame and move the discussion forward.

Staff further notes that the “community now has a defined set of terms to use when discussing and categorizing Board actions. The follow-up work has reinitiated a challenging debate within the community regarding policy vs. implementation roles and how the community provides advice to the Board.” Staff also notes that “[e]very substantive action taken by the Board is now accompanied by an identification of the type of action and the consultation expected or conducted prior to Board decision.”

### **Summary of Community Input on Implementation**

The comments received and the discussions at the public sessions reflect common sentiments from the community, including:

- a. this continues to be an important issue;
- b. outside of policy issues addressed in the well-defined GNSO, ccNSO and ASO policy processes, there is uncertainty about how advice can be provided from the community to the Board;
- c. cross-community working groups should be explored as one mechanism for providing advice to the Board;
- d. current mechanisms or approaches to provide the Board with advice from the community on non-“P” policy issues are inadequate; and
- e. ad hoc groups, experts and fast-track processes that have been used in the new gTLD process have not proven to be satisfactory approaches to address this issue.

### **ATRT2 Analysis of Recommendation Implementation**

Implementation is incomplete and work on the issue is ongoing. ATRT2 views this Recommendation as still important to provide clarity to the community and particularly important in the multistakeholder environment. Although ICANN posted a Community Input and Advice Function paper on September 24, 2012 (more than a

<sup>27</sup> <http://www.icann.org/en/news/in-focus/accountability/atrt-project-list-workplans-29jan13-en.pdf>

<sup>28</sup> <http://www.icann.org/en/news/in-focus/accountability/atrt-implementation-report-29jan13-en.pdf>

<sup>29</sup> <http://www.icann.org/en/news/in-focus/accountability/input-advice-function-24sep12-en.pdf>

<sup>30</sup> <http://www.icann.org/en/news/public-comment/policy-implementation-31jan13-en.htm>

year after the Board was to take action on Recommendation 6 under the AoC), and public sessions were held during the ICANN meetings in Toronto (October 2012) and Beijing (April 2013), the fact remains that this issue was barely addressed during the two-year timeframe envisioned by ATRT1. In fact, staff only developed its “framework” paper and posted it for Public Comment on January 21, 2013.

A continuing lack of clarity about “policy v. implementation” causes uncertainty at best and distrust at worst about whether ICANN Board or staff is acting within its proper scope or whether ICANN is acting in a “top-down” as opposed to a “bottom-up” manner. As in any organization or community, a clear understanding of respective roles, responsibilities and process is foundational to cohesion and successful interaction.<sup>31</sup>

Some maintain that distinguishing between policy and implementation is either too difficult a task or so esoteric that clear lines – and hence clarity for the community and ICANN – are not achievable. While perfect clarity may not be achievable, failure to develop a workable framework that lends clarity to roles, responsibilities and processes in matters of policy and implementation will only continue to foster questions and unnecessary concerns about the accountability of ICANN’s decision-making as well as its genuine commitment to the bottom-up, multistakeholder process.

#### **ATRT2 Assessment of Recommendation Effectiveness**

The implementation of ATRT1 Recommendation 6 has not yet been effective in achieving the Recommendation’s stated objective. While efforts have begun to engage the community in a dialogue concerning the issue, the community and ICANN appear no closer to clarity on this matter. Implementation has had the effect of spurring focused dialogue that informs community members’ understanding of the difference between “policy” and “implementation.” It may be that additional effort needs to be applied to develop complementary mechanisms for consultation in appropriate circumstances with the relevant SOs and ACs on administrative and executive issues that will be addressed at Board level. Finally, ATRT2 suggests that the terminology “policy v. implementation” be consistently used and that reference to “executive function” or “administrative function” be dropped for purpose of clarity.

#### **Final Recommendation #4**

The Board should continue supporting cross-community engagement aimed at developing an understanding of the distinction between policy development and policy implementation. Develop complementary mechanisms whereby the Supporting Organizations and Advisory Committees (SO/AC) can consult with the

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<sup>31</sup> Comments of the United States Council for International Business: There is a sense, particularly among business stakeholders, that the ICANN Board and staff call an item ‘implementation’ when they want to execute on the item without community input. (Likewise, if the ICANN Board and staff do not want to act upon a particular matter, then they may call the matter “policy” and have it lost within the lengthy PDP process.) The ATRT2 recommendations need to acknowledge the current dilemma and advocate for more effective solutions than the ‘additional efforts’ called for...”  
<http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfGwHm9XvJAd.pdf>

Board on matters, including but not limited to policy, implementation and administrative matters, on which the Board makes decisions.

## **Report Section 6. DECISION MAKING TRANSPARENCY AND APPEALS PROCESSES: ATRT2 Recommendation #5 (Assessment of ATRT1 Recommendations 7.1 and 8)**

### **Findings of ATRT1**

ATRT1 found that ICANN's bylaws emphasize the need for transparency in the Board's processes, stipulating the informed participation of stakeholders, neutrality, objectivity, responsiveness and evidence-based decision making. Likewise, the need for transparency and openness in the way the ICANN Board takes decisions is re-stated prominently in the Affirmation of Commitments. ATRT1 found a need for clear, published guidelines concerning ICANN's decision-making processes.

### **ATRT1 Recommendations 7.1 and 8**

Due to the close relationship between the subject matter of ATRT1 Recommendations 7.1 and 8, ATRT2 has combined its assessment of implementation here.

*Recommendation 7.1: "Commencing immediately, the Board should promptly publish all appropriate materials related to decision-making processes – including preliminary announcements, briefing materials provided by staff and others, detailed Minutes, and where submitted, individual Directors' statements relating to significant decisions. The redaction of materials should be kept to a minimum, limited to discussion of existing or threatened litigation and staff issues such as appointments."*

*Recommendation 8: As soon as possible, but no later than the start of the March 2011 ICANN meeting, the Board should have a document produced and published that clearly defines the limited set of circumstances where materials may be redacted and that articulates the risks (if any) associated with publication of materials. These rules should be referred to by the Board, General Counsel and staff when assessing whether material should be redacted and cited when such a decision is taken.*

### **Summary of ICANN's Assessment of Implementation**

ICANN staff reported to ATRT2 that, as a result of implementation, it is now standard operating procedure to post all Board materials, including rationales for resolutions. These and other reference materials are archived at <http://www.icann.org/en/groups/board/meetings>. In response to ATRT1's recommendation, ICANN developed an implementation plan that noted, in part, the following:

“[a]s of the 25 January 2011 meeting, staff began including proposed rationale statements in Board submissions, addressing the items set forth in the Affirmation of Commitments. If the Board does not propose significant modification to the draft rationale statements, those draft statements will be posted with the Approved Resolutions for each meeting. This practice was instituted on 27 January 2011,

with the posting of the 25 January 2011 Approved Resolutions. The rationale statements will be considered final when posted with the Minutes as approved for each meeting. The rationale statements are to address the sources of data and information, as well as to address community input accepted and rejected.”

With respect to redactions of Board materials, the implementation plan noted that,

“[w]hile these DIDP (Document Information Disclosure Policy<sup>32</sup>) conditions will remain the baseline for redactions, there is great value in producing a document to guide staff and inform the community on the specific issue of redaction of Board materials. As evidenced through the very publication of the Board briefing materials, ICANN has narrowed the previously-applied scope of its application of the conditions for non-disclosure in favor of increased transparency and accountability. The document was posted in March 2011. Of note, beginning with the 12 December 2010 Board meeting materials, the basis for each redaction was set forth on every page where a redaction occurred. A review of how to best cite to the circumstances requiring a redaction will continue.”

In addition to the implementation plan cited above, ICANN staff created a searchable Board resolution wiki “to provide the public with easy-to-access information on every substantive resolution approved by the Board of Directors.” The wiki can be found at <https://community.icann.org/display/tap/ICANN+Board+Resolutions>.

### **Summary of Community Input on Implementation**

Contributors during the Public Comment period recognized the improvement in the availability of Board materials. For example, Nominet stated,

“[we] note the improvement in the availability of Board-related materials such as Board briefing documents and the rationale behind board decisions. We welcome this improved communication, but this could be further improved to show that the Board has considered the wider implications of its decisions. In particular, the Board needs to be particularly attentive to concerns from those not normally involved in ICANN activities and ensure that they do give a reasoned response to input.”

Likewise, the Non-Commercial Stakeholder Group noted, “that some improvements have been made...Specifically, there have been timely publications of Board decisions and the rationale and explanations that have accompanied these. We commend ICANN for these efforts.” An individual commenter/former ICANN staffer also called for publication of staff advice to the Board.

### **ATRT2 Analysis of Recommendation Implementation**

Overall, ATRT2 finds that ICANN’s implementation of ATRT1 Recommendation 7.1 appears largely successful. Having adopted the recommended practices as standard

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<sup>32</sup> <http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm>

operating procedure, the Board took a concrete step toward implementation. The Board Briefing Materials, agendas, minutes, resolutions, rationales and other relevant documents are visible and accessible on the ICANN website.

An important aspect of implementation is also the actual practice of making all relevant materials available in a timely fashion. While ATRT2 has heard of instances where materials have not been published in a timely fashion, it appears to a large degree that the standard operating procedure is being respected. A question has been raised about the scope of redactions and whether that practice respects the “minimal” approach of Recommendation 7.1. This question is difficult to explore given the nature of redactions.

### **ATRT2 Assessment of Recommendation Effectiveness**

One measure of effectiveness is feedback from the community that relies on the publishing of Board materials to understand the Board decision-making process. ATRT1 identified a “black box” problem with respect to Board decisions. Otherwise said, the community saw the “inputs” to the Board decision-making process but had little or no visibility into the ICANN Board’s deliberations and rationale for the decisions that were “outputs” of the process. Comments to ATRT2 note improvement in this area and reflect a greater sense of transparency. Likewise, there was lesser comment to the contrary than encountered by ATRT1.

### **Final Recommendation #5**

The Board should review redaction standards for Board documents, Document Information Disclosure Policy (DIDP) and any other ICANN documents to create a single published redaction policy. Institute a process to regularly evaluate redacted material to determine if redactions are still required and if not, ensure that redactions are removed.

## **Report Section 7. No New ATRT2 Recommendation (Assessment of ATRT1 Recommendation 7.2)**

### **Findings of ATRT1**

ATRT1 found that the ultimate responsibility for ensuring the highest possible levels of transparency and accountability necessarily reside with the Board. ATRT1 also observed that the vast majority of the Board’s deliberations were based on organizational conventions. Significant policy issues were identified and determined based on practices established over time, not according to codified procedures or requirements. ATRT1 also noted that the absence of clear, codified guidelines, procedures or processes relating to Board decisions only serves to escalate stakeholders’ concerns and could lead to disenfranchisement and disengagement.

### **ATRT1 Recommendation 7.2**

*Commencing immediately, the Board should publish “a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and*

*information on which ICANN relied.” ICANN should also articulate that rationale for accepting or rejecting input received from Public Comments and the ICANN community, including Supporting Organizations and Advisory Committees.*

### **Summary of ICANN’s Assessment of Implementation**

ICANN staff reports that it has fully implemented ATRT1 Recommendation 7.2.

ICANN also notes that the development of rationales has, at times, increased the time needed for Board consideration of items. For major Board decisions, there have been significant costs incurred in both money and resources to develop the rationales.

With respect to effectiveness, ICANN notes that people have more information as to the bases for Board decisions. Sometimes the complexity of the resolutions has decreased because background information can now be provided through the rationale.

### **Summary of Community Input on Implementation**

ATRT2 received little comment on the Board’s explanation of decisions and stated rationale. The Registries Stakeholder Group (RySG) did comment, however, that the Board still ignores comments in its decision-making.

### **Summary of Other Relevant Information**

ATRT2 assessed Board resolutions during the period of 2011-2013 with three questions in mind:

- a. Does the Board provide a clear explanation of decisions? Are there substantive actions to be taken to further improve the ICANN process?
- b. Does the Board provide a clear and reasonable rationale for its decisions?
- c. Does the Board provide an explanation of how it considers Public Comments (if any)?

ATRT2 concluded that there is clear evidence that to a large degree, Board decisions do satisfy the three questions posed.

### **ATRT2 Analysis of Recommendation Implementation**

Implementation of ATRT1 Recommendation 7.2 appears largely successful. A review of all Board Resolutions from 2011 through 2013 reflects that detailed rationale is provided for those decisions. ATRT2’s assessment reflects an improving trend over the three-year period and while there remain examples that demonstrate room for improvement, implementation of Recommendation 7.2 indicates significant qualitative progress since 2011.

## **ATRT2 Assessment of Recommendation Effectiveness**

The baseline for this Recommendation is that prior to January 2011, the Board had not regularly adopted formal rationale statements for its decisions. Both the analysis and Public Comment reflect significant improvement in this area. See Appendix D.

## **Report Section 8. GAC OPERATIONS AND INTERACTIONS: ATRT2 Recommendation #6 (Assessment of ATRT1 Recommendations 9-14)**

### **Findings of ATRT1**

ATRT1 recognized that the existing GAC-Board relationship was dysfunctional and provided six recommendations aimed at improving GAC-Board interactions.

### **ATRT1 Recommendation 9**

*The Board, acting through the GAC-Board joint working group, should clarify by March 2011 what constitutes GAC public policy “advice” under the bylaws.*

### **ATRT1 Recommendation 10**

*Having established what constitutes “advice,” the Board, acting through the GAC-Board joint working group, should establish by March 2011 a more formal, documented process by which it notifies the GAC of matters that affect public policy concerns to request GAC advice. As a key element of this process, the Board should be proactive in requesting GAC advice in writing. In establishing a more formal process, ICANN should develop an on-line tool or database in which each request to the GAC and advice received from the GAC is documented along with the Board’s consideration of and response to each advice.*

### **ATRT1 Recommendation 11**

*The Board and the GAC should work together to have the GAC advice provided and considered on a more timely basis. The Board, acting through the GAC-Board joint working group, should establish by March 2011 a formal, documented process by which the Board responds to GAC advice. This process should set forth how and when the Board will inform the GAC, on a timely basis, whether it agrees or disagrees with the advice and will specify what details the Board will provide to the GAC in circumstances where it disagrees with the advice. This process should also set forth the procedures by which the GAC and the Board will then “try in good faith and in a timely efficient manner to find a mutually acceptable solution.” This process must take into account the fact that the GAC meets face-to-face only three times a year and should consider establishing other mechanisms by which the Board and the GAC can satisfy the Bylaw provisions relating to GAC advice.*

### **ATRT1 Recommendation 12**

*The Board, acting through the GAC-Board joint working group, should develop and implement a process to engage the GAC earlier in the policy development process.*

### **ATRT1 Recommendation 13**

*The Board and the GAC should jointly develop and implement actions to ensure that the GAC is fully informed as to the policy agenda at ICANN and that ICANN policy staff is aware of and sensitive to GAC concerns. In doing so, the Board and the GAC may wish to consider creating/revising the role of ICANN staff support, including the appropriate skill sets necessary to provide effective communication with and support to the GAC, and whether the Board and the GAC would benefit from more frequent joint meetings.*

### **ATRT1 Recommendation 14**

*The Board should endeavor to increase the level of support and commitment of governments to the GAC process. First, the Board should encourage member countries and organizations to participate in GAC deliberations and should place a particular focus on engaging nations in the developing world, paying particular attention to the need to provide multilingual access to ICANN records. Second, the Board, working with the GAC, should establish a process to determine when and how ICANN engages senior government officials on public policy issues on a regular and collective basis to complement the existing GAC process.*

### **Summary of ICANN’s Assessment of Implementation**

After adopting the Recommendations, ICANN created the joint BGRI working group to focus on implementation. For certain issues within the competence of the GAC, it undertook its own work efforts to respond to the Recommendations.

As called for by Recommendation 9, the GAC developed a definition of GAC Public Policy “Advice” that was accepted by the BGRI working group and the Board, and ultimately was added by the GAC to its Operating Principles. This definition served as a key input for developing GAC procedures for the new gTLD program, most notably in the processes for GAC Early Warning and Advice (Objections).<sup>33</sup>

To address Recommendation 10, the BGRI working group developed and implemented a GAC Register of Advice. The GAC Register of Advice is posted publicly on the GAC website.<sup>34</sup> Evaluation of the effectiveness of the Register as a tool for the Board, GAC and community is ongoing, pending longer-term use of the Register by the GAC and the Board, particularly in terms of “follow-up action” and mutual agreement that advice has been fully implemented.

To implement Recommendation 11, the BGRI working group has worked to codify the methods for the GAC-Board Consultations process as called for in the bylaws. The GAC has submitted edits to the document, and the revised text remains to be reviewed/approved by the Board. The Board then will need to develop bylaws amendments that would impose a time limit and require a super majority of the Board in order to reject GAC advice.

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<sup>33</sup> <https://gacweb.icann.org/display/GACADV/GAC+Advice>. See also ICANN Bylaws, Article XI Section 2.1 at <http://www.icann.org/en/about/governance/bylaws>, and GAC Operating Principles, Article XII – Provision of Advice to the ICANN Board at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

<sup>34</sup> <https://gacweb.icann.org/display/GACADV/GAC+Register+of+Advice>



As the BGRI working group tackled Recommendation 12, several complicating factors emerged, including the complexity and length of the Generic Names Supporting Organization's (GNSO) policy development process. Additionally, despite the fact that the policy development processes of various SOs and ACs are open to community participation, there are different levels of explicit participation avenues for the GAC. For example, the ccNSO process affirmatively includes input from the GAC in particular, while the GNSO process is "open" to all interested stakeholders and has no specific path to participation by the GAC. However, the GAC is structured under the bylaws to provide public policy advice directly to the ICANN Board. Some see this as an impediment to early engagement. In addition, considerable differences exist within the ICANN community as to the scope of the terms "policy" and "public policy." The GNSO does not appear to assign any particular or specific weight to "public policy" advice from the GAC in its deliberations. For its part, the GAC is aware that it does not have membership status in the GNSO and cannot influence or determine the outcome of GNSO processes. There is no clear record, for example, of acceptance by the GNSO of GAC input prior to the completion of any specific GNSO policy recommendation; in fact, the reverse is the case (e.g. public order and morality). Recommendation 12 was discussed by the BGRI working group at ICANN Prague, Toronto and Beijing, with focus specifically on the different work methods in the GAC as compared to the other SOs and ACs. The GAC has agreed to develop proposals for new tools/mechanisms for engagement with the GNSO policy development process, and discussions are ongoing.

In relation to Recommendation 13, at the request of the BGRI working group ICANN staff has proposed a monthly policy update for the GAC to assist its members in monitoring/tracking pending policy development initiatives. This effort has been welcomed by the GAC and is considered one of several elements that will support meeting the goal of the Recommendation. There may be additional tools identified by the BGRI working group that could facilitate a broader understanding among GAC members of the variety of pending policy initiatives and deliberations in other ICANN stakeholders groups. The GAC has also proposed, via the BGRI working group, the idea of "reverse" liaisons from ACs and SOs, as well as a Board liaison to the GAC, which remains under consideration in terms of specific implementation measures.

Many efforts were taken to implement Recommendation 14. The Canadian Government hosted the first meeting of senior government officials during the 45<sup>th</sup> ICANN Meeting in Toronto, which was well attended and highlighted considerable support for the role of the GAC within ICANN. At the request of the GAC Chair, ICANN has made strides to increase funding for GAC member travel to be commensurate with other SOs and ACs and provides interpretation for GAC meetings. This has clearly facilitated broader participation by non-English speaking GAC members in GAC deliberations. In fact, in the last three years the number of GAC members has increased from 100 to 129, and there has been a 77% increase in the level of in-person participation at ICANN meetings since 2010. Finally, the GAC issued an RFP in 2012 to solicit a provider, funded by Brazil, Norway and the Netherlands, to supply additional secretariat support. In the interim, ICANN funded the travel costs of an Australian Continuous Improvements Group (ACIG) staff member to the Durban meeting to provide support to the GAC under the guidance of the GAC Chair and Vice Chairs. In February 2013, a new ICANN staff member was hired under a temporary contract to provide additional support to the Chair and Vice

Chairs of the GAC, and that individual is on track to become a permanent employee.

### **Summary of Community Input on Implementation**

Comments received in response to ATRT2's call for input generally conclude that the Board, working with the GAC, has made a substantial, good-faith effort to implement this series of Recommendations. Nevertheless, highlighted outstanding issues include the need to develop metrics or measurable criteria with which to monitor implementation; fully implement remaining Recommendations; more clearly target future recommendations to aid in implementation; and improve communication to those outside of the immediate ICANN community.

In addition, several commenters note that implementation has taken longer than anticipated by ATRT1, and in some cases there was a gap between the wording of the Recommendation and how it was carried out.<sup>35</sup> Some also claimed that the "role of the Board and the relationship between the Board and the GAC is unclear."<sup>36</sup> In addition, while comments characterize ICANN as making best efforts, the implementation of GAC improvements remains insufficient. Commenters request that "a further smooth channel be provided for GAC to engage into policy-making procedure."<sup>37</sup> Further commenters maintain that ICANN still needs to improve accountability and transparency in decision-making and execution and "strengthen working mechanisms between GAC, Board and SOs/ACs and define roles."<sup>38</sup> Some commenters feel that implementation remains unsatisfactory as some key GAC-related Recommendations have not yet been fully implemented.

### **ATRT2 Analysis of Recommendation Implementation**

Overall, ATRT2 finds that ICANN has made a good-faith effort to implement ATRT1 Recommendations 9-14. While there seem to have been some challenges associated with responsibility for implementation (i.e., the shared nature of both the ICANN Board and GAC) as well as the practicality of priority timing proposed by ATRT1, most of the Recommendations have been addressed. However, there are outstanding implementation details that require further attention (e.g. the functioning of the Register of GAC Advice, whether and how often to hold additional High Level Meetings, etc.). For Recommendation 10, the Board needs to do further work to develop a more formal, documented process for notifying the GAC on matters that affect public policy concerns. Recommendation 12, related to facilitating the early engagement of the GAC in ICANN's policy development process, remains an ongoing work priority for the BGRI working group, which has most recently involved direct consultations with the GNSO. While there has been some progress on the level of support and commitment of governments to the GAC process, further work is needed related to Recommendation 14.

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<sup>35</sup> Shawn Gunnarson, Individual Commenter (see footnote 7)

<sup>36</sup> Maureen Hilyard, ALAC, (see footnote 7)

<sup>37</sup> 曹华平, Internet Society of China, (see footnote 7)

<sup>38</sup> Liu Yue, Chinese Academy of Telecommunications Research, (see footnote 7)

Recommendation (s)	Assessment
9	Complete, issue satisfactorily addressed.
10	Incomplete; significant steps have been taken with the GAC Register and the Board responding to GAC input, but further work is needed on the Board seeking GAC input at the outset.
11	Substance complete, but took longer than ATRT1's suggested deadline. Issue of proposing and adopting related bylaws changes remains open.
12	Discussion and implementation of recommendations remain ongoing. Completion involves considerable further work and engagement with other SOs and ACs. [To be reassessed after receiving the expert report]
13	Complete; issue satisfactorily addressed.
14	Actions taken, but further work is needed given broader geopolitics and the concerns of some governments.

### **ATR2's New GAC-Related Recommendations**

#### **Hypothesis of Problem**

Notwithstanding the substantial progress made by ICANN and the GAC in implementing ATRT1 recommendations, there are a number of issues with respect to the GAC that still need evaluation. There is a perceived lack of transparency of GAC work methods as well as concern about the inherent barriers for participation in ICANN due to the complexity of the ICANN model and the immense level of information. As discussed in the ATRT1 report, there continues to be a lack of GAC early involvement in the various ICANN policy processes. Overall, there is concern about whether ICANN is doing everything it can to bolster its legitimacy in the eyes of countries that do not participate in the GAC, especially countries in the developing world.

#### **Summary of Relevant Public Comment Responses**

Responses from the community highlighted the feeling that while the GAC's input to policy discussions is important, the processes and discussions involved in developing GAC views are often opaque. There were specific calls for community visibility into GAC work methods and processes. Comments show that this lack of insight into GAC discussion and work methods can result in confusion for the stakeholders upon the receipt of GAC Advice. As confirmed by comments from one government official, the "GAC's role is critical in ensuring the wider public interest is taken into account" in ICANN decision-making, so it is important for its role and performance to be regularly subject to scrutiny by the wider ICANN

community.”<sup>39</sup> Another commenter suggested that the GAC employ metrics to measure the GAC’s accountability, including “third party assessment of the advice, through interviews with the Board, constituency leadership, and community members.”<sup>40</sup>

The GAC has achieved notable progress in defining and providing greater visibility into the GAC consensus process, resulting in an amendment to Principle 47 of the GAC’s Operating Principles at the October 2011 ICANN meeting in Dakar. Principle 47 states that “consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”<sup>41</sup>

Comments show that large portions of the ICANN community do not share a common understanding of the different roles of the Board, the GAC and the GNSO, and that this lack of understanding of the different roles “can result in a lack of respect for the input of the various stakeholders.”<sup>42</sup> Others pointed to the limited visibility into the work methods and deliberations of the GAC, sometimes due to closed-door discussion, that results in confusion in the community as to the process of developing GAC Advice, noting that “it often appears to catch the community by surprise.”<sup>43</sup> Comments also suggested greater communication from the GAC during its deliberations and discussions could offer the community better insight into work methods and processes, and GAC Advice relieving the feeling that “messages from the GAC are often misunderstood or seen as aggressive, and vice versa.”<sup>44</sup> Understanding that various constituencies within the community are interested in different issues and have different operational styles, “communication processes should be meaningful and relevant to ICANN users.”<sup>45</sup> Currently, “GAC external dialogue seems to be mainly Board--focused and the opportunity to interact with the wider ICANN community seems constrained.”<sup>46</sup>

In addition, comments from the community focus on the need to increase the level and quality of government participation in the GAC. Specific issues raised were increasing the outreach to developing countries, the need for GAC representatives to be supported individually to encourage consistent participation and to manage how the GAC addresses its work load to ensure it can be addressed in a consistent fashion by GAC representatives. Comments referenced the perceived barriers to participation overall, noting “it is difficult to navigate in the ICANN model.”<sup>47</sup> Continuing in that vein, some commenters questioned whether the GAC is currently “effectively taking account of all situations across the globe in differing economies and communities [and] are GAC representatives sufficiently resourced on an individual basis to undertake more work on early policy development?”<sup>48</sup> Comments also suggested that ICANN should provide simple, focused and high quality

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<sup>39</sup> United Kingdom Government, Mark Carvell

<sup>40</sup> Alejandro Pisanty

<sup>41</sup> <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

<sup>42</sup> Danish Business Authority, Julia Wolman

<sup>43</sup> Nominet, Laura Hutchison

<sup>44</sup> Nominet, Laura Hutchison

<sup>45</sup> Maureen Hilyard, Affiliation, ALAC

<sup>46</sup> United Kingdom Government, Mark Carvell

<sup>47</sup> Danish Business Authority, Julia Wolman

<sup>48</sup> United Kingdom Government, Mark Carvell

information rather than information on an ad hoc basis, as well as measures to provide further support to newcomers.

Several commenters also focused on the need to increase engagement and outreach to developing countries as a means to increase membership and gain more varied regional representation of views, noting that the “GAC needs to improve the consistency of levels of engagement across its membership, both at meetings and intersessionally when the level of involvement from developing and least-developed countries are typically extremely low (notably in GAC teleconferences). This is a potentially serious problem given that the committee’s level of activity intersessionally needs to increase significantly.”<sup>49</sup> Additionally, commenters feel “it will be important to monitor progress in promoting wider engagement.” It is important that ICANN work with its existing global stakeholders to reach out in their local communities where they are already well established and networked.<sup>50</sup> Commenters note that ATRT2 should explore “aspects that may contribute to raise the level of participation and strengthening the legitimacy of the multistakeholder model.”<sup>51</sup> Finally, several comments offer solutions and identify current efforts that could contribute to increased government involvement in, and support of, the GAC, including the development of a GAC code of conduct.<sup>52</sup> One comment notes that “the deployment of innovative consultation tools may help restore the balance in order to achieve meaningful response levels.”<sup>53</sup> In addition, several commenters note that “ICANN’s opening of new offices may provide new global awareness, but will not fix problems.”<sup>54</sup>

Lastly, comments highlighted the need to incorporate the GAC into policy discussions early in the process. Noting that “early engagement of the GAC is also important to ensuring predictability; improving understanding of the rationale behind decisions will help the wider community understand the advice and recognize how it fits in with the underlying principles.”<sup>55</sup> Comments cited the GNSO Policy Development Process (PDP) as an example of where there is weak GAC engagement, stating that the “timeliness often depends on leadership strength and member commitment as well as consistent refusal of groups to participate at all or not until late in process.”<sup>56</sup> The Non-Commercial Stakeholder Group submits that they are “concerned about tendencies that threaten multi-stakeholder, bottom-up, consensus-building policy” and offer the drafting and discussion of the GAC Communique in Beijing as an example.<sup>57</sup> In addition, comments highlighted that while all input is valuable, there are often barriers to exchanging information.<sup>58</sup> Comments noted that while GAC-Board interactions and processes have improved, more could be done to include ATRT2, specifically examining “...a more dynamic

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<sup>49</sup> United Kingdom Government, Mark Carvell

<sup>50</sup> Nominet, Laura Hutchison

<sup>51</sup> Danish Business Authority, Julia Wolman

<sup>52</sup> Nominet, Laura Hutchison

<sup>53</sup> United Kingdom Government, Mark Carvell

<sup>54</sup> Rinalia Abdul Rahim, Garth Bruen, Evan Leibovitch, Holly Raiche, Carlton Samuels, Jean-Jaques Subrenat, Affiliation ALAC

<sup>55</sup> Nominet, Laura Hutchison

<sup>56</sup> Registries Stakeholder Group, Paul Diaz

<sup>57</sup> Non Commercial Stakeholders Group, Mary Wong

<sup>58</sup> Nominet, Laura Hutchison

and interactive exchange in open GAC/Board meetings.”<sup>59</sup>

### **Input from Face-to-Face Sessions**

Several comments from ATRT2 discussions with the various SOs and ACs, while noting the need to incorporate the GAC early on, also focused on the need for better cross-community communication in general. The At-Large Advisory Committee (ALAC) noted that, in general, groups like the ALAC and the GAC are not coming into the process early enough. The participants noted several barriers to joining various other processes, such as 1) silos, associated with issues and SOs and ACs, create information-sharing and process issues across the community, 2) instances when issues have been “taken” by a particular SO or AC when that issue was cross-cutting and should have been addressed by the entire community, or 3) issues with participating in some other SO or AC processes, due to the tendency for SOs and ACs to be resistant to outside input. Finally, ALAC participants noted that travel, facilities, and the compressed schedule all affect the ability of the ALAC to do its work and proposed that better/alternate ways to connect should be explored (e.g. Adobe Connect).<sup>60</sup>

During discussion with the GNSO, some ATRT2 participants noted (in their own observational capacity, not speaking on behalf of the GNSO) that while the GAC does acknowledge a need and desire to participate in the process, it has not been able to identify how to enable participation effectively while taking into account the different processes of the GAC and the GNSO. The GNSO cited ongoing work and discussions regarding how to incorporate the GAC into their PDP, noting that the ongoing discussion on this issue highlights an important aspect of the multistakeholder process. The GNSO also noted that because discussions were already underway, it is important not to duplicate work by approaching the issue from too many angles at the same time. Several GNSO participants suggested the need to examine whether policy processes as a whole were effective. Additional questions were raised regarding the ability of the GNSO policy process to allow for the development of consensus policies in a timely manner.<sup>61</sup>

Community discussions on cross-community deliberation continued with the Registry Stakeholder Group (RySG). The RySG shared several opportunities to participate in existing processes for the GAC and other SOs and ACs. For example, when a PDP is initiated and a Working Group is formed, a request/notice is sent to SOs and ACs, inviting participants. Some SOs and ACs are able to provide good and consistent participation in various Working Groups. They also noted other attempts to coordinate that did not prove to work well (e.g. liaison with the GAC) and processes that are still being tried (e.g. Intergovernmental Organization Working Group (IGO WG) engagement with the GAC). Some participants noted that the reason liaisons with some communities succeed and others fail rests on the participant SOs or ACs ability to engage and provide consistent feedback.

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<sup>59</sup> Nominet, Laura Hutchison

<sup>60</sup> Characterization of notes (B. Cute) from ALAC session

<sup>61</sup> Characterization of notes (B. Cute, E. Bacon) from GNSO session

## ICANN Staff Input

In addition to issuing a questionnaire for Public Comment, ATRT2 also asked ICANN Board and staff a series of questions to gain insight into their understanding of the goals of ATRT1 recommendations and to review the process used to review, implement and oversee implementation. The Board and staff responded to several questions from ATRT2 as part of a Staff Input Document into ATRT2,<sup>62</sup> including “whether there were additional opportunities for improvement by virtue of the implementation of these recommendations?” (Question I).

In response to that question in the context of ATRT1 Recommendations 12, ICANN identified several possible additional measures for consideration in the future, including “GAC Chair designates small GAC WG, Reviews Monthly Reports for possible public policy interest, post any comments on website, Submit comments to relevant SO, Specially-tailored Webinar prior to Public Meetings, Specifically designed for the GAC to focus on emerging or significant policy issues under development for discussion at public meetings that may raise public policy issues or concerns, Utilize Monthly Report to engage Supporting Organizations, Identify issues that may have public policy interest, Engage with relevant SOs prior to and during ICANN Public Meeting.”

With respect to ATRT1 Recommendation 13, ICANN suggested “assisting the GAC to organize/formalize regular consultation at ICANN meetings with the GNSO, ccNSO, ASO, and Advisory Committees on policy issues and matters of concern to the GAC.”<sup>63</sup>

For ATRT1 Recommendation 14, ICANN noted that “more could be done to provide new GAC members with sufficient informational resources. MyICANN was, in part, intended to contribute to this objective and the planned Online Education Platform (working title) also is expected to help address GAC members’ information needs.”<sup>64</sup>

In response to early ATRT2 analysis, staff further elaborated that the Global Stakeholder Engagement (GSE) team produces a monthly report for the Chair of the GAC. This document includes a “look back” reporting on the previous month’s activity and projection looking forward at the next month’s planned activity involving GSE staff and government interactions. This report was proposed by staff for circulation to the GAC chair. GSE staff has also developed a global government engagement strategy document that was presented to the Board Global Relations Committee (BRGC) for informational purposes at the September 2013 committee meeting in Los Angeles. As a best practice, ICANN’s Regional Vice Presidents seek to inform GAC members in their regions of the related community regional engagement strategy working groups’ activities and outcomes.

<sup>62</sup><https://community.icann.org/download/attachments/41880363/Consolidated+Responses+to+ATRT2+Questions-ATRT+1+Recommendations+Implementation+%2830Apr%29+Final.xlsx>

<sup>63</sup><https://community.icann.org/download/attachments/41880363/Consolidated+Responses+to+ATRT2+Questions-ATRT+1+Recommendations+Implementation+%2830Apr%29+Final.xlsx>

<sup>64</sup><https://community.icann.org/download/attachments/41880363/Consolidated+Responses+to+ATRT2+Questions-ATRT+1+Recommendations+Implementation+%2830Apr%29+Final.xlsx>

Staff also informed ATRT2 that one of the staff projects underway is the creation of a Customer Relationship Management (CRM) system. As part of that process, current GAC membership information will be integrated into the electronic database along with the other information being developed through community engagement strategies. A challenge with these types of projects is the need for continuous updating. Previous initiatives involving government outreach will need to be validated and integrated into the CRM as well.

Staff also informed ATRT2 that the GSE team is currently working on regional approaches to the internationalization of ICANN. This means that community member committees staffed by the regional GSE staff are developing, implementing or exploring developing regional strategies, depending on the needs and priorities of the regions. Strategic Plans for Africa, Latin America and the Middle East were announced and launched during the Toronto and Beijing meetings and were updated in Durban. Written updates on the status of the strategies were provided to the BRGC at its September 2013 meeting. Interactive sessions are also held at each ICANN Meeting to provide updates on activity and the process for identifying the initiative.

**Relevant ICANN bylaws:** Article 11, Section 2.1 (issue 1), Article XI, Section 2.1 (issue 2), Article XI, Section 2.1 (issue 3)

**Relevant ICANN published policies:** None

**Relevant ICANN published procedures:** None

**Relevant GAC Operating Principles:** Principle 47, footnote 1, as amended October 2011.

### **Findings of ATRT2**

ATRT2 has identified three major issues that affect the GAC's ability to effectively interact with the Board and community at large and that have an impact on the accountability, transparency and perceived global legitimacy of ICANN. The first issue is a lack of clarity into, or understanding of, the GAC work methods, agenda and activities by the broad ICANN community, staff and Board. Complicating that relationship is that the relationship is not well understood between advice provided by the GAC to the ICANN Board and the policy recommendations provided to the ICANN Board through the policy development processes within ICANN's Supporting Organizations (particularly the GNSO). The advice provided by the GAC is not well understood outside of government circles and the specifics of it are often a surprise to non-GAC members, particularly on those occasions when the GAC's deliberations are closed to other interested ICANN stakeholders. A lack of understanding of methods and activities of the GAC can contribute to diminished credibility and trust in the GAC and its outputs, impede interaction with the ICANN community and its constituencies, and lead to process and policy development inefficiencies.

Second, challenges continue with barriers for participation both within the GAC and in ICANN more generally. More effective procedures in the GAC, easier access to information from ICANN, as well as a better explanation of the ICANN model, would uphold a continuous and effective level of participation in the GAC.



Finally, GAC participation in the various ICANN policy development processes is limited to non-existent. Without early engagement, the GAC is often put in the position of intervening later into the policy development process, often extending the timeline for those issues. Earlier engagement in policy development by all stakeholders would also produce more comprehensive policies that reflect the views and needs of the community.

### **Public Comment on Recommendation(s)**

(see [ATRT2 Draft Report and Recommendations](#))

Responses from the community on the suite of GAC-related recommendations were generally positive. Egypt commented that “the GAC-related recommendations are of utmost importance and include very constructive ideas.” Support was voiced for efforts to make the GAC more open, with one commenter suggesting that ATRT2 go even further and offered additional recommendations. USCIB specifically commented that “the processes which through the GAC members serve on the GAC is entirely opaque and the community would benefit greatly from a better understanding of how things work.” However one commenter suggested that “some of the ATRT2 requests may be too demanding (publishing all relevant GAC transcripts, positions and correspondence, publishing meeting minutes on the GAC website within seven days after each meeting...) as may expose GAC members to an undesired publicity and shy them away from open talks. That could lead to negotiations and deals being struck on corridors or far from the limelight with few countries taking part in them. Others noted the strong degree of overlap between some of the ATRT2 recommendations and an internal GAC working-methods reform effort.

The Danish Business Authority highlighted the importance of the recommendations related to stakeholder engagement while other commenters stressed the importance of an implementation plan. The importance of early engagement of the GAC in ICANN’s various policy development process was raised as a priority by several commenters, but the challenge of this was also highlighted given “the pace of work in GNSO with that of Governments, which are always slower especially when internal consultations have to be carried through.” The GNSO Council pointed out that a recent joint GNSO-GAC initiative has already begun.

There was, however, concern raised about the call for a code of conduct, with some commenters observing that governments are already under their individual government’s code of conduct, which may vary and would override any other general agreement.” Others suggested that ATRT2 may have gone beyond its remit, stating that “countries are sovereign to decide their Internet policies in the manner they see fit and don’t have to reveal how they make up their national positions.” This was in contrast with other comments that pointed out that “while individual members of the GAC represent their countries, we note the GAC itself is not a government entity, but instead is part of the ICANN structure and is subject to the ICANN bylaws and articles of incorporation. Thus, all GAC processes and procedures should follow the limitations set forth in the bylaws, such as openness and transparency, as does the ALAC and the GNSO.” Lastly, concerns were expressed regarding the ambiguity of the wording of the recommendations and suggestion was made to identify a specific responsible body.

## Final Recommendation #6

### *Increased transparency of GAC-related activities*

6.1. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to consider a number of actions to make its deliberations more transparent and better understood to the ICANN community. Where appropriate, ICANN should provide the necessary resources to facilitate the implementation of specific activities in this regard. Examples of activities that the GAC could consider to improve transparency and understanding include:

- a. Convening “GAC 101” or information sessions for the ICANN community, to provide greater insight into how individual GAC members prepare for ICANN meetings in national capitals, how the GAC agenda and work priorities are established, and how GAC members interact intersessionally and during GAC meetings to arrive at consensus GAC positions that ultimately are forwarded to the ICANN Board as advice;
- b. Publishing agendas for GAC meetings, conference calls, etc., on the GAC website seven days in advance of the meetings and publishing meeting minutes on the GAC website within seven days after each meeting or conference call.
- c. Updating and improving the GAC website to more accurately describe GAC activities, including intersessional activities, as well as publishing all relevant GAC transcripts, positions and correspondence;
- d. Considering whether and how to open GAC conference calls to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the participation of liaisons from other ACs and SOs to the GAC, once that mechanism has been agreed upon and implemented;
- e. Considering how to structure GAC meetings and work intersessionally so that during the three public ICANN meetings a year the GAC is engaging with the community and not sitting in a room debating itself;
- f. Establishing as a routine practice agenda setting calls for the next meeting at the conclusion of the previous meeting;
- g. Providing clarity regarding the role of the leadership of the GAC; and,
- h. When deliberating on matters affecting particular entities, to the extent reasonable and practical, give those entities the opportunity to present to the GAC as a whole prior to its deliberations.

6.2. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI, to facilitate the GAC formally adopting a policy of open meetings to increase transparency into GAC deliberations and to establish and publish clear criteria for closed sessions.

6.3. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI, to facilitate the GAC developing and publishing rationales for GAC Advice at the time Advice is provided. Such rationales should be recorded in the GAC register. The register should also include a record of how the ICANN Board responded to each

item of advice.

6.4. The Board, working through the BGRI working group, should develop and document a formal process for notifying and requesting GAC advice (see ATRT1 Recommendation 10).

6.5. The Board should propose and vote on appropriate bylaw changes to formally implement the documented process for Board-GAC bylaws consultation as developed by the BGRI working group as soon as practicable (see ATRT1 Recommendation 11).

*Increase support and resource commitments of government to the GAC (see ATRT 1 Recommendation 14)*

6.6. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to identify and implement initiatives that can remove barriers for participation, including language barriers, and improve understanding of the ICANN model and access to relevant ICANN information for GAC members. The BGRI working group should consider how the GAC can improve its procedures to ensure more efficient, transparent and inclusive decision-making. The BGRI working group should develop GAC engagement best practices for its members that could include issues such as: conflict of interest; transparency and accountability; adequate domestic resource commitments; routine consultation with local Domain Name System (DNS) stakeholder and interest groups; and an expectation that positions taken within the GAC reflect the fully coordinated domestic government position and are consistent with existing relevant national and international laws.

6.7. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to regularize senior officials' meetings by asking the GAC to convene a High Level meeting on a regular basis, preferably at least once every two years. Countries and territories that do not currently have GAC representatives should also be invited and a stock-taking after each High Level meeting should occur.

6.8. ATRT2 recommends that the Board work jointly with the GAC, through the BGRI working group, to work with ICANN's Global Stakeholder Engagement group (GSE) to develop guidelines for engaging governments, both current and non-GAC members, to ensure coordination and synergy of efforts.

6.9. The Board should instruct the GSE group to develop, with community input, a baseline and set of measurable goals for stakeholder engagement that addresses the following:

- a. Relationships with GAC and non-GAC member countries, including the development of a database of contact information for relevant government ministers;
- b. Tools to summarize and communicate in a more structured manner government involvement in ICANN, via the GAC, as a way to increase the transparency on how ICANN reacts to GAC advice (e.g. by using information in the GAC advice register).
- c. Making ICANN's work relevant for stakeholders in those parts of the world with limited participation; and,

- d. Develop and execute for each region of the world a plan to ensure that local enterprises and entrepreneurs fully and on equal terms can make use of ICANN's services including new gTLD's.

## **Report Section 9. DECISION-MAKING, TRANSPARENCY AND APPEALS PROCESSES: ATRT2 Recommendation #7 (Assessment of ATRT1 Recommendations 15, 16 and 17)**

### **Findings of ATRT1**

ATRT1 found that the timeliness and effectiveness of policy-making was a serious concern among participants in the ICANN process. Key drivers were the sheer volume of open proceedings and the lack of prioritization. ATRT1 found it would be important to improve the nature and structure of the public input and policy-making processes. ATRT1 took into account the fact that the volume of open proceedings is affected by the actions of constituent bodies within ICANN and is not uniquely influenced by ICANN staff or the Board.

### **ATRT1 Recommendation 15**

*The Board should, as soon as possible but no later than June 2011, direct the adoption of and specify a timeline for the implementation of public notice and comment processes that are distinct with respect to purpose (e.g. Notice of Inquiry, Notice of Policy Making) and prioritized. Prioritization and stratification should be established based on coordinated community input and consultation with staff.*

### **ATRT1 Recommendation 16**

*Public notice and comment processes should provide for both a distinct 'Comment' cycle and a 'Reply Comment' cycle that allows community respondents to address and rebut arguments raised in opposing parties' comments.*

### **ATRT1 Recommendation 17**

As part of implementing recommendations 15 and 16, timelines for public notice and comment should be reviewed and adjusted to provide adequate opportunity for meaningful and timely comment. Comment and Reply Comment periods should be of a fixed duration.

### **Summary of ICANN's Assessment of Implementation**

ICANN staff reports that it has fully implemented ATRT1 Recommendation 16. Staff demonstrated that an implementation plan was developed and put out for Public Comment and that a Comment and Reply Comment cycle were implemented.<sup>65</sup> Staff also notes that, at the same time, review of the public wiki was undertaken to consider improvements to the public interface aspect of submitting Comments. Staff also

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<sup>65</sup> <http://www.icann.org/en/resources/policy/update/update-dec11-en htm#1>

noted that stratification categories and prioritization methods were developed and put to the community for discussion. Based on community feedback, staff did not implement a stratification and prioritization of Public Comments.

### **Summary of Community Input on Implementation**

Community input reflected a range of views. While there was little comment on the Comment and Reply Comment mechanisms themselves, there was recognition that ICANN spends a great deal of time and resources offering the opportunity to provide comments in ICANN processes.<sup>66</sup> With respect to how “easy” it is to provide comments, views ranged markedly from “very easy” to “not easy.” Some commenters recognized the improvements and offered high marks for staff efforts. A number of others pointed to the length of the request for comment period and the time period allotted for comments as creating challenges to effective participation<sup>67</sup> and others noted the need for greater multilingualism<sup>68</sup>. Others noted insufficient planning and the high number of consultations creating barriers to participation.<sup>69</sup>

### **Summary of Other Relevant Information**

Staff also noted that the community had not always utilized the “Reply Comment” cycle as ATRT1 intended it. Some community members apparently have used the Reply Comment cycle to offer comments (either for the first time or in addition to earlier filed Comments). Staff indicated that education regarding the proper use of the Reply Comment cycle had been offered, but that commenters did not follow the recommended use. Staff also noted that it is considering lengthening the time periods for Comments, having heard complaints from the community that the current time period allowed was too short for some to draft and approve Comments for submission. Staff also noted that it was developing new tools to allow for Comment through different means (e.g. social media tools) and would consult with the community before deploying such tools.

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<sup>66</sup> <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00003.html>

<sup>67</sup> Comments of the GNSO Intellectual Property Constituency: “Deluges of simultaneous or overlapping ICANN Public Comment proceedings on major issues greatly intensify the problem.” “The fact that the reply comment period has often been used to submit initial comments is not, as the staff evidently told ATRT-2, because community members were ignorant or resistant to education about ‘the proper use of the Reply Comment cycle’; rather, it was a rational response to ICANN’s seemingly irrational decision not to provide longer Public Comment opportunities on major and complex issues.” ... “ICANN should use the hiatus period consistently to exclude the dates of ICANN public meetings in calculating comment deadlines.” <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfToree1LWR0.pdf>

<sup>68</sup> Comments of the United States Council for International Business, <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfGwHm9XvJAd.pdf>; Comments of the At-Large Advisory Committee: <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfDyQDZx5CHT.pdf>; Comments by The Government of Egypt, <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfEhY8OBH3XE.pdf>

<sup>69</sup> <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00010.html> (response to Q. 9).

## **ATRT2 Analysis of Recommendation Implementation**

Implementation of ATRT1 Recommendation 16 appears complete but with qualified success. Given the community's use of the Reply Comment cycle, it does not appear that those mechanisms are offering the intended benefit. Additionally, ATRT2 notes that implementation of stratification and prioritization of Comments was abandoned based on community feedback, and the challenges with respect to the Comment process continue to be in the area of time allotment for Comments, frequency of consultations, and complexity (for some) of the requests for comments. Staff should develop new tools and techniques for addressing these persistent issues.

## **ATRT2 Assessment of Recommendation Effectiveness**

The effectiveness of implementation is qualified, but its partial success is not entirely due to staff performance. Interestingly, the Board has improved in reflecting Public Comment in its resolutions. That is a key element of accountability and transparency. ATRT2's assessment is that fulsome, broader and more frequent Public Comment can be facilitated through adjustments to time allotted, forward planning regarding the number of consultations, and new tools that facilitate easier participation in the Comment process.

## **Final Recommendation #7**

### **Public Comment Process**

7.1. The Board should explore mechanisms to improve Public Comment through adjusted time allotments, forward planning regarding the number of consultations given anticipated growth in participation, and new tools that facilitate participation.

7.2. The Board should establish a process under the Public Comment Process where those who commented or replied during the Public Comment and/or Reply Comment period(s) can request changes to the synthesis reports in cases where they believe the staff incorrectly summarized their comment(s).

## **Report Section 10. MULTILINGUALISM: ATRT2 Recommendation #8 (Assessment of ATRT1 Recommendations 18, 19, and 22)**

### **Findings of ATRT1**

The ATRT1 report focused on language as a potential barrier to the community in the sense that if all documents are in English only, there is a risk that many of the non-native English speakers might have difficulties with comprehending important issues and miss out on important information. Furthermore, it was recommended that the senior staff be multilingual in order to deliver optimal levels of transparency and accountability to the community.

In 2012 ICANN introduced translation services to enable better service to the larger diverse community. Though the language services are welcome, the quality of the

translation in terms of accuracy to the working language of the various communities is important. In addition, the timeliness of the translation in relation to community interaction and participation is necessary. This will ensure effective and clear communication with the community.

### **ATRT1 Recommendation 18**

*The Board should ensure that access to and documentation within the policy development processes and the public input processes are, to the maximum extent feasible, provided in multilingual manner.*

### **ATRT1 Recommendation 19**

*Within 21 days of taking a decision, the ICANN Board should publish its translations (including the required rationale as outlined in other ATRT recommendations) in the languages called for in the ICANN Translation Policy.*

### **ATRT1 Recommendation 22**

*The Board should ensure that ICANN's senior staffing arrangements are appropriately multilingual, delivering optimal levels of transparency and accountability to the community.*

## **Summary of ICANN's Assessment of Implementation**

One of the first accomplishments was the creation and approval by the Board of the Language Services Policy and Procedures document.<sup>70</sup> The resolution adopting this initiative was approved on October 18, 2012.<sup>71</sup> Significantly, the ATRT1 recommendation to “Enhance Multilingual Strategy” also included improvements such as more interpretation support, transcription support, and teleconference interpretation.

During calls<sup>72</sup> with ATRT2, staff explained how the translations services work and the challenges they continue to face. These include, but are not limited to, the need to update and improve glossaries of already used terminologies in the six ICANN languages; budgetary constraints (despite increases from US\$2.1M in 2012 to US\$3.6M in 2014); and management of the sheer volume of work via staffing levels and how that impacts the timeliness of output.

Staff also shared the process involved as follows:

<sup>70</sup> <http://www.icann.org/en/about/participate/language-services/policies-procedures-18may12-en.pdf>

<sup>71</sup> <http://www.icann.org/en/groups/board/documents/resolutions-18oct12-en.htm#1.b>

<sup>72</sup> See <http://audio.icann.org/atrt2-20130620-en.mp3>;  
[https://community.icann.org/download/attachments/41890059/20130620\\_ATRT2\\_ID795926.pdf?version=1&modificationDate=1372186140000](https://community.icann.org/download/attachments/41890059/20130620_ATRT2_ID795926.pdf?version=1&modificationDate=1372186140000); <http://icann.adobeconnect.com/p17n8q2y2qq/> and  
<http://icann.adobeconnect.com/p5fcx7t8u9i/> and  
<https://community.icann.org/download/attachments/41884187/chat+transcript+-+day+2.pdf?version=1&modificationDate=1376620716000>; and  
<https://community.icann.org/download/attachments/41884187/DAY2.pdf?version=1&modificationDate=1377345148000>

- a. Receive the document for translation.
- b. Quick estimate of words per page multiplied by days it takes to translate; 1 day = 1800-2000 words.
- c. Document goes through polishing.

Delays in getting the materials out at the same time often is a result of the size of the material to be translated and a lean department of two staff members.

Regarding Recommendation 22, ICANN's Director of Human Resources reported that ICANN had 38 individuals in Senior and Executive Management roles in December 2010. Of those, 28 were multilingual (73.4%). As of August 2013, there are 51 individuals in Senior and Executive Management roles, of which 39 are multilingual (76.5%). Staff reported that overall, ICANN staff members speak approximately 45 languages.

Level	On staff as of Dec 2010	Multi-Lingual	On staff as of Aug 2013	Multi-Lingual
Executive	8	7	9	8
Senior Mgmt	30	21	42	31

No information was provided on any ongoing training of ICANN staff at any level in enhancing multilingual skills.

Staff further noted<sup>73</sup> that:

*While ICANN does not have a written policy for hiring senior staff with multilingual skills, there are a number of well-established practices and standard operating procedures to address this topic. As ATRT2 noted, ICANN has been successful in ensuring that senior staff possess multilingual skills by following these practices, and we anticipate that the level of multilingual knowledge will deepen as ICANN continues to implement its global strategy. ICANN will consider other appropriate documentation of the importance of multilingual skills for senior staff on a go-forward basis.*

Practices and standard operating procedures include:

- a. All position descriptions (and job postings) where multilingual skills are appropriate have been written to include multilingual skills as desired, preferred, or required, as applicable.
- b. Where appropriate, internal interview survey forms ask each interviewer to comment on the multilingual skills of each interviewed candidate – this is a standard operating procedure.
- c. The geographic expansion in the locations of ICANN offices is resulting in expansion of multilingual skills, by design.

<sup>73</sup> <http://mm.icann.org/pipermail/attr2/2013/000958.html>



ICANN provides several resources to employees for expanding their language skills. These resources include access to world-class language training tools, such as Rosetta Stone and busuu.com online language training. Additionally, ICANN provides tuition for local instruction classes as needed; such instruction has been provided for Spanish, Dutch and French, among other languages, for staff in hub office cities.

### Summary of Community Input on Implementation

Criticism of the accuracy of ICANN’s translations is not uncommon. Below is an example of how the translation changes the actual meaning. (The table reflects Russian translations.) It is of great importance that the level of translation accuracy be improved.

Document	Section (Part)	Wording	Actual translation (in Russian)	What it can mean	Correct translation (in Russian)
<i>A Next Generation Registration Directory Service</i> (2013)	Status of this document	<b>This is an initial report from the Expert Working Group on gTLD Directory Services (EWG), providing draft recommendations for a next generation gTLD Registration Directory Service (the “RDS”) to replace the current WHOIS system</b>	Настоящий документ <b>представляет собой</b> отчёт экспертной рабочей группы (ЭРГ) с рекомендациями по замене существующей системы WHOIS на <b>службу каталогов регистрации рДВУ («СКР»)</b> <b>следующего поколения</b>	This is a [ <i>initial - missing</i> ] report of the Expert Working Group on [ <i>draft - missing</i> ] recommendations to replace the existing WHOIS system with <i>the office (service) of the catalogues of registration of the generic</i> Domains of the Top Level ( <i>abbreviation never used in Russian</i> ) of the <i>following</i> generation	<b>Настоящий документ является предварительным отчётом Экспертной рабочей группы (ЭРГ) с рекомендациями по замене системы WHOIS справочным сервисом нового поколения («СНП») по регистрационным данным доменов общего пользования</b>
<i>WHOIS Policy Review Team Final Report</i> (2012)	Title	<b>WHOIS Policy Review Team // Final Report</b>	Группа <b>проверки</b> политики WHOIS // Итоговый отчёт	The Team on <i>Checking</i> WHOIS Policy // Final Report	Группа по <b>обзору</b> политики WHOIS // <b>Итоговый отчёт</b>
(multiple documents)		<b>Registry</b>	<b>Реестр</b>	register (list)	<b>регистратура</b>
(multiple documents)		<b>Registrant</b>	<b>владелец регистрации</b>	owner of registration	<b>администратор домена</b>
(multiple documents)		<b>generic domain names</b>	<b>родовые</b> домены	ancestral, tribal domains	<b>домены общего пользования</b>

### ATRT2 Analysis of Recommendation Implementation

The implementation of the language policy is deemed unsuccessful because:

- a. The often poor quality of translations undermines public willingness to participate.
- b. The ability to encourage broader public participation is constrained by the limited availability of a full translation function.
- c. Community members cannot fully participate in the Public Comments process in their preferred language – including languages for which ICANN claims to have established translation services – because they must comment back in English due to the lack of full translations of all comments received.
- d. Many ICANN language communities are negatively impacted by the timeliness, i.e. common delays, of the current translations policy's unequal response times.

On the other hand, it appears ICANN has successfully implemented Recommendation 22, given that more than 75% of staff in Senior Management and Executive roles are reported as being multilingual. While it is not clear if ICANN has any policies regarding the use of languages other than English in email or one-to-one person communication, this has not been raised as a problem by the community. Nevertheless, should some members of the community have problems communicating with the senior staff in English, it seems likely that the senior staff's multilingual skills will allow them to deliver a high level of transparency and accountability in their interactions.

#### **ATRT2 Assessment of Recommendation Effectiveness**

ICANN should review the capacity of the language service department versus the community's need for the service and make relevant adjustments. The language service is important to what ICANN does and its plans for the future are based on the outreach program already in place. While it is recognized that there has been a significant improvement in the Language Services Department, the Translation Services component should evolve to be able to sustain an expected significant increase in activity. This shift from a craft-based ad hoc supply/demand service to a continuous industrial pipeline of documents involves the ability to:

- a. accurately predict the time to translate a document at any time of the year, based on the knowledge of historical periodic activity (past ICANN meeting cycles, peak periods, holidays, etc.);
- b. predict peaks of activity proactively and dynamically modulate capacity to supplement permanent staff using a pool of additional freelance translators on demand to smooth out peak delays;
- c. enable clients (SOs, ACs, etc.) to automatically track the status of their translation request via use of a CRM system;
- d. automatically compile metrics on document translation timeliness;
- e. implement a feedback path from the community to improve Language Services with native speaker input;

- f. implement best practice documentation management to harmonize translation quality and accuracy between experienced permanent and new or freelance translators; and
- g. benchmark related procedures with similar international organizations, the most significant being the United Nations Language and Interpretation Services.

Given that the level of multilingual staff is commendable, ATRT2 has no further input on Recommendation 22 at this issue.

### **Public Comment on Recommendation**

(see [ATRT2 Draft Report and Recommendations](#))

The At-Large Advisory Committee suggested that the language services department work with the community to prioritize documentation/materials for translation, which may differ from constituency to constituency.<sup>74</sup>

### **Final Recommendation #8**

To support public participation, the Board should review the capacity of the language services department versus the community need for the service using Key Performance Indicators (KPIs) and make relevant adjustments such as improving translation quality and timeliness and interpretation quality. ICANN should implement continuous improvement of translation and interpretation services including benchmarking of procedures used by international organizations such as the United Nations.

## **Report Section 11. DECISION-MAKING, TRANSPARENCY AND APPEALS PROCESSES: ATRT2 Recommendation #9 (Assessment of ATRT1 Recommendations 20, 23, 25, 26)**

### **Findings of ATRT1**

ATRT1 reviewed ICANN's policy development and implementation processes and made many recommendations about the inputs and standards used for making and appealing decisions.<sup>75</sup> Both to ease assessment of implementation and to shed light on the interrelationships between ATRT2's mandate<sup>76</sup> and the ICANN Board's decisions on policy and its implementation, a number of these issues have been grouped in this analysis. Importantly, the assessments and recommendations made in this document presume the default condition of transparency as a basis for all ICANN

<sup>74</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfDyQDZx5CHT.pdf>

<sup>75</sup> See ATRT1 Final Report.

<sup>76</sup> See <https://community.icann.org/display/ATRT2/Mandate>, in particular 9.1 (Ensuring accountability, transparency and the interests of global Internet users) subsections (c), (d) and (e).

activities. In those instances where the Chatham House Rule<sup>77</sup> is invoked and discussions are closed and/or reports are redacted, the decision to overrule the transparency imperative still should be publicly documented.

#### **ATRT1 Recommendation 20**

*The Board should ensure that all necessary inputs that have been received in policy-making processes are accounted for and included for consideration by the Board. To assist in this, the Board should as soon as possible adopt and make available to the community a mechanism such as a checklist or template to accompany documentation for Board decisions that certifies what inputs have been received and are included for consideration by the Board.*

#### **ATRT1 Recommendation 23**

*As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms - the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms and of their interrelation, if any (i.e., whether the three processes provide for a graduated review process), determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability. The committee of independent experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the Draft Implementation Plan. Upon receipt of the final report of the independent experts, the Board should take actions on the recommendations as soon as practicable.*

#### **ATRT1 Recommendation 25**

*As soon as possible, but no later than October 2011, the standard for Reconsideration requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.*

#### **ATRT1 Recommendation 26**

*As soon as possible, but no later than October 2011, the ICANN Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.*

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<sup>77</sup> See <http://www.chathamhouse.org/about-us/chathamhouserule> “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”

ATRT2, under the terms of its mandate, also determined that the following issues<sup>78</sup> should be addressed in this analysis of accountability and transparency in policy development and implementation processes:

- a. Publication of yearly statistical reports on transparency.
- b. Enhancement of the employee Hotline that allows relevant information to become transparent (Whistleblower Policy).

### **Summary of ICANN's Assessment of Implementation**

With regard to Board consideration of inputs in policy decision-making, staff undertook an analysis<sup>79</sup> to determine what can be learned based upon actual community usage and participation patterns. The study period was from 1 January 2010 through 31 December 2012 and involved harvesting information from each of 212 archived Public Comments Forums. Ultimately, a checklist was created that is now used with GNSO Policy Development Process (PDP) recommendations to ascertain that all inputs were received. This checklist, now embedded in Standard Operating Procedure, has been used only once to date.

With regard to restructuring review mechanisms, an Accountability Structures Expert Panel (ASEP) was commissioned in September 2012. It included three international experts on issues of corporate governance, accountability and international dispute resolution. The ASEP reported on October 2012 and the Board acted upon its recommendations on 20 December 2012, approving amendments to bylaws Article IV, Section 2<sup>80</sup> (Reconsideration), Section 3<sup>81</sup> (Independent Review), and the corresponding Cooperative Engagement Process for Independent Review.<sup>82</sup>

With regard to the Ombudsman: the Ombudsman undertook a review of his office and function in accordance with ATRT1 Recommendation #23. The Ombudsman recommended to the Board Governance Committee (BGC) that a regular meeting schedule be established, possibly through a committee of the ICANN Board. In turn, the ICANN Board decided (1) that regular meetings would be held by the Executive Committee, and (2) Ombudsman reports that require the full ICANN Board's attention shall be provided to the ICANN Board as a whole, as needed and determined in consultation with the Executive Committee and the Ombudsman.

### **Summary of Community Input on Implementation**

ATRT2 conducted face-to-face sessions with stakeholders in Beijing and Durban, as well as a community-wide survey, to gather their views on ICANN's progress towards institutionalizing more accountable and transparent policy development and

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<sup>78</sup> It should be noted that while not discussed to an extent in the ATRT1 report, the last two issues were documented in both the [2010 Berkman Center for Internet & Society report](#) and the [2007 One Work Trust report](#) on "ICANN Accountability and Transparency – Structures and Practices."

<sup>79</sup> See <https://community.icann.org/pages/viewpage.action?pageId=41885192>

<sup>80</sup> <http://www.icann.org/en/about/governance/bylaws/proposed-by-law-revision-reconsideration-26oct12-en.pdf>

<sup>81</sup> Ibid.

<sup>82</sup> <http://www.icann.org/en/news/irp/proposed-cep-26oct12-en.pdf>

implementation processes. Those relatively few responses to the survey were generally negative (see all of them in the ATRT2 archive at <http://www.icann.org/en/news/public-comment/report-comments-atrt2-20jun13-en.pdf>). For example, this graphic summarizes some of the survey responses:

Specific ratings (1-10) to the questions 1-3 on the implementation of ATRT1

	AP	Vasily	MFarel NCUC	MHilyard ALAC	Dthompson AL	GChillcott
Q 1A	8	1	4	4	7	n/a
Q 1B			defensive timeliness!			
Q 1C: Metrics				wording		
Q 2A	4	2	5	n/a	7	7
Q 2B			lack openness		financial improv	Board's Rationale
Q 2C						
Q 3A	n/a	2	1	3	5	n/a

Some members of the ICANN community raised explicit Reconsideration process concerns. For example, the Registries Stakeholder Group (RySG) challenged staff's implementation of ATRT1 recommendations #23 and #25, claiming that they were fundamentally flawed and in fact ran counter to the concept of accountability.<sup>83</sup> The RySG went on to assert that the Board ignored the Public Comments. Likewise, the Non-Commercial Stakeholders Group (NCSG), responding to ICANN's rejection of its Reconsideration #13-3 (regarding the TMCH+50 case), publicly stated its "belief that the Board's response, or rather, the manner in which it was couched and the rationale which the Board (through its representative sub-committee on the matter) chose to employ, was such as to land yet another blow to the vaunted [Multistakeholder Model]."<sup>84</sup> Other commenters noted that ATRT2 should address the questions left unresolved by ATRT1, such as: should ICANN provide an independent and binding appeal from Board decisions and, if so, what body should have that authority?

There was limited input on the Ombudsman in the open comments or in the face-to-face discussions with the ICANN community. One report did question the independence of the Ombudsman, noting that the office "appears so restrained and contained."

### Summary of Other Relevant Information

With regard to Board reconsideration, since December 2010 eight new Reconsideration Request processes were initiated and six of those "resolved." In the course of its work, ATRT2 found that the general perception throughout the ICANN community is that Reconsideration Requests "all end up in a negative decision." An analysis of the results bears this out:

Request 13-5: Booking.com B.V. (Staff action/inaction on non-exact match "hoteis").  
BCG recommendation pending.

<sup>83</sup> <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00025.html>

<sup>84</sup> <http://forum.icann.org/lists/comments-atrt2-02apr13/msg00029.html>

Request 13-4: DotConnectAfrica Trust (Board action/inaction on the GACs Beijing communique impact on dotafrica application). **Denied** as per BCG recommendation; Board resolution not finalized.

Request 13-3: Non-Commercial Stakeholders Group (against staff action on TMCH+50). Initially **Denied** by BCG, but eventually recommends to adopt “**revised**” recommendation, to be brought to the ongoing community discussion on policy versus implementation within ICANN.<sup>85</sup>

Request 13-2: Nameshop (Board/ Staff inaction on *Applicants Support*). **Denied**.<sup>86</sup>

Request 13-1: Ummah Digital, Ltd. (against staff action on *Applicants Support*). **Denied**.

Request 12-2: GNSO Intellectual Property Constituency (against Board decision on .cat). **Denied**.

Request 12-1: International Olympic Committee (board decision). **Denied** (“*at this time*”).<sup>87</sup>

Request 11-1: Michael Gende (staff inaction). **Denied**.

With Regard to the Ombudsman under the ICANN bylaws.<sup>88</sup>

*The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.*

The Ombudsman maintains its own page on the [icann.org](http://www.icann.org) [website](#).<sup>89</sup> Annual reports have been included under this page from 2005 – 2010.<sup>90</sup>

<sup>85</sup> The BCG wrote, “*The Request, however, does demonstrate the import of the ongoing work within the ICANN community regarding issues of policy and implementation, and the need to have clear definitions of processes and terms used when seeking community guidance and input. As such, we believe it is advisable for the Board to pay close attention to the policy/implementation debate, and to make sure that the issues raised within this Request be part of that community work. Further, we believe that it is advisable to ask the community to address the issue of how the Board should consider and respond to advice provided by the Supporting Organizations (outside of the PDP) and what types of consultation mechanisms, if any, are appropriate in the event the Board elects not to follow that advice. As ICANN evolves, this is an important question for consideration in upholding the multistakeholder model.*”; The Board, through the NGPC, actually accepted reconsideration of the issue, though the ultimate decision was that the action should not be overturned.

<sup>86</sup> Some interesting case law interpretations appear in the BCG recommendation: “*Reconsideration is not, and has never been, a tool for requestors to come to the Board to seek the reevaluation of staff decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in fact, in contravention of established processes and policies within ICANN.*”

<sup>87</sup> This issue is still pending in a general policy development process between GAC and GNSO on IGO protection.

<sup>88</sup> See <http://www.icann.org/en/about/governance/bylaws> - V

The Ombudsman now reports to the Board on a quarterly basis in addition to publishing an annual report. Furthermore, the Ombudsman has a Facebook page and writes a regular [blog](http://omblog.icann.org) on various topics (see <http://omblog.icann.org>)

In discussions with ATRT2<sup>91</sup>, the Ombudsman mentioned additional functions that were not included in the explicit bylaws charter, including:

“To ensure that there is transparency of the flow of information.”

“A mandate to assist with keeping peace and harmony within the ICANN community.”

Involvement in some issues with new gTLD program and Dispute Resolution providers that may have not been anticipated as part of the Ombudsman function by program implementers.

On questions of whether the Ombudsman should have a role in the Whistleblower process at ICANN, the current Ombudsman mentioned to ATRT2 that he, as well as his predecessor, had spoken to ICANN legal staff about this issue and that he was basically told “no.”<sup>92</sup> He also mentioned that the role had been defined 10 years ago and perhaps that was an issue to be explored.<sup>93</sup>

### **ATRT2 Analysis of Recommendation Implementation**

With regard to Board consideration of input in policy decision-making (ATRT1 Recommendation #20), ATRT2 found this implementation to be incomplete. Although the ICANN Board and the GAC have developed a modality that allows the latter’s advice to be received, reviewed, considered, and discussed with decisions explained, and the Supporting Organizations have rich bylaws text defining processes for consideration of policy advice, the remaining Advisory Committees may offer advice but there is no defined response mechanism. In fact, there isn’t even a bylaws obligation on the ICANN Board to respond.

With Regard to restructuring review mechanisms (ATRT1 Recommendation #23), ATR2 also found this to be incomplete. Review mechanism is only the last stage of the PDP process, but one where the objectives of AoC 9.1(d) are at risk. Review

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<sup>89</sup> See <http://www.icann.org/en/help/ombudsman>

<sup>90</sup> See <http://www.icann.org/en/help/ombudsman/reports>

<sup>91</sup> See <http://durban47.icann.org/meetings/durban2013/transcript-atrt2-13jul13-en.pdf>

<sup>92</sup> The current Ombudsman, Chris LaHatte, noted “the answer really was, well, we have a perfectly good law which deals with that so you don’t need to go there. I can’t comment from a legal perspective on whether that’s a good answer as opposed to the correct answer.” He also indicated that the Ombudsman needs “freedom of information powers, and indeed I have those, because it’s in my Bylaw that if I want to see any documents from within ICANN or in the ICANN community, then they must be provided.” He went on to note, however, “That’s not quite the same, of course, as whistleblowing, but it is perhaps the first step towards that sort of function. If someone were to come to me and say, ‘I want to make this confidential complaint about something that’s happened,’ and it is effectively a whistleblowing complaint, then I have the ability to investigate.”

<sup>93</sup> LaHatte noted “And the Bylaw, it seems to also be restrictive in its approach in that it says the role is between ICANN staff and the community, but in other areas of the Bylaw it’s not quite as explicit, and it talks about supporting structures. And it’s perhaps understandable in the context of something which was written in 2003, 2004 when it was a lot smaller, much less complicated, and when the supporting organizations hadn’t reached the degree of sophistication which they have some seven or eight years later.”



mechanism should be a “final” guarantee that there is wide support for decisions. It should not be seen as a way to solve process logjams at this stage alone.

With regard to Board Reconsideration issues, ATRT2 found that ATRT1 Recommendation #25 remains incomplete. While steps were taken to clarify the process, the issues described above indicate that it still requires clarification.

Regarding ATRT1 Recommendation #26, though, this item is complete. A timeline and suggested format for generating a Reconsideration Request can be found at <http://www.icann.org/en/groups/board/governance/reconsideration>.

With Regard to the Ombudsman (ATRT1 Recommendation #24), this item also is complete. ATRT2 believes, however, that ICANN needs to reconsider the Ombudsman’s charter and the Office’s role as a symbol of good governance to be further incorporated in transparency processes.

## **ATRT2 New Policy Input-Related Recommendations**

### **Hypothesis of Problem**

Full transparency requires that employees have an ability to report irregularities in a safe and reliable manner. While ICANN has a hotline that is meant to serve the whistleblowing activities, evidence does not indicate that this program has been used effectively.

### **Background Research Undertaken**

While ATRT1 did not make any specific recommendations on the manner in which continual assessment could be done, previous ICANN-contracted reports did include relevant suggestions:

In 2007, One World Trust concluded<sup>94</sup> that:

*ICANN should consider implementing processes that act as deterrents to abuses of power and misconduct which would protect staff who might want to raise such instances. Specifically, ICANN should consider developing a whistleblower policy that enables staff to raise concerns in a confidential manner and without fear of retaliation; and developing appropriate systems to foster compliance.*<sup>95</sup>

<sup>94</sup> See <http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf>

<sup>95</sup> In fact, One World Trust made many recommendations, including:

To ensure compliance with any organizational policy, it is important that there is high level oversight and leadership. Without this, implementation will only ever be piecemeal. To ensure implementation of the information disclosure within ICANN therefore, responsibility for overseeing the policy should be assigned to a senior manager.

Supporting this, a set of indicators should be developed to monitor the implementation of the policy, and an annual review should be undertaken which identifies how ICANN is complying with the policy, where there are problems, and the steps that are to going be taken to address these (see recommendation 5.1 in section 8).

In 2010, the Berkman Center for Internet & Society reiterated<sup>96</sup> One World Trust's recommendation that ICANN carry out and publish the results of a yearly transparency audit.<sup>97</sup>

## Findings of ATRT2

ICANN already issues an annual report on implementation and progress on ATRT1 recommendations. Additionally, while the staff does not anticipate any issues with being able to report how the Anonymous Hotline is being used, ICANN's ability to report publicly on results from Anonymous Hotline may be limited in certain cases

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While ICANN has three mechanisms for investigating complaints from members of the ICANN community, the organization does not have a policy or system in place that provides staff with channels through which they can raise complaints in confidentiality and without fear of retaliation. Having such a policy (often referred to as a whistleblower policy) is good practice among global organizations. A whistleblower policy that provides such protections serves as an important means of ensuring accountability to staff as well as preventing fraudulent behavior, misconduct and corruption within an organization.

While the Ombudsman, Reconsideration Committee and the Independent Review Panel provide complaints-based approaches to compliance, to generate greater trust among stakeholders, ICANN needs to take a more proactive approach.

To address this issue, ICANN should consider a regular independent audit of their compliance with accountability and transparency commitments. Alternatively, it could develop a permanent compliance function to emphasize prevention by identifying shortcomings as they emerge and before they become systemic problems. In either case, a regular report on compliance should be produced and publicly disseminated.

<sup>96</sup> See <http://www.icann.org/en/about/aoc-review/attr/review-berkman-final-report-20oct10-en.pdf>

<sup>97</sup> Specifically, 2.4 Transparency Audit

(a) Issues

The lack of a comprehensive audit of ICANN's information activities makes it difficult to assess its practices across active, passive, and participatory transparency.

(b) Observations

The 2007 One World Trust review describes an ICANN initiative "to conduct an annual audit of standards of accountability and transparency, including an audit of the commitments made in these Management Operating Principles . . . by an external party" with the results of the audit "published in the Annual Report."xxxv The last annual report does not contain such an audit.

(c) Discussion

ICANN currently lacks an up-to-date, publicly available transparency audit. This makes it difficult to make substantive assessments of ICANN's practices as they relate to active, passive, and participatory transparency. The lack of empirical material (e.g., on the time delays in the publication of documents) currently forces reviewers to look for conceptual, structural, and procedural deficiencies in order to identify if, where, and how there are inconsistencies between guiding policies and practices. A comprehensive audit, in contrast, would allow for periodic, facts-based, internal and external reviewing and benchmarking; ICANN could greatly benefit from this when further improving its information policies. Such a transparency audit needs to be governed by clear policies and processes which set forth the categories of information pertinent to such an audit, among other things. Following an earlier recommendation by the One World Trust review, the transparency audit should be published in the Annual Report. In addition, the Berkman team suggests that the underlying data be released as part of the Dashboard/ICANN Performance Metrics.xxxvi Accountability and Transparency at ICANN: An Independent Review {99}

(d) Recommendation

*Create and implement policies and processes for conducting and communicating regular transparency audits.*

due to legal implications. ICANN may be limited to providing a generic disposition due to such legal limitations.

### **Final Recommendation #9**

#### 9. Consideration of decision-making inputs and appeals processes

9.1. ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:

*The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.*

#### 9.2. Explore Options for Restructuring Current Review Mechanisms

The ICANN Board should convene a Special Community Group, which should also include governance and dispute resolution expertise, to discuss options for improving Board accountability with regard to restructuring of the Independent Review Process (IRP) and the Reconsideration Process. The Special Community Group will use the 2012 Report of the Accountability Structures Expert Panel (ASEP) as one basis for its discussions. All recommendations of this Special Community Group would be subject to full community participation, consultation and review, and must take into account any limitations that may be imposed by ICANN's structure, including the degree to which the ICANN Board cannot legally cede its decision-making to, or otherwise be bound by, a third party.

#### 9.3. Review Ombudsman Role

The Board should review the Ombudsman role as defined in the bylaws to determine whether it is still appropriate as defined, or whether it needs to be expanded or otherwise revised to help deal with the issues such as:

- a. A role in the continued process of review and reporting on Board and staff transparency.
- b. A role in helping employees deal with issues related to the public policy functions of ICANN, including policy, implementation and administration related to policy and operational matters.
- c. A role in fair treatment of ICANN Anonymous Hotline users and other whistleblowers, and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment.

#### 9.4. Develop Transparency Metrics and Reporting

The Board should ensure that as part of its yearly report, ICANN include, among other things, but not be limited to:

- a. A report on the broad range of Transparency issues with supporting metrics to facilitate accountability.
- b. A discussion of the degree to which ICANN, both staff and community, are adhering to a default standard of transparency in all policy, implementation and

administrative actions; as well as the degree to which all narratives, redaction, or other practices used to not disclose information to the ICANN community are documented in a transparent manner.

- c. Statistical reporting to include at least the following elements:
    - i. requests of the Documentary Information Disclosure Policy (DIDP) process and the disposition of requests.
    - ii. percentage of redacted-to-unredacted Board briefing materials released to the general public.
    - iii. number and nature of issues that the Board determined should be treated confidentially.
    - iv. other ICANN usage of redaction and other methods to not disclose information to the community and statistics on reasons given for usage of such methods.
  - d. A section on employee “Anonymous Hotline” and/or other whistleblowing activity, to include metrics on:
    - i. Reports submitted.
    - ii. Reports verified as containing issues requiring action.
    - iii. Reports that resulted in change to ICANN practices.
  - e. An analysis of the continued relevance and usefulness of existing transparency metrics, including
    - i. Considerations on whether activities are being geared toward the metrics (i.e. “teaching to the test”) without contributing toward the goal of genuine transparency.
    - ii. Recommendations for new metrics.
- 9.5. The Board should arrange an audit to determine the viability of the ICANN Anonymous Hotline as a whistleblowing mechanism and implement any necessary improvements.

The professional external audit should be based on the Section 7.1 and Appendix 5 - Whistleblower Policy of the One World Trust Independent Review of 2007 recommendations (<http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf>) to establish a viable whistleblower program, including protections for employees who use such a program, and any recent developments in areas of support and protection for the whistleblower. The professional audit should be done on a recurring basis, with the period (annual or bi-annual, for example) determined upon recommendation by the professional audit.

The processes for ICANN employee transparency and whistleblowing should be made public.

## Report Section 12. Assessment of ATRT1 Recommendation 21

### Findings of ATRT1

ATRT1 found that the timeliness of policy-making was a serious concern among participants in the ICANN processes. The numerous changes in projected completion dates for new Top Level Domain (TLD) round preparatory work were a source of concern that led to a specific proposal (i.e. Expression of Interest) from some members in the community. An often-cited concern was the sheer volume of open Public Comment. The ATRT1 took into account the fact that the volume of open proceedings is affected by the actions of constituent bodies within ICANN and is not uniquely influenced by ICANN staff or the Board.

### ATRT1 Recommendation 21

*The Board should request ICANN staff to work on a process for developing an annual work plan that forecasts matters that will require public input so as to facilitate timely and effective public input.*

### Summary of ICANN's Assessment of Implementation

Staff reported that all parts of ATRT1 Recommendation 21 were implemented as originally proposed.<sup>98</sup> ATRT2 notes, however, that the annual update process was not completed by the December 2012 deadline. Staff is currently simplifying the process and templates and expects to launch another formal refresh cycle shortly.

### Summary of Community Input on Implementation

One commenter notes that there is “insufficient forward-planning for the schedule of consultations and their priority. Number of consultations is very high; bearing in mind the bottom-up nature of ICANN, it can also be a barrier to engagement.”

### ATRT2 Analysis of Recommendation Implementation

Although the forecast was implemented late, a new forecast is now made every trimester so Recommendation 21 is considered complete. A resource guide is now published at <http://www.icann.org/en/news/public-comment/upcoming>.

Although there are no formal metrics to gauge the effect or outcome of publishing Upcoming Public Comments topics, anecdotal evidence indicates that some community members perceive value in consulting the Upcoming topics list. Therefore, a formal study should be undertaken approximately six months after the information has been refreshed.

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<sup>98</sup> <http://www.icann.org/en/news/in-focus/accountability/atrt-implementation-report-29jan13-en.pdf>

## **ATRT2 Assessment of Recommendation Effectiveness**

The recommendation seems to have had some effect based on anecdotal evidence, but ICANN should solicit feedback from the community to determine the effectiveness of forecasting and whether other tools should be used to assist the community.

## **Report Section 13. CROSS-COMMUNITY DELIBERATIONS: ATRT2 Recommendation #10**

### **Hypothesis of Problem**

Although ICANN continues to conduct its Policy Development Processes (PDP) via Working Groups (WGs) composed of ICANN community volunteers that self-select Chairs presumably capable of bridging opinion differences and arriving at generally acceptable policy recommendations, this model often appears to be lacking – especially when dealing with complex issues compounded by widely disparate points of view and/or strongly held financial interests in particular outcomes. This section largely focuses on the formal PDP defined in Annex A of the ICANN bylaws, but largely applies to all policy development processes that may be used by the GNSO and the recommendations apply to the more general case, as well.

### **Summary of ICANN Input**

ICANN stakeholders have recognized the structural shortcomings of the existing PDP WG model for some time. Alternative models have been discussed. For example, the use of professional facilitators was raised at the Beijing meeting and more thoroughly discussed at the Durban meeting.<sup>99</sup> In fact, ICANN brought in professional facilitators to help with a number of activities at the Durban meeting. ICANN staff subsequently drafted a paper, “GNSO Policy Development Process: Opportunities for Streamlining & Improvements,” that discusses a variety of potential improvements, including greater use of face-to-face (F2F) meetings and professional moderation/facilitation.<sup>100</sup>

ICANN meetings themselves are a sign that the community highly values F2F interactions. The three international meetings per year draw significant – and growing – numbers of attendees and remain an important opportunity for stakeholders to meet, debate, and decide issues. Likewise, regional meetings of contracted parties and other community members are well-received and attended. ICANN’s Board also holds workshop/retreats several times per year. Even the Review Teams established by the Affirmation of Commitments actively use F2F meetings to augment other methodologies.

<sup>99</sup> <http://durban47.icann.org/meetings/durban2013/presentation-gns0-pdp-13jul13-en.pdf>

<sup>100</sup> See <http://gns0.icann.org/en/drafts/pdp-improvements-22aug13-en.pdf>

## Summary of Community Input

A wide-ranging e-mail discussion among several former PDP WG Chairs and others with much experience in GNSO PDPs raised a number of issues that contributed to the recommendations. Among them were the need for face-to-face meetings, professional or trained facilitation/moderation, and the involvement of the Board in the process, including the benefits and dangers of deadlines and “threats.”<sup>101</sup>

- A number of Public Comments also discussed PDP issues, including:
- The involvement of the GAC in the PDP process.<sup>102</sup>
- The need for wider participation and cross-community interactions.<sup>103</sup>
- The need for participation by groups without business-related incentives for participation.<sup>104</sup>
- The need for community buy-in into the process and the belief that the decisions of a PDP will not be over-ridden.<sup>105</sup>
- The need for facilitation or other ways of getting closure on contentious issues.<sup>106</sup>
- The need to include non-English speakers in the process.<sup>107</sup>
- The need to conduct “in-reach” activities to bolster Working Group processes and for formal and informal interaction between the Board and the GNSO to understand the causes for delayed PDPs.<sup>108</sup>
- The need for clarity and transparency in GNSO Operational Procedures and PDP rules and procedures.<sup>109</sup>

## Summary of Other Relevant Research

An expert study on the PDP has been commissioned by ATRT2. The full InterConnect Communications (ICC) report can be found in Appendix A. Some of ICC’s key observations and conclusions include:  
PDPs are largely developed by North Americans and Europeans with little meaningful input from other regions. Reasons include language, time-zone constraints, inadequate communications infrastructure, and cultural issues.

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<sup>101</sup> See ATRT2 [mailing list archives](#), in particular the exchange titled “Discussion with ATRT2” that was conducted between 07-10 August 2013 - <http://mm.icann.org/pipermail/atrt2/2013/000682.html> through <http://mm.icann.org/pipermail/atrt2/2013/000705.html>.

<sup>102</sup> US Council for International Business

<sup>103</sup> Maureen Hilyard, Nominet, Gordon Chillcot, Registries Stakeholder Group, Rinalia Abdul Rahim with support of Evan Leibovitch and Carlton Samuals

<sup>104</sup> Rinalia Abdul Rahim with support of Evan Leibovitch and Carlton Samuals

<sup>105</sup> US Council for International Business, Rinalia Abdul Rahim with support of Evan Leibovitch and Carlton Samuals

<sup>106</sup> US Council for International Business, Registries Stakeholder Group, Rinalia Abdul Rahim with support of Evan Leibovitch and Carlton Samuals

<sup>107</sup> Rinalia Abdul Rahim with support of Evan Leibovitch and Carlton Samuals

<sup>108</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdfyS1QVCCIIsL.pdf>

<sup>109</sup> Comments of Raimundo Beca: <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00001.html>

Even from the participating regions, most active participants have economic and other support for their ongoing involvement, dominating attendance records.

The researchers also identified a widespread belief that participation may not be worth the effort since parties dissatisfied with the policy outcomes will find ways to ensure that they are not implemented as prescribed.

The significant time and effort required for PDP WG participation is too great for too many potential volunteers, exacerbating reliance on a small pool of active participants. Furthermore, many of those polled by ICC reported that much of the PDP WG time is not used effectively.

ICC also addresses concerns about operational practice (time difference, resource availability, support for diverse languages, etc.), as well as the current PDP collaboration and discourse model – which often fails to take into account other cultural approaches to developing and building consensus policies.

### **Relevant ICANN Bylaws, Other Published Policies and Procedures**

The GNSO PDP is governed by Bylaws Annex A.<sup>110</sup> This includes the GNSO Operating Procedures<sup>111</sup> and its rules for Working Groups. These annexes also allow work methodologies other than WGs if defined by the GNSO. Furthermore, these procedures do not dictate exact operational aspects of WG meetings.

### **Findings of ATRT2**

There appears to be a growing sense that professional facilitation of PDPs would contribute to the proper addressing of complicated policy issues. Although such support will incur costs, many stakeholders have expressed doubt that the more difficult and contentious problems will be satisfactorily addressed without such support. That would result in either poor policy or a situation where the ICANN Board must intervene and set policy itself. Even that, however, would be inadequate in cases where formal Consensus Policy – which can only be developed by the GNSO PDP – is required.

The current PDP WG model also presumes that virtually all of the work can be done via e-mail and conference calls. Experience within ICANN indicates that face-to-face meetings are extremely beneficial. Of course, this too will require increased budget support.

It is unclear how one provides the incentive to negotiate in good faith and make concessions when stakes are high. In the ICANN context, this has at times involved a Board-imposed deadline with the potential for indeterminate Board action if agreement cannot be reached. This has been effective in achieving an outcome at times, but it is less clear the outcomes achieved have been good ones. In some instances, the Board has given instructions regarding timeframes for which a PDP

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<sup>110</sup> See <http://www.icann.org/en/about/governance/bylaws#AnnexA>

<sup>111</sup> See <http://gns0.icann.org/en/node/38709>



should provide guidance, and then altered that position before the deadline has past, significantly perturbing the PDP process. Such lack of certainty must be avoided. Similarly, the potential for Board action nullifying outcomes of a PDP is one of the issues that impact the viability of the PDP. If such intervention is viewed as possible or even likely, it impacts the need for good-faith negotiations and for participation in general.

As noted by many observers, the time and effort necessary to effectively participate in a PDP often is too great for many potential volunteers. As a result, many PDPs end up relying on the same handful of active participants. Even then, many of these workers believe that their time is not being well spent due to lack of organization, good methodologies, and effective leadership. While some report that this situation is improving due to the development of new processes that will be available to successive PDPs, it seems clear that more needs to be done.

### **Public Comment on Recommendations**

(see [ATRT2 Draft Report and Recommendations](#))

In general there was strong support throughout the community for much of this recommendation:

- There was some concern with the term “facilitators,” and poor experiences with facilitators in other venues. Other methodologies may be of benefit.<sup>112</sup>
- Strong support for wider and more balanced participation in the GNSO policy development processes.<sup>113</sup>
- There was support in At-Large, NCSG and SSAC for generalizing the recommendation on support for those who do not have industry financial backing. The rationale is that many segments of the ICANN community have business activities in the ICANN-related ecosystem, and it is thus to their business and financial advantage to have employees and associates participate in ICANN activities. Those with a strong interest in ICANN, but who lack business-related funding opportunities, are at a distinct disadvantage, and this has the potential to negatively impact the ICANN multi-equal stakeholder model. ICANN currently funds travel costs for many (but not all) AC and SO members, for selected Regional At Large Organization (RALO) leaders, and more recently, for GNSO Constituency and Stakeholder Group leaders.<sup>114</sup>
- Poor participation in policy development processes is not just the lack of participation noted by the independent expert report, but a lack of participation from within the communities that are well represented within ICANN and the GNSO. PDPs rely far too much on a very small and possibly shrinking group of volunteers.<sup>115</sup>

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<sup>112</sup> ATRT meeting with the GNSO Council in Buenos Aires, [GNSO comment submission](#)

<sup>113</sup> ATRT meetings with the GNSO Council and ALAC, [GNSO](#), [ALAC](#) and [Egyptian](#) comment submission

<sup>114</sup> ATRT meetings with the ALAC, NCSG and SSAC in Buenos Aires, [ALAC](#) comment submission

<sup>115</sup> ATRT meetings with the GNSO Council and ALAC, [GNSO](#) and [ALAC](#) comment submission, Discussions with Michael O’Connor

- Inter-sessional face-to-face meeting may be needed at times, but ICANN should also explore alternatives such as using regional hubs and engagement center facilities.<sup>116</sup>
- A target of “equitable” participation may not be possible for a number of reasons. A better target may be an “opportunity for equitable participation”.<sup>117</sup>
- Allowing commenters to critique staff summaries is reasonable but should not increase the overall process time.<sup>118</sup>
- The recommendation related to the Board creating or altering policy should not presume that such action is acceptable or desirable.<sup>119</sup>
- Focus should be on using volunteer time effectively.<sup>120</sup>

### **Final Recommendation #10**

10. The Board should improve the effectiveness of cross-community deliberations.

10.1. To enhance GNSO policy development processes and methodologies to better meet community needs and be more suitable for addressing complex problems, ICANN should:

- a. In line with ongoing discussions within the GNSO, the Board should develop funded options for professional services to assist GNSO policy development WGs. Such services could include training to enhance work group leaders' and participants' ability to address difficult problems and situations, professional facilitation, mediation, negotiation. The GNSO should develop guidelines for when such options may be invoked,
- b. The Board should provide adequate funding for face-to-face meetings to augment e-mail, wiki and teleconferences for GNSO policy development processes. Such face-to-face meeting must also accommodate remote participation, and consideration should also be given to using regional ICANN facilities (regional hubs and engagement centers) to support intersessional meetings. Moreover, the possibility of meetings added on to the start or end of ICANN meetings could also be considered. The GNSO must develop guidelines for when such meetings are required and justified, and who should participate in such meetings.
- c. The Board should work with the GNSO and the wider ICANN community to develop methodologies and tools to allow the GNSO policy development

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<sup>116</sup> GNSO comment submission

<sup>117</sup> Comment submission from [Becky Burr, Paul Diaz and Chuck Gomes](#). Registry Stakeholder Group comment submission

<sup>118</sup> Comment submission from [Becky Burr, Paul Diaz and Chuck Gomes](#). Registry Stakeholder Group comment submission. GNSO comment submission

<sup>119</sup> Comment submission from [Becky Burr, Paul Diaz and Chuck Gomes](#). Registry Stakeholder Group comment submission. GNSO comment submission

<sup>120</sup> GNSO comment submission

processes to utilize volunteer time more effectively, increasing the ability to attract busy community participants into the process and also resulting in quicker policy development.

10.2. The GAC, in conjunction with the GNSO, must develop methodologies to ensure that GAC and government input is provided to ICANN policy development processes and that the GAC has effective opportunities to provide input and guidance on draft policy development outcomes. Such opportunities could be entirely new mechanisms or utilization of those already used by other stakeholders in the ICANN environment. Such interactions should encourage information exchanges and sharing of ideas/opinions, both in face-to-face meetings and intersessionally, and should institutionalize the cross-community deliberations foreseen by the AoC.

10.3. The Board and the GNSO should charter a strategic initiative addressing the need for ensuring more global participation in GNSO policy development processes, as well as other GNSO processes. The focus should be on the viability and methodology of having the opportunity for equitable, substantive and robust participation from and representing:

- a. All ICANN communities with an interest in gTLD policy and in particular, those represented within the GNSO;
- b. Under-represented geographical regions;
- c. Non-English speaking linguistic groups;
- d. Those with non-Western cultural traditions; and
- e. Those with a vital interest in gTLD policy issues but who lack the financial support of industry players.

10.4. To improve the transparency and predictability of the policy development process the Board should clearly state to what degree it believes that it may establish gTLD policy<sup>121</sup> in the event that the GNSO cannot come to closure on a specific issue, in a specified time-frame if applicable, and to the extent that it may do so, the process for establishing such gTLD policies. This statement should also note under what conditions the Board believes it may alter GNSO Policy Recommendations, either before or after formal Board acceptance.

10.5. The Board must facilitate the equitable participation in applicable ICANN activities, of those ICANN stakeholders who lack the financial support of industry players.

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<sup>121</sup> This is not referring to Temporary Policies established on an emergency basis to address security or stability issues, a right that the Board has under ICANN agreements with contracted parties.

## **Report Section 14. AoC REVIEW PROCESS EFFECTIVENESS: ATRT2 Recommendation 11**

### **Hypothesis of Problem**

The working assumption is that the AoC review processes provide sufficient review and adequate recommendations that facilitate improvement in ICANN's accountability and transparency. There is concern about the level to which the periodic institutional reviews, as required in the ICANN bylaws, create an aspect of "review fatigue" that undermines stakeholder or organizational effectiveness. Therefore, the availability of alternative approaches to review that should be considered by ICANN.

Furthermore, with three other AoC-related reviews to be carried out in a three-year cycle, there is an implied requirement for each of the review processes to be completed within the year it begins. This should enable all the required reviews to be carried out, recommendations shared, and ICANN staff given time to either implement or consider for implementation some of the Recommendations of the review teams before the next ATRT review. However, if the three reviews are not completed and considered within the prescribed cycle, then the subsequent ATRT risks having a deadline for its review when the other reviews have not yet been completed and/or their recommendations not yet fully considered by ICANN Board and staff.

### **Background Research Undertaken**

Prior Review Team reports (ATRT1, WHOIS and SSR) provide some insight into the qualitative aspects of each review process. ATRT1's Final Report provided both an Overview of the Accountability and Transparency Review Process (Appendix A) and Observations of the Review Process (Appendix B), but the WHOIS Review Team and the SSR Review Team did not provide discreet observations of the review process in their respective reports.

ATRT2 also asked for input from former members of those review teams concerning the review process and whether they believe improvements could be made.

Furthermore, ATRT2's review process has provided some insights regarding the effectiveness and efficiency of the review process.

In sum, ATRT2 found that issues that require further discussion include, but are not limited to:

- a.* Time allotted for the review process.
- b.* The mechanics of initiating data flow from ICANN staff to the review team.
- c.* The mechanics of obtaining community input at an early stage.
- d.* Understanding of budget allocations for the Review Team activities.

- e. Dynamics of work stream organization.
- f. Volunteer aspects of the review team process.

### Summary of ICANN Input

Staff reported that:

- a. The AoC does not require the reviews to be completed within one year. While timely completion of the reviews impacts the effectiveness of the three-year cycle, staff recommended that ATRT2 address the three-year cycle mandated by the AoC.
- b. Staff prepares regular and frequent implementation reports to the Board and community. In the case of ATRT2, an Annual Report<sup>122</sup> was provided to the Board and community. Additionally, staff has provided several updates<sup>123</sup> to ATRT2 during the course of its Review, in varied forms. Given the wide array of opinions within the Review Team regarding format and substance of staff reports on implementation, staff would find guidance from the Review Team very useful.
- c. ICANN has engaged One World Trust (OWT) to assist with the development of Accountability and Transparency Benchmarks and Metrics. The final report is expected by December 31, 2013. Staff will facilitate ATRT2 input and feedback to OWT. Periodic updates on progress of work will also be shared. The ongoing implementation of Accountability and Transparency Benchmarks and Metrics into ICANN operations will include the incorporation of appropriate benchmarks and metrics into the reporting of implementation progress.
- d. ICANN's AoC commitments are incorporated into its strategic<sup>124</sup> and operating<sup>125</sup> plans, and improvements related to AoC reviews are integrated into ICANN's standard operating procedures and programs.<sup>126</sup> As the Board, staff and other organizations implement the recommendations of the review teams, ICANN follows a continuous improvement model, integrating the spirit of the recommendations into ICANN's operations and strategic initiatives, as appropriate.
- e. ICANN uses various methods to ensure review coordination and already has staff whose mandate is to coordinate reviews. AoC review teams are independent and make their own timelines, and AoC language specifies the frequency of the reviews. The Board and staff do not have control over the timing of the reviews such that they are completed with ample implementation time prior to the next Accountability and Transparency Review. In order to address this concern, the AoC mandate would need to be changed.

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<sup>122</sup> <http://www.icann.org/en/news/in-focus/accountability>

<sup>123</sup> <https://community.icann.org/display/ATRT2/Information+provided+by+ICANN+Staff>

<sup>124</sup> <http://www.icann.org/en/about/planning/strategic/strategic-plan-2012-2015-18may12-en.pdf>

<sup>125</sup> <http://www.icann.org/en/about/financials/adopted-opplan-budget-fy14-22aug13-en.pdf>

<sup>126</sup> <http://beijing46.icann.org/node/37035>

## Summary of Community Input

Some notable comments include:

- Former ICANN CEO and President Mike Roberts questioned whether insider dynamics captured prior review teams.
- Alejandro Pisanty – A large part of the recommendations is superfluous and engenders greater bureaucracy. ATRT2 should try to find a way to make recommendations less burdensome and more substantive.
- Nominet – One should have a full picture of the extent to which the recommendation is embedded into ICANN process and what the full effects of the implementation are. Implementation progress should feature as part of the Board update at every ICANN meeting. They should be given the highest visibility and priority.
- Danish Business Authority - In line with our previous comments to the ATRT2 process, Denmark believes that it is essential to the global legitimacy of ICANN and the multi-stakeholder model that accountability and transparency mechanisms are institutionalized into all parts of the organization. The Affirmation of Commitment Reviews are instrumental to achieving this and it is therefore essential that ICANN prioritize and institutionalize the AOC Reviews in the organization's governance structures.
- At-Large Advisory Committee - We agree with the ATRT2's general Recommendations that, in moving forward, ICANN needs to: establish clear metrics and benchmarks against which improvements in accountability and transparency can be measured.

## Summary of Other Relevant Research

ATRT2 members representing various SO/ACs provided the following input on the process:

- a. There was limited time to get the actual work done, and future teams should consider the possibility of limiting certain meetings. Whereas the face-to-face meetings were very productive, the conference calls were not as productive.
- b. A report is provided to the team on things done, but no report is provided on lessons learned. There is no bench-line identified for developing recommendations. This creates a dilemma in relation to interaction with the secretariat.
- c. There is a clear need for adequate financial resources to support the work of the Review Team, independent experts/consultants (as need is determined by the Review Team), and the secretariat. There was no discussion on the budget for an independent expert and whether or not to engage one, thus limiting the group.
- d. Measures (e.g. appointees, budget, operational reporting, etc.) for the next

Review Team should be in place before the official start in January 2016. This will reduce the pressure to meet the year-end deadline.

- e. Right from the beginning, Day 1, staff should share reports without compromising ATRT work.
- f. Some ATRT2 members felt that they were operating under the shadow of ATRT1. What did or did not work from the previous Review could be assessed by an external expert. At the least, provide judgment criteria and indicators to look for when going back for the review process.
- g. While the Review Team's interaction with different stakeholders has been very good, with the Durban process very helpful in data collection, visibility with the rest of ICANN community needs to be improved due to inherent limitations of the reviews' historic versus futuristic approach.
- h. Regularity of Reviews has to be strictly coordinated by having all reviews done before the next ATRT, i.e. proper linkage. Future teams may need to consider the possibility of an independent secretariat or technical facilitator. These resources would reduce the focus being driven by input from staff and facilitate balanced input from external communities. This would enable the review team members to carry out evaluation on implementation appropriately.
- i. A reliance on volunteers for doing functions that should be carried out by professionals is not a good model for a review group carrying out such an important task. For example, reviewing the other Review Teams' output is a lot of work for a cadre of volunteers.
- j. With each ATRT expected to have to look at all of the previous Review Teams' output, community engagement is likely to be difficult for ATRT3.
- k. Volunteer involvement with competing priorities for the various communities within ICANN requires that ATRT members go to our own communities to help gather input for the various processes.
- l. There seems to be tension between being independent and objective and working with staff. The ATRT should drive the work and the staff should give responses.

### **Relevant ICANN Bylaws, Other Published Policies and Procedures**

Organizational reviews are overseen by the Board's Structural Improvements Committee. The methodology of organizational reviews and background materials can be found at <http://www.icann.org/en/groups/reviews>.

### **Final Recommendation #11**

#### 11. Effectiveness of the Review Process

##### 11.1. Institutionalization of the Review Process

The Board should ensure that the ongoing work of the AoC reviews, including implementation, is fed into the work of other ICANN strategic activities wherever appropriate.

#### 11.2. Coordination of Reviews

The Board should ensure strict coordination of the various review processes so as to have all reviews complete before next ATRT review begins, and with the proper linkage of issues as framed by the AoC.

#### 11.3. Appointment of Review Teams

The Board should ensure that AoC Review Teams are appointed in a timely fashion, allowing them to complete their work in the minimum one (1) year period that the review is supposed to take place, regardless of the time when the team is established. It is important for ICANN to factor in the cycle of AoC reviews; the Review Team selection process should begin at the earliest point in time possible given its mandate.

#### 11.4. Complete implementation reports

The Board should prepare a complete implementation report to be ready by review kick-off. This report should be submitted for public consultation, and relevant benchmarks and metrics must be incorporated in the report.

#### 11.5. Budget transparency and accountability

The ICANN Board should ensure in its budget that sufficient resources are allocated for Review Teams to fulfill their mandates. This should include, but is not limited to, accommodation of Review Team requests to appoint independent experts/consultants if deemed necessary by the teams. Before a review is commenced, ICANN should publish the budget for the review, together with a rationale for the amount allocated that is based on the experiences of the previous teams, including ensuring a continuous assessment and adjustment of the budget according to the needs of the different reviews.

#### 11.6. Board action on Recommendations

The Board should address all AoC Review Team recommendations in a clear and unambiguous manner, indicating to what extent they are accepting each recommendation.

#### 11.7. Implementation Timeframes

In responding to Review Team recommendations, the Board should provide an expected time frame for implementation, and if that time frame is different from one given by the Review Team, the rationale should address the difference.



## **Report Section 15. FINANCIAL ACCOUNTABILITY AND TRANSPARENCY: ATRT2 Recommendation #12**

### **Hypothesis of Problem**

ICANN is a non-profit, privately organized institution. The services delivered by ICANN are delivered without any other institutions or bodies competing with ICANN. The political decisions of the ICANN Board and, in the broader context, the multistakeholder mechanism, will - in the absence of direct competition - be the only factors that determine how ICANN should prioritize its resources, its revenue, and its spending.

The combination of a more complex organization (as shown in the ICANN organization chart<sup>127</sup>), increased income and expenses, and the increased complexity of a business going from approximately 20 gTLDs to more than 1,000 gTLDs over the next few years, highlights the importance of increased accountability and transparency in ICANN's financial governance, including decisions related to activities, prices, expenses and investments.

### **Summary of ICANN Input**

ATRT2 members conferred with ICANN CFO Xavier Calvez in late August 2013.<sup>128</sup> The conversation was very informative, and it is evident that ICANN has improved its level of financial reporting during the last couple of years. Calvez reported that ICANN is considering a benchmark study to compare ICANN to other non-profit organizations, but this has not been definitely decided. Responding to a question about separating the expense and budgets for each AC and SO, he noted that would be difficult to do and is not planned or projected yet. When asked for the plans or principles for using any surplus from the New gTLD Program to lower the fees collected by ICANN, Calvez replied that a five-year strategy could enable the suggested principles.

At the ATRT2 meeting in Los Angeles in August 2013, ICANN Board Chair Steve Crocker highlighted the appropriateness of improving accountability and transparency of ICANN's planned activities, implemented activities, and corresponding expenses.<sup>129</sup>

### **Summary of Community Input**

#### **GAC Comments**

On numerous occasions, including the ICANN meetings in Toronto<sup>130</sup>, Beijing<sup>131</sup> and

<sup>127</sup> <https://www.icann.org/en/about/staff/management-org-09sep13-en>

<sup>128</sup> <https://community.icann.org/download/attachments/40935097/Transcript%20-%20Call%2010.pdf?version=1&modificationDate=1378454662000&api=v2>

<sup>129</sup> <https://community.icann.org/display/ATRT2/Los+Angeles+-+14-17+August+2013>

<sup>130</sup> In particular, see page 3, last bullet at

<https://gacweb.icann.org/download/attachments/27132072/Summary%20of%20the%20HLM%20Chair%20v%20final.pdf?version=1&modificationDate=1360614203000&api=v2>

Durban<sup>132</sup>, the GAC has recommended that the issue of accountability and transparency regarding ICANN's finances be further looked into. In fact, the need to analyze improvements to ICANN's financial accountability mechanisms was specifically emphasized by the participants at the High Level GAC meeting at ICANN Toronto in October 2012.<sup>133</sup>

### Public Comments

Community input<sup>134</sup> on the FY14 Draft Operating Plan and Budget reveal numerous concerns about ICANN financial issues, including calls for more clarified reporting and/or a different approach to the organization's budget-setting processes. Some comments spoke to broader financial accountability and transparency concerns.<sup>135</sup> Based on the staff summary of the Public Comments, the key issues included:

- a. expenses and budgets for AC/SOs (see references # 4, 7,8,26, 75, 78, 79);
- b. ICANN income and expenses (see references # 2, 6, 73, 76, 77, 105, 106, 107); and
- c. inadequate time to comment and for ICANN to incorporate those comments (see references # 23, 24)

### Summary of Other Relevant Research

Being a public-benefit corporation, ICANN needs to strike a reasonable balance between its revenues and expenses. In a situation with increasing revenue, one option is to increase activities corresponding to this additional income. Another option is to lower the prices paid by ICANN's consumers and in turn benefit domain name end-users. Of course, the two options can be combined.

In recent years ICANN's activities and corresponding revenues and expenses have grown significantly. Revenues increased from \$18 million in 2005 to \$72 million in 2012. Accordingly, expenses increased from \$14 million in 2005 to \$70 million in 2012<sup>136</sup>. During the same period, staff increased from 36 in 2005<sup>137</sup> to 149 in 2012 and up to 220 in 2013, with a planned increase to approximately 284 in 2014.

In the recently approved Fiscal Year 2014 (FY14) budget,<sup>138</sup> ICANN forecast 2013

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<sup>131</sup> See page 2, Section III.1 at

[https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013\\_Final.pdf?version=1&modificationDate=1365666376000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2)

<sup>132</sup> See page 1, Section II.2 at

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2)

<sup>133</sup> See Toronto report cited at Footnote 120.

<sup>134</sup> <http://www.icann.org/en/news/public-comment/summary-comments-op-budget-fy14-30aug13-en.pdf>

<sup>135</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/pdf6b42Ud7VdW.pdf>

<sup>136</sup> <http://www.icann.org/en/about/annual-report>

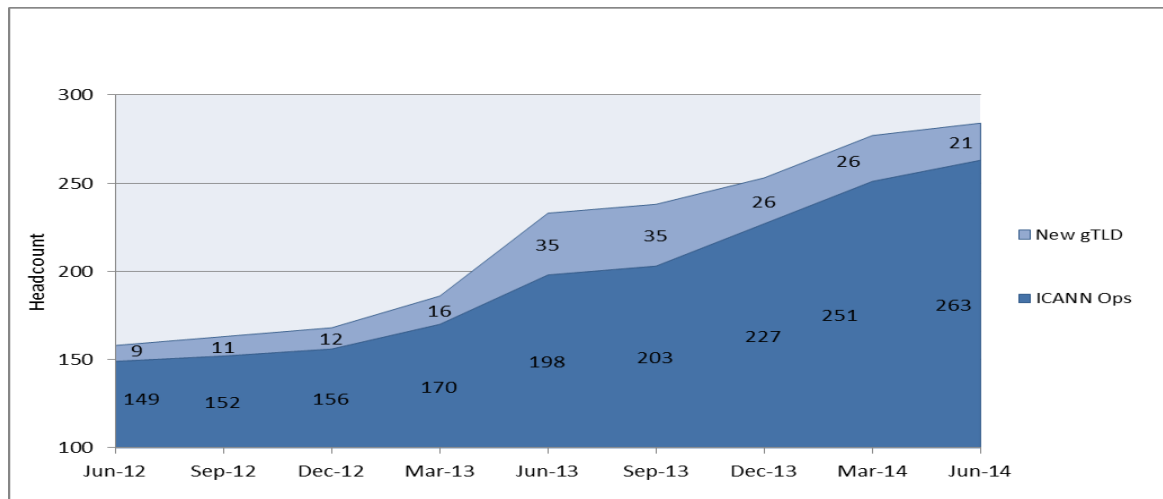
<sup>137</sup> <http://www.icann.org/en/about/financials/fiscal-30jun05-en.htm> - discussion and analysis paper of significant variances between the reported financial statements for FY2004 and FY2005.

<sup>138</sup> <http://www.icann.org/en/about/financials/adopted-opplan-budget-fy14-22aug13-en.pdf>

revenue of more than US\$80 million and an expectation of ending 2013 with net income of nearly US\$32 million. If the 2013 balance from the New gTLD Program is added in, the net result jumps to US\$92 million. In fact, the New gTLD Program is expected to generate at least US\$315 million in revenue. While the FY14 budget forecasts that the Program will generate US\$197 million in operating expenses, it still leaves a net balance of US\$118 million.

The following graphic captures these trends:

### FY14 Draft Operating Plan & Budget Headcount Growth<sup>139</sup>



### Relevant ICANN Bylaws, Other Published Policies and Procedures

Within the procedure of the board approval of the budget,<sup>140</sup> the ICANN Board Finance Committee is responsible for:

- a. Providing oversight on the annual budget process of the Corporation;
- b. Reviewing and making recommendations on the annual budget submitted by the President (the CEO of ICANN);
- c. Developing and recommending short- and long-range strategic financial objectives for the corporation; and
- d. Providing strategic oversight on financial matters for the Corporation.

### Findings of ATRT2

Given that ICANN's present and future financial situation forecasts substantial surpluses, the community needs to establish a firmer basis for discussing how to continue developing ICANN and prioritize its work to the benefit of participants within the multistakeholder model. Such a discussion will entail three key elements:

<sup>139</sup> <https://www.icann.org/en/about/financials/proposed-opplan-budget-fy14-16may13-en.pdf>

<sup>140</sup> <http://www.icann.org/en/groups/board/finance/charter>

1. The revenue side. How should the revenue in general develop, and what should the future ICANN fee structure look like? One pressing question is whether ICANN can continue the present fee structure, and annual surpluses of over one-third of yearly revenues, given its non-profit status? Should ICANN in general reduce the annual fees in order to balance revenue and spending?
2. The expenditure side. ICANN has expanded its activities dramatically. For example, ICANN staff will nearly double over a two-year period. Is this a trend that should be continued? When has ICANN reached its mature size and organizational setup?
3. The prioritization of the work of ICANN. ICANN is in the very fortunate situation that its financial prospects are very positive and promising. This should not, however, lead to an insufficient or unclear prioritization of its strategic outlook and the work it undertakes. In all organizations, resources are scarce, either because of competition or because of constraints from the granting authority. While this might have negative effects, it should help keep the organization agile and focused on its desired outcomes. Importantly, there must be effective matches between the resources spent and the effects achieved. ICANN should develop new transparent and accountable mechanisms that combine more effective resource allocation and use with the involvement of all the parties within the multistakeholder model.

### **Public Comment on Recommendation**

(see [ATRT2 Draft Report and Recommendations](#))

Responses from the community on the recommendations regarding finances were generally positive.

Both the Danish Government<sup>141</sup> and the Egyptian Government<sup>142</sup> commented on the importance of reviewing and improving ICANN's financial governance and financial accountability and transparency. In particular, the Spanish Government comments.<sup>143</sup> "Likewise, [W]e would be more than pleased to participate in the budget consultation process envisaged in section 15. It is as important to have safe sources of income as allocating enough resources to fulfilling strategic objectives of the organization."

Intellectual Property Constituency (IPC) commented: "The impression is given that ICANN gives top priority to opening new offices around the world and diving headlong into new policy areas such as Internet governance, without directing sufficient resources to 'operational excellence' in the organization's core business of administering the systems for IP addresses and domain names. The only effective way to dispel this impression is through the types of reforms spelled out in these recommendations, including (as sketched out in the preceding section of these comments) by 'ensuring that sufficient time is given to the community to provide their

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<sup>141</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00006.html>

<sup>142</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00010.html>

<sup>143</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00013.html>

views on the proposed budget and enough time for the Board to take into account all input before approving the budget.<sup>144</sup>

This comment is well in line with the comments from Registries Stakeholder Group (RySG) regarding the recommendation on financial planning and comment periods:

“We strongly support this recommendation but note that it is very difficult for community members to effectively participate if they don’t receive sufficient detail until after it is too late to make changes. It is easy to claim this goal is met by showing how community members were able to participate at a high level in the process and that is what has been happening for years, but that is not sufficient. ATRT2 needs to be much more specific in terms of what is expected.”<sup>145</sup>

Regarding recommendation on benchmark-studies, the RySG noted:

“More detail is needed on this recommendation. What would be the purpose of the study? How would the study be used? Would comparisons with comparable organizations be included in the study? If so, how would comparable organizations be selected? etc.”<sup>146</sup>

Regarding the recommendation on multi-year planning, the RySG, noted the following:

“We fully support the second part of this recommendation. It is not clear, though, whether the first part is realistic; we would be very pleased if it could be done.”

"Community members who have tried to actively contribute to the process of developing an operating plan and budget for just one year have been repeatedly told that it is not possible to provide detailed budget information until it is too late to make significant changes. In many cases it is not possible to make meaningful contributions without having budget information at the task and sub-task level earlier in the process, so what happens is this: detailed budget information is provided late in the fiscal year, we make comments, but it is too late for any significant changes to be made because the Board has to approve the budget before its next fiscal year.”<sup>147</sup>

IPC had the following comment regarding the importance of adequate time to consult on proposed budgets:

“IPC has frequently expressed its concerns about the lack of transparency and accountability in the ICANN budget process and its financial reporting to the community”.

“Unlike many organizations, both for-profit and not-for-profit, which must face tough decisions about spending priorities in the face of flat or diminishing revenues, ICANN has enjoyed years of increasing revenues. But this makes even more critical the need

<sup>144</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00014.html>

<sup>145</sup> <http://forum.icann.org/lists/comments-atrt2-recommendations-21oct13/msg00008.html>

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

for a transparent process for setting spending priorities, and an accountability mechanism to ensure that the results of that prioritization process are fulfilled. IPC urges that Recommendation 12 be given a high priority in ATRT2's final report, and that achievement of a much higher level of financial accountability and transparency be enshrined as a strategic objective for ICANN over the next few years."

IPC appreciates the recent statements of ICANN Board leaders and senior staff supporting this ATRT2 recommendation. ICANN board meeting with the Commercial Stakeholder Group in Buenos Aires, on November 19, 2013 includes this statement by Cherine Chalaby – "You make an excellent point. You have not seen the strategic plan in its entirety. There will be a five-year financial plan inside the strategic plan as well.... We one hundred percent agree with your point and want to raise it even higher to a completely different level." Likewise, Fadi Chehadé noted: "We are hugely upgrading that whole area. We have a new Chief Operating Officer who is focused on that. As Cherine Chalaby said, it is the first time we moving away from expense management to financial planning within ICANN, not just budgeting, and now leaning to true financial reports—the kind you would expect from any organization our size."<sup>148</sup>

## **Final Recommendation #12**

### **12. Financial Accountability and Transparency**

In light of the significant growth in the organization, the Board should undertake a special scrutiny of its financial governance structure regarding its overall principles, methods applied and decision-making procedures, to include engaging stakeholders.

12.1. The Board should implement new financial procedures in ICANN that can effectively ensure that the ICANN community, including all SOs and ACs, can participate and assist the ICANN Board in planning and prioritizing the work and development of the organization.

12.2. The Board should explicitly consider the cost-effectiveness of ICANN's operations when preparing its budget for the coming year, in keeping with ICANN's status as a non-profit organization operating and delivering services in a non-competitive environment. This should include how expected increases in the income of ICANN could be reflected in the priority of activities and pricing of services. These considerations should be subject of a separate consultation.

12.3. Every three years the Board should conduct a benchmark study on relevant parameters, (e.g. size of organization, levels of staff compensation and benefits, cost of living adjustments, etc.) suitable for a non-profit organization. If the result of the benchmark is that ICANN as an organization is not in line with the standards of comparable organizations, the Board should consider aligning the deviation. In cases where the Board chooses not to align, this has to be reasoned in the Board decision and published to the Internet community.

12.4. In order to improve accountability and transparency ICANN's Board should

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<sup>148</sup> IPC Public Comments cited above.

base the yearly budgets on a multi-annual strategic plan and corresponding financial framework (covering e.g. a three-year period). This rolling plan and framework should reflect the planned activities and the corresponding expenses in that multi-annual period. This should include specified budgets for the ACs and SOs. ICANN's (yearly) financial reporting shall ensure that it is possible to track ICANN's activities and the related expenses with particular focus on the implementation of the (yearly) budget. The financial report shall be subject to public consultation.

12.5. In order to ensure that the budget reflects the views of the ICANN community, the Board shall improve the budget consultation process by i.e. ensuring that sufficient time is given to the community to provide their views on the proposed budget and sufficient time is allocated for the Board to take into account all input before approving the budget. The budget consultation process shall also include time for an open meeting among the Board and the Supporting Organizations and Advisory Committees to discuss the proposed budget.

## **Report Section 16. Summary of ATRT2 Assessment of the Implementation of WHOIS Review Team Recommendations**

### **Board Adoption of Review Team (RT) Recommendations**

Although a detailed review of the wording of the Board action indicates that it did indeed approve implementation of the bulk of the WHOIS RT recommendations, it is understandable why that was not the impression left on many community members. The wording of the Board motion specifically identified three areas to be addressed (communications, outreach and compliance) but did not explicitly approve the recommendations that fell outside of those areas. Furthermore, the details of the proposed implementation were embedded in a staff briefing paper. Moreover, the creation of the Expert Working Group (EWG) was based on the recommendation of the SSAC, which essentially recommended that the EWG work be done before anything else. In fact, this was the first action of the Board before addressing the RT report, reinforcing this prioritization.

### **ATRT Review Timing**

ATRT2 notes that the review of the WHOIS implementation recommendations is taking place between six and 12 months after Board action on the WHOIS report, so it is not unexpected that the work is ongoing and in a few cases just starting.

### **Implementability**

To a large extent, the RT recommendations have proven to be implementable. In several cases, the initial staff position was that they either could not readily be implemented, or the problem would need to be addressed using different methodology. However, as work is progressing, it appears that most of the recommendations are being followed reasonably closely, indicating that they were for the most part implementable.

## Progress

As few aspects of the implementation have been completed, it is not possible to judge the final outcome. It is clear, however, that the time frame for implementation has far exceeded that proposed by the RT. This can be attributed to a number of different reasons (not in order of relevance):

- a. The time frame proposed by the RT was not reasonable given the complexity of the issue and the requirement to put plans and in some cases community working groups in place.
- b. The timing of the Board action coinciding with the culmination of the Registrar Accreditation Agreement (RAA) negotiation and implementation put heavy pressures on the small group overseeing both closely related activities.
- c. Some of the activities were focused on areas of ICANN which were experiencing heavy staff turnover, and it took time for the new staff to be able to address the issues.
- d. Not all parts of the implementation were completely under the control of ICANN staff and in particular have required GNSO action, which itself has experienced heavy workload in 2013.

Allowing for these delays, there is progress being made. Much of it has not been visible to the community, but in a number of critical cases, work has now progressed to the stage where this progress will soon be visible to the community.

There are three areas which are worthy of particular note.

1. The overall plan for approaching the WHOIS recommendations (Recommendation 15) has not been presented in a clear and understandable way so that the community could track implementation. That is not to say that there is not much information available, but it was not sufficiently well organized and clear as to be useful. In fact, for this reason, ATRT2 had great difficulty in carrying out this assessment.
2. Although a wider problem than just WHOIS, there is still a lack of faith in the community that Contractual Compliance is being sufficiently well addressed as to meet ICANN's needs. With regard to WHOIS accuracy, partly because the tools to address it are still in the process of being developed, there is a particular lack of information. The new provisions in the RAA do create some hope.
3. Progress on the handling of WHOIS information for internationalized domain name registrations (that is, for those registration where the information collected is in non-ASCII representations) is problematic. Work has been slow to start and is not expected to complete for close to two years. That leaves registrars and registries with the requirement to populate WHOIS records, which exist purely in 7-bit ASCII, with no guidelines or rules as to how to do this.



## Conclusion

Implementation of the WHOIS RT Recommendations is progressing and the expectation is that ultimately most will be reasonably carried out. The Recommendations call for annual reports on implementation, and the deadline for the first such report coincides with the publication of this ATRT2 draft report. Hopefully when this annual report is available, the overall implementation plan and its status will be clearly presented so that the community in general can directly assess the progress.

*Further assessment of ICANN's implementation of WHOIS RT Recommendations can be found in Appendix B.*

## Report Section 17. Summary of ATRT2 Assessment of the Implementation of Security Stability and Resiliency (SSR) Review Team Recommendations

### Actions Taken

A majority of the 28 recommendations (and their subtasks) is as yet incomplete; however implementation has at least begun on all recommendations. The 28 recommendations translated to 41 subtasks and of the 41 subtasks; 27 subtasks are as yet incomplete, representing 66%.

### Implementability

In nearly all cases, recommendations appear to be implementable. There are cases where implementation is complete. In the vast majority of recommendations, staff has indicated they did not anticipate or experience any issues when implementing the recommendations.

It should be kept in mind, however, that the implementation of a large number of recommendations has not been completed and, in some cases, has not even started. It may be that implementation difficulties will be encountered at some future point. One notable exception to this general implementability is related to recommendation 23, in which it is recommended that ICANN “must ensure decisions reached by Working Groups and Advisory Committees are reached in an objective manner that is free from external or internal pressure.” While objectivity in reaching decisions is a worthwhile goal, it is difficult to imagine a decision that is “free from external or internal pressure.”

### Effectiveness

For those recommendations that have been implemented, the overall impression has been that they have been reasonably effective in addressing at least the letter of the recommendation. Unfortunately, many of the recommendations used subjective qualifiers and few specified concrete metrics by which effectiveness could be measured. As such, objective measurement of the recommendations' effectiveness is challenging.

### **Summary of Community Input on Implementation**

A total of three Public Comments were received on the final report of the SSR Review team. A summary of those comments can be found at:  
<http://www.icann.org/en/news/public-comment/report-comments-ssr-rt-final-report-30aug12-en.pdf>

*Further assessment of ICANN's implementation of SSR Review Team Recommendations can be found in Appendix C.*

**R-47**

**RESPONDENT'S EXHIBIT**

GET  
STARTEDNEWS &  
MEDIA

POLICY

PUBLIC  
COMMENT

RESOURCES

COMMUNITY

IANA  
STEWARDSHIP  
& ACCOUNTABILITY

## Resources

 About [ICANN](#) Board Accountability Governance Groups

Business

Civil Society

 Contractual  
Compliance Registrars Registries

GDD Metrics

 Identifier  
Systems  
Security, Stability  
and Resiliency  
(IS-SSR) ccTLDs Internationalized  
Domain Names Universal  
Acceptance  
Initiative

## Accountability Structures Expert Panel

In fulfillment of ATRT Recommendations 23 and 25, calling for a review of [ICANN's Accountability Structures](#), [ICANN](#) has identified an international panel of experts to serve on the Accountability Structures Expert Panel (ASEP). Short biographies of each of the three experts is included below.

The ASEP is interested in hearing from the [ICANN](#) community regarding your thoughts on [ICANN's](#) accountability structures, particularly the Reconsideration process and the Independent Review process, and whether they can or should be modified. Your comments and inputs can be submitted to [ASEP@ICANN.org](mailto:ASEP@ICANN.org) and comments can be viewed at <http://forum.icann.org/lists/asep/>. Please provide your input by 1 October 2012.

The ASEP will be posting documents on this page as they are available.

[ASEP Project Plan posted 24 September 2012](#) [PDF, 83 KB]

### Background on Accountability Mechanisms:

#### Reconsideration Process:

[ICANN's](#) Board Governance Committee is responsible for receiving requests from any person or entity that has been materially affected by any [ICANN](#) staff action or inaction if such affected person or entity believes the action contradicts established [ICANN](#) policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: this is a brief summary of the relevant Bylaws provisions. For more information about [ICANN's](#) reconsideration process, please visit <http://www.icann.org/en/about/governance/bylaws#IV> and <http://www.icann.org/en/groups/board/governance>. A suggested Reconsideration Request form, an explanatory timeline for the Reconsideration Process and Reconsideration Request documents are available [here](#).

- Policy

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- Public Comment

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- Root Zone KSK Rollover

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- Technical Functions

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- Contact

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- Help

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## Independent Review Process:

ICANN has established a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. For additional information about the independent review process, please refer to [ICANN Bylaws Article IV, Section 3](#). The Bylaws provide that requests for independent review will be referred to an Independent Review Panel ("IRP"). ICANN has designated the International Centre for Dispute Resolution to operate the independent review process. To initiate a request for Independent Review, please complete the ICDR form which can be found [here](#) [PDF, 75 KB]. ICDR will then contact you to discuss the process in more detail. For more information on the ICDR's International Arbitration rules and procedures, click [here](#). Details of the supplemental rules for the ICANN process can be found [here](#). IRP documents can be found [here](#). Answers to recurring questions regarding the IRP are located [here](#).

## Members of the Accountability and Transparency Expert Panel:

MERVYN E KING S.C.

BA. LLB (Cum Laude) H Dip Tax (Wits), Ph.D (h.c.) in Law (Wits)



Mervyn King is a Senior Counsel and former Judge of the Supreme Court of South Africa. He is Professor Extraordinaire at the University of South Africa on Corporate Citizenship, has an honorary Doctor of Laws from the University of the Witwatersrand, is Chairman of the King Committee on Corporate Governance in South Africa, which produced King I, II and III, President of the Advertising Standards Authority and First Vice President of the Institute of Directors Southern Africa

He is Chairman of the International Integrated Reporting Council (IIRC), Chairman Emeritus of the Global Reporting Initiative (GRI) and a member of the Private Sector Advisory Group to the World Bank on Corporate Governance. He chaired the United Nations Committee on Governance and Oversight.

He has been a chairman, director and chief executive of several companies listed on the London, Luxembourg and Johannesburg Stock Exchanges.

He has consulted, advised and spoken on legal, business, advertising, sustainability and corporate governance issues in 49 countries and has received many awards. He is the author of *The Corporate Citizen* and *Transient Caretakers*, with Teodorina Lessidrenska, and sits as an arbitrator and mediator locally and internationally.

## GRAHAM MCDONALD



Graham McDonald has had a legal career spanning over 40 years during which he has acted an attorney involved in the establishment of the legal assistance for Australia's indigenous population, in his own law firms, as a corporate regulator, the inaugural Australian Banking Ombudsman, Chair of the Superannuation Tribunal, and for 22 years as a Presidential Member of Australia's Administrative Appeals Tribunal which hears and determines appeals from Federal Government departments, agencies and Ministers.

Graham is a judicial pensioner and currently serves on the Board of Auda, the company that regulates Australia's domain names where he is also chair of the Finance and Audit Committee.

## RICHARD MORAN



Richard A. Moran is a nationally known authority on corporate leadership and workplace issues. He is the Chief Executive Officer and Vice Chair at Accretive Solutions and serves as director on several boards. He is a venture capitalist, former executive at software companies and a former Accenture partner. His clients have included News Corporation, AT&T, Apple, Hewlett Packard, American Airlines and Oracle. He often works with corporate boards to improve effectiveness and serves as director on the boards of

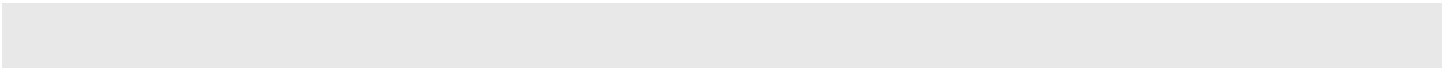
the Silicon Valley Chapter of the National Association of Corporate Directors, EASi, Perfect Forms and First Giving. He has also served on boards of Mechanics Bank and GluMobile to name a few. Mr. Moran holds an A.B. from Rutgers College, an M.S. from Indiana University and a Ph.D. from Miami University.

Rich is credited with creating the genre of "business bullet" books, based on the premise that business is often best directed by simple, rather than complex principles. His previous books include: National Bestseller *Never Confuse a Memo with Reality*; *Beware Those Who Ask for Feedback*; *Fear No Yellow Stickies*; *Cancel the Meetings, Keep the Doughnuts*; and *Nuts, Bolts and Jolts*. Rich's latest book is *Sins and CEOs*. He has appeared on CNN, NPR, CNBC and also in *Fortune*, the *Financial Times*, and other media discussing change and leadership. His radio show *In the Workplace* runs weekly on KCBS. He is the President of Moran Manor & Vineyards and lives in San Francisco with his wife and four children.

<a href="#">You Tube</a>	<a href="#">Twitter</a>	<a href="#">LinkedIn</a>	<a href="#">Flickr</a>	<a href="#">Facebook</a>
<a href="#">RSS Feeds</a>	<a href="#">Community Wiki</a>	<a href="#">ICANN Blog</a>		

<b>Who We Are</b>	<b>Contact Us</b>	<b>Accountability &amp; Transparency</b>	<b>Governance</b>	<b>Help</b>
<a href="#">Get Started</a>	<a href="#">Offices</a>	<a href="#">Accountability Mechanisms</a>	<a href="#">Documents</a>	<a href="#">Dispute Resolution</a>
<a href="#">Learning</a>	<a href="#">Global Support</a>	<a href="#">Independent Review Process</a>	<a href="#">Agreements</a>	<a href="#">Domain Name Dispute Resolution</a>
<a href="#">Participate</a>	<a href="#">Security Team</a>	<a href="#">Request for Reconsideration</a>	<a href="#">Specific Reviews</a>	<a href="#">Name Collision</a>
<a href="#">Groups</a>	<a href="#">PGP Keys</a>	<a href="#">Ombudsman</a>	<a href="#">Annual Report</a>	<a href="#">Registrar Problems</a>
<a href="#">Board</a>	<a href="#">Certificate Authority</a>		<a href="#">Financials</a>	<a href="#">WHOIS</a>
<a href="#">President's Corner</a>	<a href="#">Registry Liaison</a>		<a href="#">Document Disclosure</a>	
<a href="#">Staff</a>	<a href="#">Specific Reviews</a>		<a href="#">Planning</a>	
<a href="#">Careers</a>	<a href="#">Organizational Reviews</a>		<a href="#">KPI Dashboard</a>	
<a href="#">Newsletter</a>	<a href="#">Request a Speaker</a>		<a href="#">RFPs</a>	
<a href="#">Development and Public Responsibility</a>	<a href="#">For Journalists</a>		<a href="#">Litigation</a>	
			<a href="#">Correspondence</a>	





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RESPONDENT'S EXHIBIT

Report by Accountability  
Structures Expert Panel (ASEP)

October 2012

## Basis for ASEP Review

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- ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments, calling for:
  - Open and transparent governance
  - Accountability to multi-stakeholder community
  - Effective, efficient, open and inclusive reconsideration and review of ICANN decisions

# Scope of ASEP Review

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- **ATRT Recommendations 23/25**
  - Researched development and use of Reconsideration & Review structures
  - Reviewed Improving Institutional Confidence (IIC) Recommendations and community comment
  - Understood community concern and lack of consensus on IIC recommendations

# Guiding Principles

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## The Four Es:

- Enhancing effectiveness of structures
- Efficiency in process
- Allowing expeditious resolution
- Enhancing community's ease of access to accountability structures

The Board must always act with objectivity and fairness in the best interests of ICANN, but in doing so take account of the legitimate needs, interests and expectations of stakeholders material to the issue being decided. Staff must act in same manner.

## Guiding Principles (cont.)

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- Bring fresh perspective to ICANN, accounting for today's circumstances
- Build on prior recommendations where possible
- Make improvements; give ICANN a base for future consideration & improvement
- Focus on enhancement and clarifications to structures, not restrictions

# Guiding Principles

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- Create stability through building of precedent
- Where possible, reduce burden and costs to those accessing structures
- Accountability structures should not preclude any party from filing suit against ICANN in court of competent jurisdiction

# Current Accountability Structures

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- Ombudsman, Bylaws, Art. V
- Reconsideration Request - considered by Board Governance Committee (BGC), Bylaws, Art IV, Section 2
- Independent Review - administered by International Centre for Dispute Resolution, Bylaws, Art IV, Section 3



# Current Accountability Structures

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- No change recommended to role of Ombudsman
  - Ombudsman undertaking own review of work in line with international standards
  - Ability to bring claims of unfairness across ICANN community seems to be working well
- Reconsideration and Independent Review processes to remain, but improvement required

# Key Recommendations

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# Summary of Recommendations

## RECONSIDERATION

- Improve access - add claims for consideration of inaccurate material information
- Define key terms, such as “material information”, “materially harmed”
- Modify time limits for submissions
- Include terms and conditions in request form
- Allow for urgent review in place of stay
- Allow for summary dismissal when warranted
- Allow “class” filings/consolidation
- Require allegations of standing

## INDEPENDENT REVIEW

- Create omnibus standing panel
- Define key terms
- Introduce optional cooperative engagement and conciliation phases to narrow issues and improve efficiency
- Require submission form with terms and conditions
- Introduce: (i) time limits for filing and decision; (ii) and page limitations for argument
- Eliminate in-person proceedings absent real need
- Allow “class” filings/consolidation
- Require allegations of standing

# Reconsideration Process

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# Reconsideration Process Recommendations

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## **Form of Reconsideration Model**

- BGC to continue reconsideration of Board's prior decisions.
- The full BGC, and not a subset, should remain as the body considering Reconsideration Requests.

# Reconsideration Process Recommendations

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## What May Be Reconsidered?

- Staff action: Policies that can be basis for challenging staff action/inaction should be those that are approved by the Board (after community input) that will impact the community in some way.
  - For those processes/procedures that are not policies, complaints regarding staff action/inaction are more appropriately addressed to ICANN management, or the Ombudsman if unfairness can be alleged.

# Reconsideration Process

## Recommendations

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### What May Be Reconsidered?

- Board action: Grounds for Reconsideration should be expanded to include both:
  - If information was available at time of Board decision, but not presented to Board, except where the requestor could have submitted but did not submit the information, and the information could have formed the basis for the decision.
  - If the requestor can demonstrate that inaccurate/false/misleading information was presented to, and formed the basis for, the challenged Board action or inaction, if it materially and adversely affected a party.
  - Requires more than allegation of inaccuracy; requestor must demonstrate inaccuracy and the causal connection between the inaccuracy and the challenged Board decision.

# Reconsideration Process Recommendations

## What May Be Reconsidered?

- Standard for “materially harmed” and “adversely impacted”
  - Aggrieved party must demonstrate: a loss or injury suffered (financial or non-financial) that is directly and causally connected to challenged Board or staff action or inaction.
  - Aggrieved party must set out the loss or injury and the direct nature of that harm in specific and particular details.
  - The relief requested must be capable of reversing the alleged harm.
  - Injury or harm caused by third parties as a result of acting in line with the challenged decision is not a sufficient ground for reconsideration.
  - The impact of the injury or harm must be in itself of sufficient magnitude to justify the reconsideration and not exacerbated by the actions or omissions of a third party.
  - The request may be summarily dismissed, with due notice in the request form, if the facts relied on do not evidence “harm” or “impact”.



# Reconsideration Process Recommendations

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## What May Be Reconsidered?

- Define “Material Information”
  - “Material information” = Facts that are material to the Board’s decision.
- Revise Reconsideration Request Form to Incorporate Definitions
  - The Reconsideration Request form should include terms and conditions and be modified to call for information specific to the definitions laid out here.

# Reconsideration Process Recommendations

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## **Clarification of Process - New Time Limitations**

- For Board actions, Requests must be filed within 15 days of posting of the resolution at issue, or from the initial posting of the rationale (if rationale is not posted with resolution).
- For staff actions, requests should be received within 15 days of the staff action/inaction taking effect.
- The BGC must issue recommendation on the Request within 30 days of filing, or as soon thereafter as feasible. The feasibility of time limits depend on issues such as the complexity of the request, the number of requests pending simultaneously, or similar situations.
- The Board to issue determination on the BGC recommendation within 60 days of receipt or as soon thereafter as feasible; circumstances that delay the Board action should be published on the website.

# Reconsideration Process Recommendations

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## **Clarification of Process - Page Limitations**

- Incorporating a page limitation for the submission of argument is not anticipated to curtail any of the principles identified.
- Efficiency, expeditiousness and ease of access will be enhanced by limiting argument (legal submissions) to no more than 25 pages of double-spaced, 12-point font.
- Requestors may submit all facts necessary in the request form, without limitation, to demonstrate why the decision should be reconsidered.

# Reconsideration Process Recommendations

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## **Clarification of Process - BGC Role in Considering Staff Action/Inaction**

- When a reconsideration request is brought to challenge a staff action/inaction, BGC should have delegated authority from the Board to make the final determination.
- In these situations, as the staff action/inaction was not initially a matter before the Board, there is no need for the Board as a whole to review these recommendations.
- The BGC may determine if it is appropriate to take a recommendation of this type to the Board, and the BGC retains the authority and discretion to do so.
- This vesting of responsibility to the BGC may necessitate a modification to the BGC Charter.

# Reconsideration Process Recommendations

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## **Clarification of Process - Summary Review and Dismissal**

- The BGC should have the power to dismiss a reconsideration request summarily; there is no benefit to continue process when there is no substance to request or if it is frivolous, querulous or vexatious.
- Reconsideration Request form should be modified to put requestors on notice of the potential for a summary dismissal.
- A question similar to the following must be included in the form: "Please state specifically the grounds under which you have the standing and the right to assert this claim." This question may be tailored to address the definition of "materiality" that will be incorporated into the Request Form.

# Reconsideration Process Recommendations

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## **Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead**

- A stay adds – not diminishes – uncertainty to the process. ICANN is not able to grant the relief to third parties that normally accompany a stay in other scenarios, such as a right to a bond in the event the stay is improperly taken.
- Many people or entities, not just a Requestor, rely upon the Board’s action. The ASEP does not view this lightly; it is important to note that ICANN is to be accountable to all, not just those aggrieved by a particular decision.

# Reconsideration Process Recommendations

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## **Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead (cont.)**

- Provide a right to apply to the BGC for urgent reconsideration.
- An request for urgent consideration must be made within two business days (calculated at ICANN’s headquarters in Los Angeles, California) of posting of the resolution at issue; must set out why the matter is urgent for reconsideration; and must demonstrate a likelihood of success in the resolution of a request for reconsideration.
- The BGC must respond in two working days or as soon as feasible thereafter as to whether the matter is urgent.
- If the matter is deemed as urgent, the requestor will be given an additional two business days to complete the submission of a Reconsideration Request. The BGC must consider this issue as a matter of urgency within seven days thereafter.

# Reconsideration Process Recommendations

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## **Clarification of Process - Hearings Not Required**

- No hearing is required in the Reconsideration Process. However, the BGC retains the absolute discretion to call people before it to provide additional information.
- Complainants may request an opportunity to be heard by the BGC; the BGC decision on such a request to be heard is final.
- This should be included in the Request form.



# Reconsideration Process Recommendations

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## **Clarification of Process - Combined/Consolidated Request**

- “Class” type filings may be appropriate within the reconsideration process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the alleged causal connection and the resulting harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has been materially harmed and adversely impacted by the action/inaction giving rise to the request.
- As needed, the BGC shall have the ability to consolidate the consideration of reconsideration requests if they are sufficiently similar.

# Reconsideration Process Recommendations

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## **Clarification of Process - Third Party Participation in Process**

- All material information relevant to the request should be provided through the requestor.
- However, if information comes to the BGC through another channel the BGC should provide that information to the requestor and post it on the ICANN website.

# Reconsideration Process Recommendations

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## **Effect Of Outcomes - No Right to “Appeal” Decisions on Reconsideration**

- The Board’s decision on the BGC’s recommendation is final (i.e., not subject to a Reconsideration Request).
- In the event the matter is about Staff action/inaction, the BGC’s determination is final.
- Notice of this should be made clear to those seeking reconsideration through the introduction of a Terms and Conditions section in the form provided for the submission of Reconsideration Requests.

# Reconsideration Process Recommendations

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## **Effect Of Outcomes - Precedential Value of Decision**

- **Board Action:** When a reconsideration request is about Board action, the concept of “precedent” is not relevant, as the question focuses on whether or not the Board considered material information in a specific instance.
- **Staff Action:** When the request is about staff action, the BGC consideration of violation of the policy should have precedential value. The fact of precedential value carried by prior recommendations on Reconsideration should be noted in the Reconsideration Request form.

# Reconsideration Process Recommendations

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## **Metrics to Identify Effectiveness**

- It is difficult to identify metrics to show that the Reconsideration process adds value, as it should not be based solely upon how many requests are filed or how many requests succeed. The fact of use of the process may show that the availability of the process as means to make sure the Board and staff act appropriately is of value. When the process is invoked, it will be important to evaluate if the BGC/Board performed the process in a consistent and transparent manner.
- For complaints of staff action, a proposed metric is: If the BGC determines that staff did not follow a policy, did staff properly re-evaluate and follow policy thereafter?

# Independent Review Process (IRP)

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# Independent Review Process Recommendations

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## **Independent Review - Omnibus Standing Panel**

- The ASEP recommends establishing an omnibus standing panel of six-to-nine members, taking account of geographic diversity. Each member should receive an annual retainer, and a small per-diem fee as they are called for service.
- Each IRP panel will be selected from among the omnibus standing panel members.
- The expertise desired on the standing panel include jurisprudence, judicial experience, alternative dispute resolution, and knowledge of ICANN's mission and work.
- For consistency in IRP panel decisions and administration of proceedings, due care must be given in the selection of panelists to assure a broad range of experience and meeting of objective criteria for service.

# Independent Review Process Recommendations

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## **Independent Review Panel – Omnibus Standing Panel (cont.)**

- The standing panel should have a Chair that may, at his/her discretion, serve on any or all selected panels during his/her tenure (not to exceed three years) as another measure of continuity throughout the proceedings. There should be administrative support for the standing panel.
- Appointment periods for the panelists should be staggered to allow for continued review of whether the panel has the correct number of members and the required skills and capacity.



# Independent Review Process Recommendations

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## **Independent Review - Size of IRP Panel**

- While the parties can request that an IRP be heard by a one- or three-member panel, the Chair of the standing panel retains the right to decide on the size of the panel and make recommendations on who will be on the panel, based upon issues such as the complexity of the matter alleged and whether any particular expertise is called for.
- The terms and conditions section of IRP submission form will describe the panel selection process.

# Independent Review Process Recommendations

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## **What May Be Subject of IRP? – Complainant must be “materially harmed”:**

- The complainant must demonstrate, in specific and particular details, the injury or harm suffered (financial or non-financial) that is a directly and causally connected to the Board’s alleged violation of the Bylaws or Articles of Incorporation.
- The decision of the panel (as reviewed and acted upon by the Board) must be capable of reversing the injury alleged by complainant.
- Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for independent review.
- The impact of the injury or harm must be in itself of sufficient magnitude to justify the review and not exacerbated by the actions or omissions of a third party.
- The request may be summarily dismissed, with due notice in the IRP submission form, if the facts relied on do not evidence “injury” or “harm” as defined.

# Independent Review Process Recommendations

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## **What May Be Subject of IRP? - Material Standing Requirement:**

- There has to be some definition of locus to ICANN. The person or entity bringing an IRP against ICANN must be able to specifically identify how it has been directly impacted by an ICANN Board decision, and not by the actions of third parties.
- This will be called for in the IRP submission form.

# Independent Review Process Recommendations

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## **Clarification of Process – Time Limitations**

- A reasonable but not excessive limitation must be imposed. The request must be filed within 30 days of the posting of approved minutes (and accompanying Board Briefing Materials) that demonstrate the requestor's contention that ICANN violated its Bylaws or Articles of Incorporation. If the request is not filed within that time, the requestor is time barred.

# Independent Review Process Recommendations

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## **Clarification of Process - Time Limitations (cont.)**

- It is generally recommended that an IRP conclude to determination within four-to-six months of filing.
- The IRP Panel will retain ultimate responsibility and control of the timing of each IRP and the schedule for the parties to follow.
- The form for requesting an IRP should include a term and condition that the IRP Panel sets the timetable for the proceeding and violations of the IRP Panel's timetable may result in an appropriate order.

# Independent Review Process Recommendations

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## **Clarification of Process - Cooperative Engagement**

- It is recommended that the complainant initiate a period of cooperative engagement with ICANN prior to seeking independent review.
- The cooperative engagement mechanism will be an opportunity for ICANN and the complainant, in good faith and without outside counsel, to discuss the ways in which the party alleges the Board has violated ICANN's Bylaws or Articles of Incorporation and to determine if the issue can be resolved without an IRP, or if the issues can be narrowed.
- When the cooperative engagement is initiated, ICANN will designate a representative for the discussions, and in-person consultation is recommended, if reasonable.

# Independent Review Process Recommendations

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## **Clarification of Process - Cooperative Engagement (cont.)**

- The cooperative engagement period should last for approximately 14 days.
- Cooperative engagement is not mandatory, but recommended.
- All matters discussed during cooperative engagement are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
- Cooperative engagement period should be initiated prior to a requestor incurring fees for preparing filings for an IRP.

# Independent Review Process Recommendations

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## **Clarification of Process – Conciliation**

- Upon the filing of an IRP a period of good faith conciliation is recommended, to resolve or narrow the remaining issues.
- A conciliator will be appointed by Chair of the omnibus standing panel from among the standing panel members (if the creation of a standing panel is adopted).
- The conciliator will receive a limited per-diem fee.
- The conciliator will not serve on the IRP panel.
- The IRP panel chair may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues.
- The conciliation period should last for approximately three weeks.
- All matters discussed during conciliation are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.



# Independent Review Process Recommendations

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## **Clarification of Process - Effect of Not Using Cooperative Engagement or Conciliation**

- Neither cooperative engagement nor conciliation is required, but if IRP complainant does not avail itself in good faith of cooperative engagement or conciliation AND the IRP complainant is not successful, the IRP panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- ICANN is expected to participate in the cooperative engagement and conciliation processes, as requested, in good faith.
- This should be included as a term and condition in the IRP submission form.

# Independent Review Process Recommendations

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## Clarification of Process - Summary Review and Dismissal

- An IRP should be summarily dismissed for lack of standing, lack of substance., being frivolous or vexatious.
  - Allowing a claim to proceed and use community resources when there is no merit to the claim is not an enhancement to accountability and is not in the interest of the community.
- Notice of the option of summary dismissal must be in the IRP Form. A question similar to the following must be included: “Please state specifically the grounds under which you have the standing and the right to assert this claim and the specific grounds on which you rely.”
- A question may be tailored to address the definition of “materiality” that will be incorporated into the IRP.

# Independent Review Process Recommendations

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## **Clarification of Process - Page Limitations**

- Written submissions of legal argument to the IRP Panel should be limited to 25 pages, double spaced and in 12-point font (both requestor and ICANN are subject to the same limits). This does not include evidence.
- All necessary evidence to demonstrate the claims that ICANN violated its Bylaws or Articles of Incorporation should be submitted in the IRP form.

# Independent Review Process Recommendations

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## **Clarification of Process - Expert Submissions Allowed**

- The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence by exchange of the written objections with written rebuttals filed within 14 days of receipt of the written expert evidence.

# Independent Review Process Recommendations

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## **Clarification of Process - In-Person Hearings Not Authorized**

- The nature of the IRP panel is to determine if ICANN followed its Bylaws or Articles of Incorporation, which does not seem to lend to hearings.
- In general, there should not be an in-person hearing. The parties should maximize electronic communication in their submissions.
- If there is need for a hearing, in the discretion of the IRP Panel, the hearing should be limited to argument only; all evidence (including witness statements, expert statements, etc.) shall be submitted in writing.

# Independent Review Process Recommendations

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## **Clarification of Process – Panel Selection**

- Once the size of the panel is determined, the parties may agree on panel selection process.
- Panelist selection must be completed within 21 days after the completion of the conciliation phase (or if no conciliation phase, the filing of the IRP).
- If the parties have not agreed on the selection at that time, the Chair of the standing panel shall complete selection of panelists within seven days.
- This will be identified in the IRP filing terms and conditions.

# Independent Review Process Recommendations

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## **Clarification of Process – Combined/Consolidated Proceedings**

- “Class” type filings may be appropriate within the IRP process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the causal connection between the circumstances of the complaint and the harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has standing and has been materially impacted by the Board action in violation of the Articles of Incorporation or Bylaws that gives rise to the request.
- As needed, the IRP Panel shall have the ability to consolidate IRP requests if they are sufficiently similar.

# Independent Review Process Recommendations

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## **Clarification of Process - Third Party Participation**

- If third parties believe that they have information to provide to the IRP, that information should be provided through the claimant.



# Independent Review Process Recommendations

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## **Clarification of Process - A Defined Standard of Review Must Be Incorporated**

- The IRP should be subject to a defined standard of review, including: (i) did the Board act without conflict of interest in taking its decision; (ii) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; (iii) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
- If a complainant demonstrates that the Board did not make a reasonable inquiry to determine it had sufficient facts available, Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the complainant will have properly stated grounds for review.

# Independent Review Process Recommendations

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## **Effect of Outcomes - Outcomes of the IRP Process are Final**

- The declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.
- If an IRP is later initiated on the same issue, the prior decision may serve as grounds for a summary dismissal.
- The terms and conditions within the submission form must note that the ultimate Board decision following on from the IRP determination is final and creates precedent.

# Future Work & Next Steps

## Next Steps

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- The ASEP recommends that ICANN Community carefully consider the recommendations.
- If comments are received that suggest modifications to these recommendations would further ICANN's accountability and transparency, the ASEP will take those into consideration.
- The ASEP encourages a further schedule of review of the accountability structures once there is experience with the structures as modified.
- The ASEP also encourages future consideration of adoption of new accountability structures as would serve the global public interest.

# The Experts

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# Accountability Structures Expert Panel



## **Mervyn King**

- **Senior Counsel and former Judge of the Supreme Court of South Africa**
- **Professor Extraordinaire at the University of South Africa on Corporate Citizenship**
- **Chair of King Committee on Corporate Governance (S.A.)**
- **Former Chair, UN Committee on Governance and Oversight**
- **Chairman of the International Integrated Reporting Council**

# Accountability Structures Expert Panel



## **Graham McDonald**

- **40 year legal career**
- **Inaugural Australian Banking Ombudsman**
- **Served 22 years as a Presidential Member of Australia's Administrative Appeals Tribunal**
- **On board of AuDA**

# Accountability Structures Expert Panel

## **Richard Moran**



- **CEO and Vice Chair, Accretive Solutions**
- **Director on several Boards**
- **Active with the National Association of Corporate Directors, working with boards to improve effectiveness**
- **Business author and radio host**



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RESPONDENT'S EXHIBIT

ations at ICANN (<https://www.icann.org/translations>) [العربية \(https://www.icann.org/ar\)](https://www.icann.org/ar)

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[Q \(HTTPS://WWW.ICANN.ORG/SEARCH\)](https://www.icann.org/search)

[ICANN Resolutions \(/resolutions\)](/resolutions) » Accountability Structures Bylaws Effective Date

**Important note:** The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

Resolution of the ICANN Board

**Topic:**

Bylaws Revisions Regarding Reconsideration and Independent Review

**Summary:**

Board designates effective date of 11 April 2013 for the approved revisions to the Bylaws relating to ICANN's Reconsideration and Independent Review processes.

**Category:**

Board

**Meeting Date:**

Thu, 11 Apr 2013

**Resolution Number:**

2013.04.11.06

**URL for Resolution:**

<https://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm>  
(<https://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm>)

**Resolution Text:**

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures. Whereas, ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution, which after research and review of ICANN's Reconsideration and Independent Review processes and multiple opportunities for public input, produced a report in October 2012. Whereas, the ASEP report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report. Whereas, after ASEP and Board review and consideration of the public comment received, on 20 December 2012 the Board approved Bylaws revision to give

effect to the ASEP's recommendations, and directed additional implementation work to be followed by a staff recommendation for the effective date of the revised Bylaws. Whereas, as contemplated within the Board resolution, and as reflected in public comment, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP). Resolved (2013.04.11.06), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and subject to a minor amendment to address public comments regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

### **Rationale for Resolution:**

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations from the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the ATRT requested review. The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and the ability to bring collective requests. A new ground for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed. The Bylaws as further revised also address a potential area of concern raised by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists. The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the recommendations are expected to result in less costly and time-consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS. This is an Organizational Administrative Function of the Board for which the Board received public comment.

**R-50**

**RESPONDENT'S EXHIBIT**

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6 Manwin Licensing International S.à.r.l.

11 MANWIN LICENSING INTERNATIONAL  
S.À.R.L.,

12 Claimant,

13 v.

14 INTERNET CORPORATION FOR  
15 ASSIGNED NAMES AND NUMBERS,

16 Respondent.

ICDR Case No. \_\_\_\_\_

**REQUEST OF MANWIN LICENSING  
INTERNATIONAL S.À.R.L, FOR  
INDEPENDENT REVIEW PROCEEDING**

19 **I. INTRODUCTION AND SUMMARY OF CLAIM AND RELIEF SOUGHT**

20 1. Manwin Licensing International S.à.r.l. owns and licenses the trademarks and  
21 domain names used for many of the most popular adult-oriented websites, including  
22 YouPorn.com, the single most popular free adult video website on the internet, as well as  
23 xTube.com, Pornhub.com, and Brazzers.com, to cite only a few examples. This request for  
24 independent review proceeding refers to Manwin as "YouPorn." YouPorn hereby seeks review of  
25 certain acts and omissions of the Internet Corporation for Assigned Names and Numbers  
26 ("ICANN") which acts and omissions have, as alleged more fully hereafter, violated ICANN's  
27 Articles of Incorporation and Bylaws. Said acts and omissions have caused or threatened to cause  
28 YouPorn injury, thereby making YouPorn an affected party within the meaning of Article 4 of

1 ICANN's Bylaws. YouPorn is therefore entitled to seek review of ICANN's acts and omissions  
2 pursuant to Article 4 of ICANN's Bylaws, the International Arbitration Rules of the International  
3 Centre for Dispute Resolution ("ICDR") and the ICDR Supplementary Rules for ICANN  
4 Independent Review Process.

5 2. The dispute between YouPorn and ICANN, as detailed below, relates to ICANN's  
6 improper (a) approval of inclusion of the .XXX top-level domain ("the .XXX TLD") into the  
7 Internet Domain Name System ("DNS"), (b) administration of the process by which ICANN  
8 selected a registry operator for the .XXX TLD, (c) approval of the application of ICM Registry  
9 LLC ("ICM") to serve as the registry operator for the .XXX TLD, and (d) agreement with ICM  
10 concerning the terms and conditions on which ICM is to act as the registry operator for the .XXX  
11 TLD. ICANN's acts and omissions with respect to each of these matters materially violated  
12 ICANN's Articles of Incorporation and Bylaws as well as local and international law.

13 3. Reserving its rights to amend or supplement this Request and the relief sought  
14 hereby, YouPorn respectfully requests that the Independent Review Panel (the "Panel") grant the  
15 following relief:

16 a. Declare that ICANN's approval of the .XXX TLD violated and was  
17 inconsistent with ICANN's Articles of Incorporation and Bylaws;

18 b. Declare that ICANN's administration of the process whereby it selected a  
19 registry operator for the .XXX TLD violated and was inconsistent with ICANN's Articles  
20 of Incorporation and Bylaws;

21 c. Declare that ICANN's approval of the application of ICM Registry LLC  
22 ("ICM") to serve as the registry operator for the .XXX TLD violated and was inconsistent  
23 with ICANN's Articles of Incorporation and Bylaws;

24 d. Declare that ICANN's agreement with ICM concerning the terms and  
25 conditions on which ICM is to act as the registry operator for the .XXX TLD violates and  
26 is inconsistent with ICANN's Articles of Incorporation and Bylaws;

1 e. Declare that ICANN must reconsider its decision regarding approval of the  
2 .XXX TLD for use in the DNS in a manner consistent with its Articles of Incorporation  
3 and Bylaws;

4 f. Declare that ICANN must complete proper economic studies analyzing the  
5 impact of the introduction of new TLDs, particularly the .XXX TLD, before reconsidering  
6 the .XXX TLD or approving any new TLDs;

7 g. Declare that ICANN's decision approving ICM as registry operator for the  
8 .XXX TLD and the agreement between ICANN and ICM setting out the terms and  
9 conditions on which ICM would act as the registry operator for the .XXX TLD are void;

10 h. Declare that should ICANN, after reconsideration consistent with its  
11 Articles of Incorporation and Bylaws, determine to allow the .XXX TLD to be used in the  
12 DNS, it must reconsider who should be allowed to act as the registry operator for the  
13 .XXX TLD in a process administered in a manner consistent with ICANN's Articles of  
14 Incorporation and Bylaws;

15 i. Declare that ICM has breached the XXX Registry Agreement and the  
16 appendices and amendment thereto, and that ICANN must seek to rescind the agreement,  
17 appendices and amendments and/or other appropriate relief;

18 j. Declare that ICANN must, upon the expiration of the initial term of the  
19 ICM registry agreement, either allow open and fair competition for the .XXX registry  
20 and/or upon any renewal of the ICM registry agreement, negotiate conditions and terms  
21 that provide adequate protections for free and fair competition, trademarks, and other name  
22 and intellectual property rights in connection with the operation of the .XXX TLD;

23 k. Require that ICANN adopt "Consensus Policies" binding on ICM that  
24 protect competition, trademarks and other name and intellectual property rights;

25 l. Declare that ICANN must compensate YouPorn for the costs incurred by  
26 YouPorn in bringing this Independent Review Proceeding; and

27 m. Make such other declarations and grant such other relief as the Panel may  
28 consider appropriate.



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**II. THE PARTIES, COUNSEL AND CONTACT INFORMATION**

**A. CLAIMANT**

4. YouPorn is and at all relevant times was a business entity organized as a “Société à responsabilité limitée” under the laws of Luxembourg, and having its principal place of business in the City of Luxembourg, Luxembourg. YouPorn’s contact information for purposes of these proceedings is:

Manwin Licensing International S.à.r.l.  
c/o Gianfranco Salerno  
7777 Boulevard Decarie, Suite 300  
Montreal, QC, Canada H4P 2H2  
Contact Information Redacted

5. YouPorn is represented in these proceedings by Kevin E. Gaut, Thomas P. Lambert and Jean Pierre Nogues

Mitchell Silberberg & Knupp LLP  
11377 W. Olympic Boulevard  
Los Angeles, California 90064

Contact Information Redacted

Phone: +1 310 312 3000  
Fax: +1 310 312 3100

**B. RESPONDENT**

6. The respondent is ICANN. ICANN’s address is:  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

1 USA

2 Phone: +1 310 823 9358

3 FAX: +1 310 823 8649

4  
5 7. ICANN is a public benefit, non-profit corporation organized under the laws of the  
6 State of California. It is headquartered in Marina del Rey, California.

7 8. ICANN was established “for the benefit of the Internet community as a whole.”  
8 ICANN Articles of Incorporation, ¶ 4. ICANN’s Articles of Incorporation further state its  
9 purposes as follows: “the Corporation shall . . . pursue the charitable and public purposes of  
10 lessening the burdens of government and promoting the global public interest in the operational  
11 stability of the Internet by (i) coordinating the assignment of Internet technical parameters as  
12 needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions  
13 related to the coordination of the Internet Protocol (‘IP’) address space; (iii) performing and  
14 overseeing functions related to the coordination of the Internet domain name system (‘DNS’),  
15 including the development of policies for determining the circumstances under which new top-  
16 level domains are added to the DNS root system; (iv) overseeing operation of the authoritative  
17 Internet DNS root server system; and (v) engaging in any other related lawful activity in  
18 furtherance of items (i) through (iv).” *Id.* ¶ 3. ICANN’s Articles of Incorporation require it to  
19 “carr[y] out its activities in conformity with relevant principles of international law and applicable  
20 international conventions and local law.” *Id.* ¶ 4. ICANN is also obligated to operate “in an open  
21 and transparent manner and consistent with procedures designed to ensure fairness” and to “be  
22 accountable to the community for operating in a manner that is consistent with [the] Bylaws, and  
23 with due regard for the core values set forth” in the organization’s Bylaws. ICANN Bylaws, Art.  
24 IV, § 1.

25 9. ICANN’s core function is the management of the Internet’s DNS, which includes  
26 approving the introduction of new TLDs. The DNS is a database of Internet names and addresses  
27 that correlates the “human-readable” computer names, websites, and email addresses made of  
28 letters and words with the “computer-readable” Internet Protocol (“IP”) addresses that computers

1 actually use to locate information, but which consist of complicated numerical strings. TLDs  
2 appear in the human-readable addresses, or domain names, as a familiar string of letters—such as  
3 “.COM”, “.GOV”, “.ORG”, and “.EDU”—following the rightmost “dot” in domain names.

4 ICANN delegates responsibility for the operation of each TLD to a registry operator.

5 10. In performing its functions, ICANN has committed itself to, among other things:

6 a. “Seeking and supporting broad, informed participation reflecting the  
7 functional, geographic, and cultural diversity of the Internet at all levels of policy  
8 development and decision-making.”

9 b. “Introducing and promoting competition in the registration of domain  
10 names where practicable and beneficial in the public interest.”

11 c. “Employing open and transparent policy development mechanisms that  
12 (i) promote well-informed decisions based on expert advice, and (ii) ensure that those  
13 entities most affected can assist in the policy development process.”

14 d. “While remaining rooted in the private sector, recognizing that governments  
15 and public authorities are responsible for public policy and duly taking into account  
16 governments’ or public authorities’ recommendations.”

17 e. “[I]n those cases where the policy action affects public policy concerns, to  
18 request the opinion of the Governmental Advisory Committee and take duly into account  
19 any advice timely presented by the Governmental Advisory Committee on its own  
20 initiative or at the Board’s request.”

21 f. “[O]perating in a manner that is consistent with these Bylaws, and with due  
22 regard for the core values set forth in Article I of these Bylaws,” including those listed in  
23 Paragraph 10(a) through (d) above. Bylaws, Art. I, § 2; Art. III, § 6; Art. IV, § 1.

24 11. Prior to ICANN’s formation in 1998, DNS management was carried out under  
25 contractual arrangements between the United States Government, which developed and initially  
26 controlled the Internet, and other parties.

27 12. Beginning in 1998, the U.S. Department of Commerce (“DOC”) and ICANN  
28 entered into the first of a series of agreements, including a “Memorandum of Understanding” or

1 “MOU,” amendments thereto, and an Affirmation of Commitments relating to DOC’s delegation  
2 of authority to ICANN to manage the DNS and DOC’s role in overseeing and approving ICANN’s  
3 activities and operating the root server system. The root server system is the physical system  
4 which implements the DNS and allows users of the Internet to reach websites and email addresses.  
5 In those agreements, DOC and ICANN, among other things, agreed that ICANN would

6 “[c]ontinue the process of implementing new top level domains (TLDs), which process  
7 shall include consideration and evaluation of:

- 8 a. The potential impact of new TLDs on the Internet root server system and  
9 Internet stability.
- 10 b. The creation and implementation of selection criteria for new and existing  
11 TLD registries, including public explanation of the process, selection criteria, and the  
12 rationale for selection decisions.
- 13 c. Potential consumer benefits/costs associated with establishing a competitive  
14 environment for TLD registries.
- 15 d. Recommendations from expert advisory panels, bodies, agencies, or  
16 organizations regarding economic, competition, trademark, and intellectual property  
17 issues.” Amendment 5 to MOU, ¶ II(c)(8).

18 13. In 2009, ICANN reaffirmed its commitments to DOC, agreeing, among other  
19 things: “ICANN will ensure that as it contemplates expanding the top-level domain space, the  
20 various issues that are involved (including competition, consumer protection, security, stability  
21 and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be  
22 adequately addressed prior to implementation.” September 30, 2009 Affirmation of Commitments  
23 ¶ 9.3.

24 14. In order to fulfill its commitments under the MOU as amended and to comply with  
25 its Articles of Incorporation and Bylaws, the ICANN Board in 2006 instructed ICANN to conduct  
26 economic studies regarding competition issues among TLDs, including the question of whether  
27 individual TLDs compete with one another or function as self-contained markets. The U.S.  
28 Department of Justice reiterated the need for such studies in 2008.

1           15. Under its agreements with DOC, ICANN's duties include determining which new  
2 TLDs to approve, choosing registries for existing or newly approved TLDs, and contracting with  
3 the registries to operate the TLDs.

4           16. ICANN is managed by a Board of Directors. Its day-to-day operations are  
5 overseen by its President and CEO, who is supported by an international staff.

6           17. Pursuant to its Bylaws, ICANN receives input from several Advisory Committees.  
7 One of those committees is the Governmental Advisory Committee ("GAC"). Membership in the  
8 GAC is open to all national governments. In addition, other multinational inter-governmental or  
9 economic organizations may under certain circumstances participate in the GAC. ICANN's  
10 Bylaws provide:

11           "The advice of the Governmental Advisory Committee on public policy matters shall be  
12 duly taken into account, both in the formulation and adoption of policies. In the event that  
13 the ICANN Board determines to take an action that is not consistent with the  
14 Governmental Advisory Committee advice, it shall so inform the Committee and state the  
15 reasons why it decided not to follow that advice. The Governmental Advisory Committee  
16 and the ICANN Board will then try, in good faith and in a timely and efficient manner, to  
17 find a mutually acceptable solution." Bylaws, Art. XI, § 2.

18           18. Pursuant to ICANN's Bylaws, ICANN and its Generic Names Supporting  
19 Organization ("GNSO") are required to develop and adopt "Consensus Policies" to fulfill and  
20 implement ICANN's obligations under its Articles of Incorporation, Bylaws, and the MOU,  
21 amendments thereto and Affirmation of Commitments. ICANN and its GNSO have failed to  
22 develop and adopt Consensus Policies relating to registry operators adequately protecting  
23 competition, trademarks and other name and intellectual property rights.

24  
25           **III. SUMMARY OF EVENTS AND FACTS UNDERLYING THIS REQUEST**  
26           **FOR REVIEW**

27           19. In or about 2000, ICANN announced that it would consider applications for  
28 establishment of new TLDs. More than 40 applicants filed applications for over 150 new TLDs.

1 At least three applicants filed applications for the .XXX TLD. One of those applicants was ICM  
2 Registry Inc. ("ICM"), who also applied for a .KIDS TLD. See [http://www.icann.org/en/tlds/tld-](http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm)  
3 [applications-lodged-02oct00.htm](http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm).

4 20. The process for considering new TLDs required that applications first be reviewed  
5 by a panel of evaluators appointed by ICANN. ICANN's evaluators reviewed ICM's application  
6 and recommended against adopting the .XXX TLD, writing:

7 "ICM Registry's application for an .xxx TLD does not appear to meet unmet needs. Adult  
8 content is readily available on the Internet. To the extent that some believe that an .xxx  
9 TLD would segregate adult content, no mechanism (technical or non-technical) exists to  
10 require adult content to migrate from existing TLDs to an .xxx TLD.

11  
12 "It is interesting to note the opposition of at least some segments of the adult online  
13 content industry to a .xxx TLD. In testimony recently presented to a United States  
14 commission chartered by the U.S. Congress to 'identify technological or other methods  
15 that will help reduce access by minors to material that is harmful to minors on the Internet'  
16 the COPA Commission <<http://www.copacommission.org>> -- the president and CEO of a  
17 leading firm in hosting services for adult sites testified: 'While the proposition of XXX  
18 Domain is well intentioned, a XXX Domain, however, is not a global solution for the  
19 World Wide Web. It poses ethical risks to a diverse American public, financial burdens on  
20 Adult consumers and the Adult Online Community, as well as the assurance of biased  
21 censorship on the part of search portals.'

22  
23 "The COPA Commission articulated some of the more common reservations about a  
24 content-specific TLD for sex-related speech, even when its content-designation is purely  
25 voluntary:

1           “Privacy and First Amendment concerns may be raised by the clear identification  
2           of a ‘red light district’ and the stigma involved in being found there, and the  
3           concern about a ‘slippery slope’ toward mandatory location in the gTLD.’  
4

5           “Though these concerns are certainly not universally shared outside (or even within) the  
6           United States, they indicate the degree of controversy that surrounds .xxx.  
7

8           “The evaluation team concluded that at this early ‘proof of concept’ stage with a limited  
9           number of new TLDs contemplated, other proposed TLDs without the controversy of an  
10          adult TLD would better serve the goals of this initial introduction of new TLDs. If an  
11          adult TLD is to be introduced, moreover, it would be beneficial to have a diversity of  
12          proposals, with a diversity of possible approaches to the various problems, from which to  
13          choose.  
14

15          . . . .  
16          “Because of the inadequacies in the proposed technical and business measures to actually  
17          promote kid-friendly content, the evaluation team does not recommend selecting a .KIDS  
18          domain in the current phase of the TLD program. In addition, because of the controversy  
19          surrounding, and poor definition of the hoped-for benefits of, .xxx, we also recommend  
20          against its selection at this time.” Report on TLD Applications: Application of the  
21          August 15 Criteria to Each Category or Group (9 November 2000) located at  
22          <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

23          21. ICANN moved forward with and eventually approved seven of the TLD  
24          applications received in 2000 (.BIZ, .INFO, .NAME, .PRO, .AERO, .COOP and .MUSEUM), but  
25          chose not to move forward with .XXX.

26          22. In April 2003, Michael Palage, a co-founder of ICM and member of ICM’s board,  
27          was elected to the ICANN Board.

28          23. In June 2003, ICM announced its intention to continue pursuing the .XXX TLD.

1           24.     On December 15, 2003, ICANN announced that it would accept applications for  
2 new “sponsored” TLDs (“sTLDs”). ICANN set out criteria for “sponsorship” in its request for  
3 proposals:

4  
5           **“A.     Definition of Sponsored TLD Community**

6           The proposed sTLD must address the needs and interests of a clearly defined community  
7 (the Sponsored TLD Community), which can benefit from the establishment of a TLD  
8 operating in a policy formulation environment in which the community would participate.

9           Applicants must demonstrate that the Sponsored TLD Community is:

- 10           •       Precisely defined, so it can readily be determined which persons or entities make  
11 up that community; and  
12           •       Comprised of persons that have needs and interests in common but which are  
13 differentiated from those of the general global Internet community.

14  
15           **“B.     Evidence of support from the Sponsoring Organization**

16           Applicants must:

- 17           •       Provide evidence of support for your application from your sponsoring  
18 organization; and,  
19           •       Provide the name and contact information within the sponsoring organization.

20  
21           **“C.     Appropriateness of the Sponsoring Organization and the policy formulation  
22 environment**

23           Applicants must provide an explanation of the Sponsoring Organization’s policy-  
24 formulation procedures demonstrating:

- 25           •       Operates primarily in the interests of the Sponsored TLD Community;  
26           •       Has a clearly defined delegated policy-formulation role and is appropriate to the  
27 needs of the Sponsored TLD Community; and



- 1           • Has defined mechanisms to ensure that approved policies are primarily in the  
2 interests of the Sponsored TLD Community and the public interest.

3 The scope of delegation of the policy formulation role need not be (and is not) uniform for  
4 all sTLDs, but is tailored to meet the particular needs of the defined Sponsored TLD  
5 Community and the characteristics of the policy formulation environment.

6           **“D. Level of support from the Community**

7 A key requirement of a sTLD proposal is that it demonstrates broad-based support from  
8 the community it is intended to represent.

9 Applicants must demonstrate that there is:

- 10           • Evidence of broad-based support from the Sponsored TLD Community for the  
11 sTLD, for the Sponsoring Organization, and for the proposed policy-formulation process;  
12 and
- 13           • An outreach program that illustrates the Sponsoring Organization’s capacity to  
14 represent a wide range of interests within the community.” Explanatory Notes to sTLD  
15 Application found at <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>.

17

18           25. ICM submitted the only application for the .XXX TLD under the 2003-04 sTLD  
19 program. That application was again evaluated by a team of evaluators appointed by ICANN.  
20 The team concluded, among other things, that ICM did not fulfill the sponsorship criteria for an  
21 sTLD, a key criterion for the 2003-04 sTLD application process. The panel concluded that ICM’s  
22 .XXX application did not merit further discussion.

23           26. Nevertheless, ICM continued to pursue its application before ICANN. The public  
24 record indicates that throughout its application process, ICM misrepresented the level of support it  
25 had from the adult entertainment community, the community for whom the .XXX TLD was  
26 purportedly to be established. For example, the public record indicates that:

- 27           a. ICM claimed that members of the adult entertainment industry who pre-  
28 registered for .XXX websites in an effort to protect their existing non-.XXX websites

1 supported ICM's proposal, even though ICM had represented to the pre-registrants, many  
2 of whom opposed .XXX, that ICM would not "count" their registrations as support for the  
3 .XXX proposal;

4 b. ICM claimed to have support from several major adult entertainment  
5 industry companies, when in fact those entities subsequently opposed the application or  
6 took neutral positions with respect thereto;

7 c. ICM attempted to obtain support from the Free Speech Coalition ("FSC"),  
8 an adult entertainment industry umbrella group, by offering various inducements,  
9 including cash and International Foundation For Online Responsibility ("IFFOR") Board  
10 memberships, and by attempting to "stack" FSC meetings with supporters in order to  
11 obtain FSC's endorsement, but such efforts failed;

12 d. ICM generated fake comments in support of its application by posting a link  
13 that purported to lead to additional information about the .XXX proposal, but which in fact  
14 automatically generated emails to ICANN supporting ICM's .XXX application;

15 e. ICM submitted misleadingly edited videos and/or photos of an adult  
16 industry conference to suggest that there was little or no opposition to its application;

17 f. ICM submitted redacted information concerning alleged supporters of the  
18 .XXX application alleged to be in the adult entertainment industry who appeared not to  
19 have been involved in the industry, or whose identity as actual persons could not be  
20 verified;

21 g. ICM obtained and attempted to obtain support from actual and alleged  
22 participants in the industry and in related fields who were at the time or later employed or  
23 paid by, or otherwise in receipt of benefits or promises from, ICM without properly  
24 disclosing their ICM connections;

25 h. ICM offered various inappropriate inducements to persons and entities to  
26 support ICM's application;

1           i.       ICM claimed that IFFOR was an independent “sponsoring” entity for  
2 ICM’s .XXX application when in fact IFFOR was created and is controlled by ICM and its  
3 Chairman, Stuart Lawley; and

4           j.       When questioned about these tactics, ICM refused to publicly disclose the  
5 identities of its alleged supporters, ostensibly on privacy grounds, making it difficult if not  
6 impossible for anyone to verify or challenge the veracity of ICM’s claims.

7       27.       After numerous meetings and discussions with ICM and consideration of ICM’s  
8 application over several meetings, and in reliance on ICM’s lobbying effort described above, in or  
9 about June of 2005, ICANN took the preliminary step of authorizing its president and general  
10 counsel to enter into negotiations with ICM relating to its proposal regarding the .XXX TLD. A  
11 proposed agreement was posted on ICANN’s website in August 2005.

12       28.       Thereafter, ICANN received many communications from members of the GAC and  
13 various governments, including the United States Department of Commerce, expressing concerns  
14 and opposition to the establishment of the .XXX TLD. In addition, members of the adult  
15 entertainment industry and those opposed to the .XXX TLD on religious and moral grounds  
16 continued to express opposition to the .XXX TLD in an ever-swelling chorus. The concerns  
17 expressed included concerns about freedom of expression and association; about censorship by  
18 various governments of the entire .XXX TLD; that ICM’s proposal did not have the support or  
19 sponsorship of the adult entertainment community; and that ICM was not acting in the interest of  
20 the very community which it contended to be the sponsoring community. In March 2006, the  
21 GAC issued the Wellington Communiqué, which noted that several GAC members were  
22 “emphatically opposed from a public policy perspective to the introduction of a .XXX sTLD.”  
23 ICANN deferred final consideration of the ICM application and agreement for many months to  
24 consider these objections and to revisit the issue of whether the .XXX TLD should be approved.

25       29.       During this period, ICM applied pressure to ICANN and the U.S. Government to  
26 try to force ICANN to allow ICM to proceed with the .XXX TLD. For example, ICM knew that  
27 the U.S. Government was under international political pressure to avoid exercising control over  
28 the internet. ICM first made Freedom of Information Act requests for sensitive documents

1 relating to Internet policy, and thereafter sued the Department of Commerce and the Department of  
2 State seeking to compel disclosure of those documents, especially those relating to the  
3 government's position on .XXX, all in an apparent attempt to embarrass the government and  
4 muzzle opposition to ICM's .XXX campaign. ICM also submitted a complaint to the ICANN  
5 ombudsman regarding ICANN's publication of negative evaluation reports pertaining to ICM's  
6 .XXX TLD application.

7 30. On April 4, 2006, Michael Palage, ICM's co-founder, resigned from the ICANN  
8 Board in the midst of a controversy about conflicts of interest.

9 31. On May 10, 2006, ICANN rejected ICM's .XXX proposal.

10 32. On May 19, 2006, ICM filed a request for reconsideration with ICANN. That  
11 request was amended on May 26, 2006, and withdrawn on October 1, 2006 after ICM's counsel  
12 allegedly received a request from ICANN's General Counsel indicating that ICANN would revisit  
13 its decision if ICM submitted a revised proposed contract.

14 33. Submissions by ICM in support of its .XXX application falsely contending that it  
15 met sponsorship requirements, and submissions by members of the adult entertainment industry,  
16 governmental entities, and others voicing strong opposition to the .XXX TLD continued until  
17 March 30, 2007, when ICANN again rejected the ICM .XXX application.

18 34. On June 6, 2008, more than a year after ICANN rejected its application for the  
19 .XXX TLD, ICM filed a Notice of Independent Review to challenge that decision. ICM's central  
20 contention in the Independent Review Proceeding ("IRP") was that ICANN had approved ICM's  
21 application for the .XXX TLD in June of 2005, when its Board directed that its President and  
22 General Counsel begin negotiating an agreement with ICM, and that ICANN thereafter improperly  
23 and unfairly "reconsidered" its decision and rejected ICM's application. *See* Declaration of Panel  
24 in ICM v. ICANN ¶ 84 (ICM contends that ICANN had concluded that Board found sponsorship  
25 criteria met in June of 2005 and that its reopening of that issue thereafter was "unfair,  
26 discriminatory and pretextual").

27 35. On February 19, 2009, the majority of the Independent Review Panel hearing the  
28 ICM v. ICANN matter issued a non-binding Declaration siding with ICM, declaring that ICANN

1 had decided that ICM had met the criteria established for a new sTLD in June 2005 when its  
2 Board directed that negotiations of a contract with ICM proceed, and declaring that ICANN could  
3 not thereafter properly reopen the issue of sponsorship for reconsideration. The Panel's  
4 Declaration did not address the issue of whether or not sponsorship criteria were in fact met or  
5 whether the "evidence" of sponsorship presented by ICM up through the time of the June 2005  
6 decision supported that determination or was misleading or fraudulent. The Panel did not hear  
7 directly from members of the adult entertainment industry, the GAC, or others vitally concerned  
8 with and opposed to the establishment of the .XXX TLD and making ICM the registry operator for  
9 .XXX.

10 36. On March 26, 2010, ICANN published a document setting forth its options in  
11 responding to the non-binding Declaration, noting that, among other things, ICANN could accept  
12 the majority Declaration and move forward with the ICM application, adopt the findings of the  
13 dissenting Declaration and reject ICM's application, adopt portions of the declarations and/or  
14 reconsider the application under various scenarios. *See* [http://www.icann.org/en/irp/icm-v-  
15 icann/draft-options-post-irp-declaration-26mar10-en.pdf](http://www.icann.org/en/irp/icm-v-icann/draft-options-post-irp-declaration-26mar10-en.pdf). Shortly thereafter, ICM sent ICANN a  
16 "response" to the options, stating, among other things, that it was "self-evident" that litigation  
17 would result if ICANN did not adopt the IRP majority Declaration and allow ICM to proceed with  
18 the .XXX TLD. *See* <http://forum.icann.org/lists/icm-options-report/pdf08UAr9Ao8z.pdf>.  
19 YouPorn is informed and believes and on that basis alleges that ICM also made other threats of  
20 litigation against ICANN, its Board members, and others it perceived as responsible in some way  
21 for the denial of its .XXX application.

22 37. On June 25, 2010, ICANN's Board adopted the IRP majority Declaration in part,  
23 and directed its staff to undertake expedited due diligence and take other measures toward possible  
24 approval of the ICM application.

25 38. On March 18 and 19, 2011, ICANN approved ICM's application for the .XXX  
26 TLD.

27 39. Throughout the period between ICANN's rejection of the ICM application in its  
28 March 30, 2007 decision and ICANN's March 2011 approval of ICM's application, and thereafter,

1 members of the adult entertainment industry and others, including members of GAC, continued to  
2 object to ICANN's approval of the .XXX TLD in comments submitted in writing and  
3 electronically and in various public fora.

4 40. Before approving the .XXX TLD, ICANN was consistently advised by numerous  
5 members of the adult entertainment industry that the industry did not support inserting the .XXX  
6 TLD into the DNS root server for a variety of reasons, including potential "ghettoization" of adult  
7 entertainment websites, other freedom of expression and association concerns, violation of various  
8 intellectual property and business rights, and concerns about anticompetitive conduct by the  
9 proposed registry operator, ICM. Members of the adult entertainment industry also provided  
10 substantial information to ICANN demonstrating that ICM's evidence of alleged "sponsorship" by  
11 the adult entertainment industry was misleading or fraudulent, that any initial interest by members  
12 of the industry in establishment of the .XXX TLD had eroded to the point of non-existence once  
13 the .XXX proposal was fleshed out, and that the industry was opposed to establishment of the  
14 .XXX TLD.

15 41. Before approving the .XXX TLD, ICANN received advice from various  
16 governments and members of the GAC that they were opposed to establishment of the .XXX TLD  
17 on various public policy grounds, including freedom of expression and association, competition,  
18 rights protection and concerns about universal resolvability of web addresses given threatened  
19 censorship of .XXX websites in some countries.

20 42. At no time prior to approval of the .XXX TLD did ICANN cause proper economic  
21 studies to be made of the effects of introduction of new TLDs, including the .XXX TLD, on  
22 competition and the rights of various affected parties, despite the fact that ICANN's Board and the  
23 U.S. Department of Justice had previously concluded that such studies were necessary to properly  
24 evaluate new TLD requests in a manner consistent with ICANN's Articles of Incorporation and  
25 Bylaws and to insure compliance with international and local law. The reports that were prepared  
26 at ICANN's behest on these subjects for the most part consisted of nothing more than unsupported  
27 speculation and assumptions downplaying the possible adverse effects of the introduction of new  
28 TLDs and advocating introduction of new TLDs rather than rigorous and unbiased analysis of the

1 facts and effects. However, those studies, as well as independent analyses submitted to ICANN  
2 concerning the potential impact of new TLDs, including the .XXX TLD, did identify negative  
3 effects on competition from the introduction of new TLDs.

4 43. On March 21, 2011, ICANN ultimately refused to conduct proper economic  
5 studies, stating, without any real or substantial support, that there was no economic basis for not  
6 allowing new TLDs, and asserting that “no further economic analysis will prove to be any more  
7 informative in that regard than those that have already been conducted.” *See*  
8 <https://www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf>.

9 44. ICANN never sought competitive “bids” for the .XXX registry. ICANN’s contract  
10 with ICM regarding the .XXX TLD reflects the fact that ICANN did not consider alternatives to  
11 ICM running .XXX. Among other things, it provides for automatic renewal of the registry  
12 agreement, and does not provide for competitive bidding after the initial period of the agreement.  
13 Even though it creates and grants ICM a monopoly over the .XXX TLD, it does not impose  
14 conditions and limitations on ICM’s operation of the registry (such as limitations on registration  
15 prices and processes) to protect against anticompetitive behavior by ICM. ICANN has imposed  
16 such conditions on other registry operators to ensure fairness, competitiveness and compliance  
17 with law.

18 45. ICANN approved .XXX and the ICM registry contract, despite these legitimate and  
19 strenuously voiced concerns, in violation of its by-laws and contractual obligations, and despite  
20 the lack of complete and requisite economic studies, only because: (a) ICANN was intimidated  
21 and coerced by ICM’s improper conduct (described above) which threatened ICANN, imposed  
22 significant economic expense on ICANN, and promised to continue such tactics if ICANN did not  
23 consent to .XXX; and (b) ICM promised ICANN significant financial payments, likely to amount  
24 to millions of dollars, under the .XXX registry contract. Reflecting that ICANN’s approvals were  
25 in part a reaction to improper ICM pressure, ICANN insisted upon and obtained a release from  
26 ICM – barring ICM from further litigation threats – as a condition to signing the .XXX registry  
27 contract.

1           46. ICANN and ICM entered into a registry agreement and related appendices and  
2 amendments to make ICM the registry operator for .XXX. Under the terms of those agreements,  
3 appendices and amendments, among other things:

4           a. ICM represented that the statements it made in applying for the .XXX TLD  
5 and negotiating the registry agreement were true and correct (.XXX Registry Agreement  
6 §2.1(b));

7           b. ICM agreed to follow “Consensus Policies,” including those relating to  
8 resolution of disputes regarding whether particular parties may register or maintain  
9 registration of particular domain names (.XXX Registry Agreement §§ 3.1(b)(i) and  
10 3(b)(iv)(F));

11           c. ICM agreed to conduct policy development in a manner that reasonably  
12 provided members of the sponsored community with the ability to express their views  
13 about such policies and to participate in policy development (.XXX Registry Agreement §  
14 3.1(g));

15           d. ICM agreed to publish, implement and enforce registry policies consistent  
16 with the Registration Agreement and ICM’s obligations under the Sponsoring  
17 Organization Agreement Appendix S to the .XXX Registry Agreement (Appendix S to  
18 .XXX Registry Agreement Part 8);

19           e. ICM agreed to operate .XXX for the benefit of those who “provide online,  
20 sexually-oriented Adult Entertainment,” those who represent such providers and those who  
21 provide products or services to such providers (*id.*); and

22           f. ICM agreed that it would only register domain names for persons who  
23 already provided sexually-oriented adult entertainment or related products or services on  
24 the Internet or who credibly proposed to provide such entertainment, products or services  
25 (*id.* Part 3).

26           47. ICM has breached and violated the terms of the registry agreement and related  
27 appendices and amendments in at least the following respects:

28           a. It misrepresented its “sponsorship” during the application process;



1           b.       It refused to block registration of websites that are confusingly similar to  
2 domain names in other TLDs, including YouPorn, unless the operators of those sites are  
3 willing to give up valuable legal rights as a condition to blocking;

4           c.       It has ignored the input of the vast majority of the members of the online  
5 adult entertainment community in establishing the .XXX TLD and the policies governing  
6 that TLD;

7           d.       It is operating the .XXX TLD in a manner inconsistent with the interests of  
8 those for whose benefit it agreed to operate the TLD and to maximize its own profits and  
9 to hold domain names confusingly similar to domain names for websites in other TLDs  
10 hostage to substantial payments and waivers of valuable rights demanded by ICM to block  
11 those .XXX domain names; and

12           e.       It has knowingly sold domain names to persons and entities who are known  
13 domain name speculators, and whose expressed intent is to resell those domain names at a  
14 profit rather than use them for purposes of providing adult entertainment or related  
15 products or services.

16       48.       Despite the foregoing material breaches of the registry agreement, appendices and  
17 amendments, ICANN has failed to take any steps to rescind the registry agreement, to compel  
18 compliance therewith or to seek other relief for ICM's breaches thereof.

19       49.       Since obtaining ICANN approval, ICM has set up processes for the .XXX TLD that  
20 threaten intellectual property rights of various persons and entities in and out of the adult  
21 entertainment industry, including YouPorn, has held those rights hostage to substantial payments  
22 for registration or blocking of websites using names similar to trademarks and other existing  
23 websites, and has otherwise acted in a manner that adversely affects competition and aids, abets,  
24 encourages and facilitates misappropriation and misuse of intellectual property by various  
25 wrongdoers.

1           **IV. ICANN'S CONSENT TO THE INDEPENDENT REVIEW PROCEDURE**  
2           **AND YOUPORN'S STANDING AS AN AFFECTED PARTY**

3  
4           50. ICANN's consent to subject its conduct "alleged by an affected party to be  
5 inconsistent with the Articles of Incorporation or Bylaws" to independent review is set forth in  
6 Article IV, Section 3 of ICANN's Bylaws:

7                   "1. . . . ICANN shall have in place a separate process for independent third-party  
8 review of Board actions alleged by an affected party to be inconsistent with the Articles of  
9 Incorporation or Bylaws.

10                   2. Any person materially affected by a decision or action by the Board that he  
11 or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a  
12 request for independent review of that decision or action.

13                   3. Requests for such independent review shall be referred to an Independent  
14 Review Panel ("IRP")."

15           51. ICANN has selected the International Centre for Dispute Resolution ("ICDR") to  
16 handle requests for an IRP.

17           52. The procedural framework for the independent review process is set out in  
18 ICANN's Bylaws, the ICDR's International Arbitration Rules and ICDR's Supplementary  
19 Procedures for ICANN Independent Review Process.

20           53. YouPorn has been materially affected by ICANN's decision to permit the .XXX  
21 TLD to be entered into the DNS root server and to allow ICM to act as the registry for the .XXX  
22 TLD in at least the following respects:

23                   a. Under ICM's requirements for the .XXX TLD, in order to have an .XXX  
24 website, YouPorn must agree to unacceptable restrictions on free expression.

25                   b. In order to register for an .XXX website or block registration of an .XXX  
26 domain name, YouPorn must waive certain legal and other claims it has against ICM.

27                   c. Under ICM's published rules for the .XXX TLD, YouPorn must either  
28 operate .XXX websites as a member of the ICM-defined community or it must declare that

1 it is not a member of the community to block .XXX websites matching its trademarks and  
2 existing non-.XXX websites; it is not permitted to operate some websites and block others  
3 under ICM's rules, in violation of its rights to freedom of speech and association under  
4 international and local law.

5 d. In order to protect their existing websites, trademarks, tradenames and  
6 intellectual property, YouPorn and others must pay substantial sums to acquire and/or  
7 block .XXX websites, to the detriment of fair competition.

8 e. Under ICM's rules for the .XXX TLD, portions of monies paid by YouPorn  
9 to register domain names would be diverted to IFFOR, an organization that espouses  
10 viewpoints with which YouPorn disagrees.

11 f. YouPorn has been injured by ICM's breaches of the .XXX Registry  
12 Agreement and the appendices and amendments thereto, and ICANN's failure to seek  
13 rescission thereof or other appropriate relief for such breaches.

#### 14 15 **V. APPLICABLE REVIEW STANDARD**

16 54. Pursuant to ICANN's Bylaws, the IRP's mandate is to (1) compare those actions of  
17 the Board contested by an affected party to the Articles of Incorporation and Bylaws, and (2) to  
18 declare whether the Board has taken a decision, acted, or failed to act consistently with the  
19 provisions of those Articles of Incorporation and Bylaws.

20 55. The Panel must therefore determine, inter alia, whether ICANN's procedures,  
21 processes, consideration and/or disposition of the request to establish the .XXX TLD and ICM's  
22 application to serve as the registry operator for the .XXX TLD were inconsistent with all or any  
23 part of its Articles of Incorporation or Bylaws, and in particular those portions of the Articles of  
24 Incorporation and Bylaws cited in paragraphs 8 through 12 hereinabove, including, without  
25 limitation, its commitment to act in the interest of the entire community, to act in accordance with  
26 international and local law, and to act in a manner that promotes competition and with due regard  
27 for intellectual property right protection. As summarized below, YouPorn submits that ICANN  
28 has acted inconsistently with its Articles of Incorporation and Bylaws.

1  
2 **VI. ICANN FAILED TO COMPLY WITH ITS ARTICLES OF**  
3 **INCORPORATION AND BYLAWS**

4 56. ICANN's Bylaws require that it take public policy into account in making its  
5 decisions, and that it seek and take into account the advice it receives from governments and the  
6 GAC in making its decisions. ICANN acted inconsistently with and violated its Articles of  
7 Incorporation and Bylaws when, among other things:

8 a. It disregarded its commitment under its Articles of Incorporation, Bylaws  
9 and its agreements with the DOC to adequately address issues including competition,  
10 consumer protection, malicious abuse and rights protection prior to approving the .XXX  
11 TLD and granting ICM the exclusive right to act as the .XXX registry operator without  
12 adequate safeguards with respect to such issues.

13 b. It disregarded its commitment under its Articles of Incorporation, Bylaws  
14 and its agreements with DOC to introduce and promote competition in the registration of  
15 domain names by selecting ICM in a closed process without considering other potential  
16 registry operators for the .XXX TLD.

17 c. It disregarded the advice of the GAC and its members that the .XXX TLD  
18 should not be permitted because of freedom of expression and other public policy issues.

19 d. It failed to conduct proper economic studies of the impact of the  
20 introduction of new TLDs, including the .XXX TLD, on competition and rights protection  
21 that it agreed with DOC were necessary to fulfill its obligations under the Articles of  
22 Incorporation and Bylaws to promote and adequately address competition, rights  
23 protection and other issues before approving new TLDs, including the .XXX TLD.

24 e. It failed to take action respecting ICM's breaches of the .XXX Registry  
25 Agreement and the appendices and amendments thereto, allowing ICM to persist in  
26 anticompetitive conduct and in derogation of trade marks, name rights and other  
27 intellectual property rights.

1           57. ICANN's Articles of Incorporation and Bylaws require that ICANN introduce and  
2 promote competition in approving TLDs and registries. ICANN acted inconsistently with and  
3 violated its Articles of Incorporation and Bylaws when, in approving the .XXX TLD, among other  
4 things:

- 5           a. It approved the .XXX TLD and made ICM the registry operator for the  
6 .XXX TLD without adequately considering competition issues.
- 7           b. It failed to conduct proper economic studies of the impact of the  
8 introduction of the .XXX TLD's on competition and rights protection.
- 9           c. ICANN has failed to adopt or enforce Consensus Policies that adequately  
10 protect competition, trademarks, and other name and intellectual property rights applicable  
11 to .XXX and other TLDs.
- 12           d. It failed to consider or impose conditions and restrictions on ICM's  
13 operation of the .XXX TLD in order to adequately protect consumers, rights holders and  
14 members of the adult entertainment industry from the anticompetitive effects of granting  
15 ICM a monopoly on the .XXX TLD.
- 16           e. It failed to impose competitive terms on any renewal of ICM's contract to  
17 control the .XXX TLD.
- 18           f. It failed to consider potential .XXX registry operators other than ICM.
- 19           g. It disregarded the advice of members of the adult entertainment industry,  
20 economists and other experts concerning the significant negative impacts that introduction  
21 of the .XXX TLD would have on competition, intellectual property rights, and freedom of  
22 expression.

23           58. ICANN's Articles of Incorporation and Bylaws require that it conduct its activities  
24 in an open and transparent manner that promotes well-informed decisions based on expert advice  
25 and ensures that those most affected by ICANN's actions have a voice in the process. ICANN  
26 acted inconsistently with and violated its Articles of Incorporation and Bylaws when, in approving  
27 the .XXX TLD, it disregarded the comments, concerns and evidence presented by members of the  
28 adult entertainment community and experts, that, among other things:

1 a. ICM and the .XXX TLD did not have community support, and that  
2 assertions of “sponsorship” were fraudulent and misleading;

3 b. Establishment of the .XXX TLD could lead to “ghettoization” of the adult  
4 entertainment industry, and could lead to curtailment of freedom of expression through  
5 restrictions placed on websites within and outside of the .XXX TLD.

6 c. ICM was acting and threatening to act in a manner that was contrary to the  
7 interests of the adult entertainment industry, the “community” that ICM contended was  
8 “sponsoring” the .XXX TLD.

9 d. The .XXX TLD would have significant anticompetitive effects and would  
10 have substantial negative impacts on the intellectual property and other property rights of  
11 various rights holders, including YouPorn.

12 e. Establishment of the .XXX TLD would impose substantial costs on  
13 operators of websites and on holders of trademarks, tradenames and other intellectual  
14 property, including YouPorn, to protect their rights and interests against infringement,  
15 violation, dilution and other injury.

16 59. ICANN’s Articles of Incorporation and Bylaws require that it act in compliance  
17 with international law and conventions and local laws. ICANN acted inconsistently with and  
18 violated its Articles of Incorporation and Bylaws and acted inconsistently with international law  
19 and conventions and local laws regarding competition and protection of intellectual property and  
20 other property rights by approving the inclusion of the .XXX TLD in the DNS, approving ICM’s  
21 application to act as registry operator for the .XXX TLD and in entering into an agreement with  
22 ICM for operation of the .XXX registry that did not include adequate safeguards and protection of  
23 competition and intellectual property and other rights. Among other things, granting ICM a  
24 monopoly over the .XXX TLD has allowed it to:

25 a. Extort and attempt to extort substantial sums from members of the adult  
26 entertainment industry and others, including YouPorn, to protect their existing websites,  
27 trademarks and other intellectual property, whether they intend to operate websites within  
28 the .XXX TLD or block such sites.

1           b.       Require persons registering websites for the .XXX TLD to pay money to  
2 IFFOR, an organization controlled by ICM and its principals, even if the registrants do not  
3 agree with IFFOR's viewpoints.

4           c.       Unlawfully tie products and services together in violation of law, such as by  
5 requiring that any registrant either purchase or block all websites in which it had any  
6 affirmative or defensive interest, rather than choosing to purchase and operate some and  
7 block others.

8           d.       Require registrants to give up legal rights and claims they may have against  
9 ICM as a condition of registering or blocking a website.

10         60.       ICANN's Articles of Incorporation and Bylaws require that it proceed in a fair and  
11 open manner. ICANN acted inconsistently with and violated its Articles of Incorporation and  
12 Bylaws when, in approving the .XXX TLD, it among other things:

13           a.       Disregarded the criteria it had set out for sTLDs like .XXX, and approved  
14 the .XXX TLD and ICM as registry operator of the .XXX TLD over the strong opposition  
15 of the adult entertainment industry, the community which ICM contended was the sponsor  
16 of the .XXX TLD, and approved the .XXX TLD even after it had become clear that ICM  
17 had not met and could not meet the sponsorship criteria for sTLDs.

18           b.       Prevented a fair hearing and inquiry into ICM's claims of sponsorship by  
19 allowing ICM not to disclose the identities of its supposed supporters.

20           c.       It failed to take heed of complaints by members of the adult entertainment  
21 industry, members of GAC and others warning of the dangers of proceeding with the  
22 .XXX TLD and naming ICM as the registry operator for .XXX.

23           d.       It gave ICM a permanent monopoly over the .XXX TLD without  
24 considering other candidates for registry operator and without making provision for  
25 considering other potential registry operators at the end of the initial term of the .XXX  
26 Registry Agreement.

1           **VII. YOUPorn IS ENTITLED TO THE REQUESTED RELIEF**

2  
3           61. As a result of ICANN's failures to comply with and violations of its Articles of  
4 Incorporation and Bylaws as alleged herein, and reserving its rights to amend or supplement this  
5 Request and the relief sought hereby, YouPorn is entitled to the following relief:

- 6           a. A declaration that ICANN's approval of the .XXX TLD violated and was  
7 inconsistent with ICANN's Articles of Incorporation and Bylaws;
- 8           b. A declaration that ICANN's administration of the process whereby it  
9 selected a registry operator for the .XXX TLD violated and was inconsistent with  
10 ICANN's Articles of Incorporation and Bylaws;
- 11           c. A declaration that ICANN's approval of the application of ICM Registry  
12 LLC ("ICM") to serve as the registry operator for the .XXX TLD violated and was  
13 inconsistent with ICANN's Articles of Incorporation and Bylaws;
- 14           d. A declaration that ICANN's agreement with ICM concerning the terms and  
15 conditions on which ICM is to act as the registry operator for the .XXX TLD violates and  
16 is inconsistent with ICANN's Articles of Incorporation and Bylaws;
- 17           e. A declaration that ICANN must reconsider its decision regarding approval  
18 of the .XXX TLD for use in the DNS in a manner consistent with its Articles of  
19 Incorporation and Bylaws;
- 20           f. A declaration that ICANN's decision approving ICM as registry operator  
21 for the .XXX TLD and the agreement between ICANN and ICM setting out the terms and  
22 conditions on which ICM would act as the registry operator for the .XXX TLD are void;
- 23           g. A declaration that should ICANN, after reconsideration consistent with its  
24 Articles of Incorporation and Bylaws, determine to allow the .XXX TLD to be used in the  
25 DNS, it must reconsider who should be allowed to act as the registry operator for the  
26 .XXX TLD in a process administered in a manner consistent with ICANN's Articles of  
27 Incorporation and Bylaws;



1           h.       A declaration that ICANN has failed to take action to rescind or enforce the  
2       .XXX Registry Agreement, and the appendices and amendments thereto, in the face of  
3       multiple serious breaches of same by ICM, and must, to comply with its articles and  
4       bylaws, seek such relief immediately;

5           i.       Declare that ICANN must upon the expiration of the initial term of the ICM  
6       registry agreement either allow open and for competition for the .XXX registry and/or  
7       upon any renewal of the ICM registry agreement, negotiate conditions and terms that  
8       provide adequate protections for free and fair competition, trademarks, other name and  
9       intellectual property rights in connection with the operation of the .XXX TLD;

10          j.       Require that ICANN adopt "Consensus Policies" binding on ICM that  
11       protect competition, trademarks and other name and intellectual property rights in  
12       connection with the operation of the .XXX TLD and other TLDs;

13          k.       A declaration that ICANN must compensate YouPorn for the costs incurred  
14       by YouPorn in bringing this Independent Review Proceeding; and

15          l.       Such other declarations and such other relief as the Panel may consider  
16       appropriate.

17       62.       YouPorn therefore requests that the Panel make the declarations and grant the relief  
18       specified above.

19  
20           **IV.    INDEPENDENT REVIEW PROCEDURAL ELECTIONS AND PROPOSAL**  
21           **REGARDING PANEL SELECTION AND LOCATION OF PROCEEDINGS**

22  
23       63.       The ICDR does not maintain a panel of neutrals under contract for the ICANN  
24       Independent Review Process. Accordingly, YouPorn proposes that the parties agree to waive the  
25       requirement in Article IV, Section 3(4) of the Bylaws that the arbitrators be under contract with or  
26       nominated by the IRP provider.

1           64. Pursuant to Article IV, Section 3(6) of the Bylaws, YouPorn hereby elects that the  
2 Panel be composed of three (3) members, each of whom shall be impartial and independent of the  
3 parties.

4           65. Pursuant to Article IV, Section 3(7) of the Bylaws, YouPorn proposes the  
5 following methodology for constituting the Panel: each party shall appoint one panelist. The two  
6 panelists so appointed, and in consultation with the parties, shall jointly select the third panelist,  
7 who shall serve as the Chairperson of the Panel.

8           66. YouPorn proposes that YouPorn and ICANN make their panelist appointment  
9 within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth  
10 herein. The two co-panelists shall select the Chairperson of the Panel within twenty (20) days of  
11 their appointment. In the event that YouPorn or ICANN fails to make its panelist appointment  
12 within the time period indicated, the ICDR shall make the appointment of YouPorn or ICANN's  
13 panelist and the Chairperson of the Panel within thirty (30) days of the date on which said party  
14 should have made its panelist appointment. In the event that the two party-appointed panelists fail  
15 to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in  
16 accordance with its established procedures.

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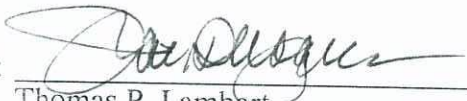
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67. Pursuant to Article 13 of the ICDR Rules, YouPorn proposes that the place of the IRP be Los Angeles, CA, United States of America.

Respectfully submitted,

DATED: November 16, 2011

MITCHELL SILBERBERG & KNUPP LLP  
THOMAS P. LAMBERT  
JEAN PIERRE NOGUES  
KEVIN E. GAUT

By:   
Thomas P. Lambert  
Jean Pierre Nogues  
Kevin E. Gaut  
Attorneys for Claimant  
Manwin Licensing International S.à.r.l.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On November 16, 2011, I served a copy of the foregoing document(s) described as **NOTICE OF INDEPENDENT REVIEW and REQUEST OF MANWIN LICENSING INTERNATIONAL S.A.R.L., FOR INDEPENDENT REVIEW PROCEEDING** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way  
Suite 330  
Marina Del Rey, CA 90292-6601

**BY PERSONAL DELIVERY:** I placed the above-mentioned document(s) in sealed envelope(s), and caused personal delivery by **FIRST LEGAL SUPPORT SERVICES** of the document(s) listed above to the person(s) at the address(es) set forth above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2011, at Los Angeles, California.

\_\_\_\_\_  
Bertha A. García

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18, and not a party to the within action; my business address is **FIRST LEGAL SUPPORT SERVICES**, 1511 West Beverly Blvd., Los Angeles, CA 90026.

On November 16, 2011, I served the foregoing document(s) described as **NOTICE OF INDEPENDENT REVIEW and REQUEST OF MANWIN LICENSING INTERNATIONAL S.A.R.L., FOR INDEPENDENT REVIEW PROCEEDING** which was enclosed in sealed envelopes addressed as follows, and taking the action described below:

Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way  
Suite 330  
Marina Del Rey, CA 90292-6601

**BY PERSONAL SERVICE:** I hand delivered such envelope(s):

- to the addressee(s);
- to the receptionist/clerk/secretary in the office(s) of the addressee(s).
- by leaving the envelope in a conspicuous place at the office of the addressee(s) between the hours of 9:00 a.m. and 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2011, at Los Angeles, California.

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Signature

R-51

RESPONDENT'S EXHIBIT

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)  
Independent Review Panel  
CASE # 50 2013 001083**

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**In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process***

**Between: DotConnectAfrica Trust;**  
("Claimant")

Represented by Mr. Arif H. Ali of Weil, Gotshal, Manges, LLP  
located at Contact Information Redacted

**And**

**Internet Corporation for Assigned Names and Numbers  
(ICANN);**  
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at  
Contact Information Redacted

Claimant and the Respondent are hereafter jointly referred to as the  
"Parties".

**THIRD DECLARATION ON THE IRP PROCEDURE**

1. This Declaration is rendered following the Panel's review of the Parties' written submissions concerning the following two issues filed on 8 April 2015:

- i) Presence of and opportunity for the Panel *only* to ask witnesses *viva voce* questions during any in-person, telephonic or video hearing ordered by the Panel; and
- ii) Evidentiary treatment by the Panel of the witness statements already filed, if there is to be no cross-examination by the Parties and no *viva voce* questions asked by the Panel during any in-person, telephonic or video hearing ordered by the Panel.

## **I. THE PARTIES' POSITIONS**

2. DCA Trust submits that witnesses should be present (or available by telephone or videoconference, as appropriate) and the Panel should have the opportunity to ask witnesses questions *viva voce* during any in-person, telephonic or video hearing the Panel orders, and counsel tendering the witness for examination should have the opportunity to ask follow-up questions in light of the Panel's questions, as well as a brief opportunity for direct examination.
3. DCA Trust also submits "the Panel should give the witness statements filed full weight and effect as presented, provided that each party complies with the procedural orders of the Panel, that is, tendering the witnesses for examination. In the event a witness is unavailable [...] without a valid reason for *viva voce* questioning by the Panel during any...hearing ordered by the Panel, DCA respectfully requests that the Panel exercise its discretion to strike the statement of such witness, draw adverse inferences against the testimony of the witness, or otherwise accord negative evidentiary treatment to the testimony of the witness as the Panel deems appropriate."
4. Finally, DCA Trust submits that "ICANN's announcement at this stage of the proceedings – months after the Panel ruled on the issue of live witness testimony – that it will not make its witnesses available should have cost consequences for ICANN. The approach ICANN has adopted is characteristic of its position throughout these proceedings: constantly making ad hoc decisions to suit ICANN's strategic interests with seemingly little regard for the principles of transparency, fairness and accountability embodied in its governing documents and espoused by its leadership."
5. ICANN on the other hand argues that, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing." In support of this proposition, ICANN cites Article IV, section



3, and Paragraph 12 of its Bylaws. ICANN also writes that it “understands that, in its March 24, 2015 declaration, the Panel concluded that a hearing could include not only arguments but examination of witnesses, rejecting ICANN’s argument that the hearing of witnesses was not permissible. However, ICANN has determined that it has no choice but to follow the provisions of its Bylaws that set forth the rules for all Independent Review proceedings.” Instead, ICANN offers the Panel the possibility to ask witnesses questions in writing.

6. With respect to the second issue identified in paragraph 1, ICANN submits that, “the law is clear that there is no ‘right’ to cross-examination in an arbitration (much less an independent Review proceeding). If the written testimony is demonstrated to be [at] odds with other testimony and exhibits, the written testimony can be given less (or even no) weight. On the other hand, if the written testimony is consistent with other testimony and exhibits, the Panel likely would credit the veracity of the written testimony.”
7. According to ICANN, in this matter, ICANN “has two declarants – Ms. Dryden and Mr. Chalaby. Ms. Dryden’s declaration addresses events that occurred before and during the Governmental Advisory Committee (GAC) meeting at which the GAC issued ‘consensus advice’ against DCA’s application for .AFRICA. After ICANN submitted Ms. Dryden’s declaration, ICANN produced documents from the GAC that confirm the accuracy of Ms. Dryden’s testimony and refute DCA’s position. [...]”
8. ICANN also submits that, “Mr. Chalaby’s declaration addresses DCA’s claim that two of ICANN’s Board members might have had conflicts of interest when they voted to accept the GAC Advice that DCA’s application not proceed. DCA has *never* submitted any evidence on the conflict issue, and DCA’s Reply Memorial does not even address the issue. Ms. Bekele’s declaration...does briefly address the conflict issue but does not submit any evidence to rebut Mr. Chalaby’s statements or the exhibits that Mr. Chalaby referenced (including ICANN’s conflict of interest policy and how the policy was followed in this instance).”

## **II. ANALYSIS OF THE ISSUES AND REASONS**

9. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and

ensure the stable and secure operation of the Internet's unique identifier systems.

10. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
11. ICANN's Bylaws (as amended on 11 April 2013) read in relevant parts as follows:

#### **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

##### **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a *separate process for independent third-party review* of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be *charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws*, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
  - a. did the Board act without conflict of interest in taking its decision?
  - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
  - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? [Emphasis by way of italics is that of the Panel]

12. Section 8 of the Supplementary Procedures for ICANN Independent Review Process similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the internet community and the global public interest, the requestor will have established proper grounds for review.

13. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.
15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate “accountability” remedy for an applicant is the IRP.

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.
17. ICANN’s Bylaws have determined that the IRP would be governed by the ICDR International Arbitration Rules (“ICDR Rules”) as supplemented by the Supplementary Procedures. In the event there is any inconsistency between these Supplementary Procedures and the ICDR Rules, the Supplementary Procedures are to govern.
18. Again, as explained in this Panel’s August 2014 Declaration, “a key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”
19. Another key provision of the ICDR Rules, Article 36 directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of the exercise of such powers are left to the discretion of the Panel itself.
20. Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
21. In order to keep the costs and burdens of independent review as low as possible, ICANN’s Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words “should” and “may” versus “shall” are demonstrative of this point. In the same paragraph, however, ICANN’s Bylaws state that, “in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.
23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?
24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel can not ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?
25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?
26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.
27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.
28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness.*" These statements were most likely prepared under the

common law tradition and with direct input of counsel. It also appears that ICANN's witnesses signed their respective Declarations with full knowledge that they may be called as a witness to explain and elaborate on their statements. Considering the above, it is apparent that ICANN has changed its position since it filed its Declarations.

29. In his Declaration, Mr. Chalaby states that "all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA's application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA's application for .AFRICA."
30. The Panel considers it important and useful for ICANN's witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.
31. While the Panel takes note of ICANN's position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.
32. The Panel also takes note of ICANN's offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for it to act openly, transparently, fairly and with integrity.
33. As already indicated in this Panel's August 2014 Declaration, analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust's counsel to ask any follow-up questions arising out of the Panel's questions of ICANN's witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:
  - a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
  - b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.
35. The Panel of course, reserves and retains the right to modify and adapt the above procedure during the hearing as it deems it appropriate or necessary. The Panel shall also at all times have complete control over the procedure in relation to the witnesses answering *viva voce* any questions that the Panel or any follow-up questions that a Party may have for them.

### **III. DECLARATION OF THE PANEL**

36. Based on the foregoing, after having carefully considered the Parties' written submissions, and after deliberation, the Panel is of the view that the hearing in this IRP should be *in-person* in Washington, D.C. at the offices of Jones Day on 22 and 23 May 2015.
37. Based on the above, the Panel requires all three witnesses in this IRP to be physically present at the hearing in Washington, D.C. If a witness fails to appear at the hearing without a valid reason acceptable to the Panel, the Panel shall in its sole discretion draw the necessary inferences and reach appropriate conclusions regarding that witness's Declaration.
38. Based on the above, the Panel requires all three witnesses in this IRP to answer *viva voce* any questions the Panel may have for them, and thereafter, answer any follow up questions that counsel for the Parties may have for them in respect to the questions asked by the Panel.
39. Finally, considering the Panel's decisions above with respect to the first issue set out in paragraph 1, the second issue in that same paragraph is moot and no longer requires consideration by the Panel at this stage.
40. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

This Third Declaration on the IRP Procedure has ten (10) pages.

Place of IRP: Los Angeles, California.

Dated: Monday, 20 April 2015



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barr, President



**R-52**

**RESPONDENT'S EXHIBIT**



INTERNATIONAL CENTRE  
FOR DISPUTE RESOLUTION®

# INTERNATIONAL DISPUTE RESOLUTION PROCEDURES

(Including Mediation and Arbitration Rules)

*Rules Amended and Effective June 1, 2014*

*Fee Schedule Amended and Effective July 1, 2016*

available online at  
[icdr.org](http://icdr.org)

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# International Dispute Resolution Procedures

(Including Mediation and Arbitration Rules)



## Introduction

These Procedures are designed to provide a complete dispute resolution framework for disputing parties, their counsel, arbitrators, and mediators. They provide a balance between the autonomy of the parties to agree to the dispute resolution process they want and the need for process management by mediators and arbitrators.

The International Centre for Dispute Resolution® (“ICDR®”) is the international division of the American Arbitration Association® (“AAA®”). The ICDR provides dispute resolution services around the world in locations chosen by the parties. ICDR arbitrations and mediations may be conducted in any language chosen by the parties. The ICDR Procedures reflect best international practices that are designed to deliver efficient, economic, and fair proceedings.

## International Mediation

The parties may seek to settle their dispute through mediation. Mediation may be scheduled independently of arbitration or concurrently with the scheduling of the arbitration. In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. The Mediation Rules that follow provide a framework for the mediation.

The following pre-dispute mediation clause may be included in contracts:

*In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure.*

The parties should consider adding:

- a. *The place of mediation shall be [city, (province or state), country]; and*
- b. *The language(s) of the mediation shall be \_\_\_\_\_.*

If the parties want to use a mediator to resolve an existing dispute, they may enter into the following submission agreement:

*The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the place of mediation, and any other item of concern to the parties.)*

### International Arbitration

A dispute can be submitted to an arbitral tribunal for a final and binding decision. In ICDR arbitration, each party is given the opportunity to make a case presentation following the process provided by these Rules and the tribunal.

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.*

The parties should consider adding:

- a. *The number of arbitrators shall be (one or three);*
- b. *The place of arbitration shall be [city, (province or state), country]; and*
- c. *The language(s) of the arbitration shall be \_\_\_\_\_.*

For more complete clause-drafting guidance, please refer to the *ICDR Guide to Drafting International Dispute Resolution Clauses* on the Clause Drafting page at [www.icdr.org](http://www.icdr.org). When writing a clause or agreement for dispute resolution, the parties may choose to confer with the ICDR on useful options. Please see the contact information provided in *How to File a Case with the ICDR*.



## International Expedited Procedures

The Expedited Procedures provide parties with an expedited and simplified arbitration procedure designed to reduce the time and cost of an arbitration.

The Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration. The parties may agree to the application of these Expedited Procedures on matters of any claim size.

Where parties intend that the Expedited Procedures shall apply regardless of the amount in dispute, they may consider the following clause:

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Expedited Procedures.*

The parties should consider adding:

- a. *The place of arbitration shall be (city, [province or state], country); and*
- b. *The language(s) of the arbitration shall be \_\_\_\_\_.*

Features of the International Expedited Procedures:

- Parties may choose to apply the Expedited Procedures to cases of any size;
- Comprehensive filing requirements;
- Expedited arbitrator appointment process with party input;
- Appointment from an experienced pool of arbitrators ready to serve on an expedited basis;
- Early preparatory conference call with the arbitrator requiring participation of parties and their representatives;
- Presumption that cases up to \$100,000 will be decided on documents only;
- Expedited schedule and limited hearing days, if any; and
- An award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties' final statements and proofs.

## Exhibit R-52

Whenever a singular term is used in the International Mediation or International Arbitration Rules, such as “party,” “claimant,” or “arbitrator,” that term shall include the plural if there is more than one such entity.

The English-language version of these Rules is the official text for questions of interpretation.

### How to File a Case with the ICDR

Parties initiating a case with the International Centre for Dispute Resolution or the American Arbitration Association may file online via AAWebFile® (File & Manage a Case) at **www.icdr.org**, by mail, or facsimile (fax). For filing assistance, parties may contact the ICDR directly at any ICDR or AAA office.

#### **Mail:**

International Centre for Dispute Resolution Case Filing Services  
1101 Laurel Oak Road, Suite 100  
Voorhees, NJ, 08043  
United States

**AAWebFile:** [www.icdr.org](http://www.icdr.org)

**Email:** [casefiling@adr.org](mailto:casefiling@adr.org)

**Phone:** +1.856.435.6401

**Fax:** +1.212.484.4178

**Toll-free phone in the U.S. and Canada:** +1.877.495.4185

**Toll-free fax in the U.S. and Canada:** +1.877.304.8457

For further information about these Rules, visit the ICDR website at **www.icdr.org** or call +1.212.484.4181.

## International Mediation Rules

### 1. Agreement of Parties

Whenever parties have agreed in writing to mediate disputes under these International Mediation Rules or have provided for mediation or conciliation of existing or future international disputes under the auspices of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), or the AAA without designating particular Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement. The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

### 2. Initiation of Mediation

1. Any party or parties to a dispute may initiate mediation under the ICDR's auspices by making a request for mediation to any ICDR or AAA office or case management center via telephone, email, regular mail, or fax. Requests for mediation may also be filed online via AAA WebFile at **[www.icdr.org](http://www.icdr.org)**.
2. The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the ICDR and the other party or parties as applicable:
  - a. a copy of the mediation provision of the parties' contract or the parties' stipulation to mediate;
  - b. the names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;
  - c. a brief statement of the nature of the dispute and the relief requested;
  - d. any specific qualifications the mediator should possess.
3. Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the ICDR, a party may request the ICDR to invite another party to participate in "mediation by voluntary submission." Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

### 3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the ICDR.

#### 4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- a. Upon receipt of a request for mediation, the ICDR will send to each party a list of mediators from the ICDR's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the ICDR of their agreement.
- b. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the ICDR. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the ICDR shall invite a mediator to serve.
- c. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the ICDR shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

#### 5. Mediator's Impartiality and Duty to Disclose

1. ICDR mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Rules, these Mediation Rules shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.
2. Prior to accepting an appointment, ICDR mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. ICDR mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties. Upon receipt of such disclosures, the ICDR shall immediately communicate the disclosures to the parties for their comments.
3. The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the

event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

### 6. Vacancies

If any mediator shall become unwilling or unable to serve, the ICDR will appoint another mediator, unless the parties agree otherwise, in accordance with Rule 4.

### 7. Duties and Responsibilities of the Mediator

1. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.
2. The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise.
3. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
4. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
5. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.
6. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

### 8. Responsibilities of the Parties

1. The parties shall ensure that appropriate representatives of each party having authority to consummate a settlement attend the mediation conference.
2. Prior to and during the scheduled mediation conference(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

## 9. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.

## 10. Confidentiality

1. Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.
2. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.
3. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:
  - a. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
  - b. admissions made by a party or other participant in the course of the mediation proceedings;
  - c. proposals made or views expressed by the mediator; or
  - d. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

## 11. No Stenographic Record

There shall be no stenographic record of the mediation process.

## 12. Termination of Mediation

The mediation shall be terminated:

- a. by the execution of a settlement agreement by the parties; or
- b. by a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- c. by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

- d. when there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

### 13. Exclusion of Liability

Neither the ICDR nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the ICDR nor any mediator shall be liable to any party for any error, act, or omission in connection with any mediation conducted under these Rules.

### 14. Interpretation and Application of Rules

The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the ICDR.

### 15. Deposits

Unless otherwise directed by the mediator, the ICDR will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

### 16. Expenses

All expenses of the mediation, including required travel and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

### 17. Cost of Mediation

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT [www.adr.org/internationalfeeschedule](http://www.adr.org/internationalfeeschedule).*

### 18. Language of Mediation

If the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement.

## International Arbitration Rules

### Article 1: Scope of These Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules (“Rules”), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.
2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR, a division of the AAA, as the Administrator. The Administrator may provide services through any of the ICDR’s case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.
4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases. The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of these Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Where no party’s claim or counterclaim exceeds USD \$100,000 exclusive of interest, attorneys’ fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

### Commencing the Arbitration

#### Article 2: Notice of Arbitration

1. The party initiating arbitration (“Claimant”) shall, in compliance with Article 10, give written Notice of Arbitration to the Administrator and at the same time to the party against whom a claim is being made (“Respondent”). The Claimant may also initiate the arbitration through the Administrator’s online filing system located at **[www.icdr.org](http://www.icdr.org)**.



2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.
3. The Notice of Arbitration shall contain the following information:
  - a. a demand that the dispute be referred to arbitration;
  - b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;
  - c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;
  - d. a reference to any contract out of or in relation to which the dispute arises;
  - e. a description of the claim and of the facts supporting it;
  - f. the relief or remedy sought and any amount claimed; and
  - g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.
4. The Notice of Arbitration shall be accompanied by the appropriate filing fee.
5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

### Article 3: Answer and Counterclaim

1. Within 30 days after the commencement of the arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.
2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs.
3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.
4. Respondent shall within 30 days after the commencement of the arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

5. The arbitral tribunal, or the Administrator if the tribunal has not yet been constituted, may extend any of the time limits established in this Article if it considers such an extension justified.
6. Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding.
7. In arbitrations with multiple parties, Respondent may make claims or assert setoffs against another Respondent and Claimant may make claims or assert setoffs against another Claimant in accordance with the provisions of this Article 3.

### Article 4: Administrative Conference

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to facilitate party discussion and agreement on issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters.

### Article 5: Mediation

Following the time for submission of an Answer, the Administrator may invite the parties to mediate in accordance with the ICDR's International Mediation Rules. At any stage of the proceedings, the parties may agree to mediate in accordance with the ICDR's International Mediation Rules. Unless the parties agree otherwise, the mediation shall proceed concurrently with arbitration and the mediator shall not be an arbitrator appointed to the case.

### Article 6: Emergency Measures of Protection

1. A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written notice to the Administrator and to all other parties setting forth the nature of the relief sought, the reasons why such relief is required on an emergency basis, and the reasons why the party is entitled to such relief. The notice shall be submitted concurrent with or following the submission of a Notice of Arbitration. Such notice may be given by email, or as otherwise permitted by Article 10, and must include a statement certifying that all parties have been notified or an explanation of the steps taken in good faith to notify all parties.
2. Within one business day of receipt of the notice as provided in Article 6(1), the Administrator shall appoint a single emergency arbitrator. Prior to accepting appointment, a prospective emergency arbitrator shall, in accordance with Article 13, disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

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3. The emergency arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 19, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article.
4. The emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 24 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.
5. The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.
6. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.
7. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 6 or with the agreement to arbitrate or a waiver of the right to arbitrate.
8. The costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the arbitral tribunal to determine finally the allocation of such costs.

### Article 7: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The party wishing to join the additional party shall, at that same time, submit the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party. Any joinder shall be subject to the provisions of Articles 12 and 19.
2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

3. The additional party shall submit an Answer in accordance with the provisions of Article 3.
4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3.

### Article 8: Consolidation

1. At the request of a party, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:
  - a. the parties have expressly agreed to consolidation; or
  - b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or
  - c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the consolidation arbitrator finds the arbitration agreements to be compatible.
2. A consolidation arbitrator shall be appointed as follows:
  - a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.
  - b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.
  - c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.
  - d. The provisions of Articles 13-15 of these Rules shall apply to the appointment of the consolidation arbitrator.
3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:
  - a. applicable law;
  - b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;
  - c. the progress already made in the arbitrations;
  - d. whether the arbitrations raise common issues of law and/or facts; and

- e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.
4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.
5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator finds otherwise.
6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceeding.
7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

### Article 9: Amendment or Supplement of Claim, Counterclaim, or Defense

Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate. The tribunal may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the Administrator.

### Article 10: Notices

1. Unless otherwise agreed by the parties or ordered by the arbitral tribunal, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission including mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last- known address, or by personal service.
2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is made. If the last day of such period is an official holiday at the place received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period.

## The Tribunal

## Article 11: Number of Arbitrators

If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.

## Article 12: Appointment of Arbitrators

1. The parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure. In the absence of party agreement as to the method of appointment, the Administrator may use the ICDR list method as provided in Article 12(6).
2. The parties may agree to select arbitrators, with or without the assistance of the Administrator. When such selections are made, the parties shall take into account the arbitrators' availability to serve and shall notify the Administrator so that a Notice of Appointment can be communicated to the arbitrators, together with a copy of these Rules.
3. If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing the arbitrator(s) or have not agreed on the selection of the arbitrator(s), the Administrator shall, at the written request of any party, appoint the arbitrator(s). Where the parties have agreed upon a procedure for selecting the arbitrator(s), but all appointments have not been made within the time limits provided by that procedure, the Administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.
4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint nationals of a country other than that of any of the parties.
5. If there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration.
6. If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator, at its discretion, may appoint the arbitrator(s) in the following manner using the ICDR list method. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s). The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 days from the transmittal date in which

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to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal.

7. The appointment of an arbitrator is effective upon receipt by the Administrator of the Administrator's Notice of Appointment completed and signed by the arbitrator.

### Article 13: Impartiality and Independence of Arbitrator

1. Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with the terms of the Notice of Appointment provided by the Administrator.
2. Upon accepting appointment, an arbitrator shall sign the Notice of Appointment provided by the Administrator affirming that the arbitrator is available to serve and is independent and impartial. The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties.
3. If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information to all parties and to the Administrator. Upon receipt of such information from an arbitrator or a party, the Administrator shall communicate it to all parties and to the tribunal.
4. Disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence.
5. Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those circumstances.
6. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to

discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.

### Article 14: Challenge of an Arbitrator

1. A party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party shall send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party. The challenge shall state in writing the reasons for the challenge. The party shall not send this notice to any member of the arbitral tribunal.
2. Upon receipt of such a challenge, the Administrator shall notify the other party of the challenge and give such party an opportunity to respond. The Administrator shall not send the notice of challenge to any member of the tribunal but shall notify the tribunal that a challenge has been received, without identifying the party challenging. The Administrator may advise the challenged arbitrator of the challenge and request information from the challenged arbitrator relating to the challenge. When an arbitrator has been challenged by a party, the other party may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator, after consultation with the Administrator, also may withdraw in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.
3. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Administrator in its sole discretion shall make the decision on the challenge.
4. The Administrator, on its own initiative, may remove an arbitrator for failing to perform his or her duties.

### Article 15: Replacement of an Arbitrator

1. If an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.
2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.
3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for reasons other than those identified in Article 15(1), the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of



the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the Administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.

### General Conditions

#### Article 16: Party Representation

Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.

#### Article 17: Place of Arbitration

1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.
2. The tribunal may meet at any place it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

#### Article 18: Language of Arbitration

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal

may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

### Article 19: Arbitral Jurisdiction

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration.
2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
3. A party must object to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff no later than the filing of the Answer, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection. The tribunal may extend such time limit and may rule on any objection under this Article as a preliminary matter or as part of the final award.
4. Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal for determination once constituted.

### Article 20: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.
3. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.
4. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 21.

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5. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator.
6. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
7. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

### Article 21: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.
3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.
4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.
6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.
7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.

## Exhibit R-52

8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.
10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

### Article 22: Privilege

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

### Article 23: Hearing

1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing.
2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony.
3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.
4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may disregard any written statement by that witness.
5. The tribunal may direct that witnesses be examined through means that do not require their physical presence.

6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

### Article 24: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.
3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
4. The arbitral tribunal may in its discretion allocate costs associated with applications for interim relief in any interim order or award or in the final award.
5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 6.

### Article 25: Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.
4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

### Article 26: Default

1. If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration.
2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.

3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

### Article 27: Closure of Hearing

1. The arbitral tribunal may ask the parties if they have any further submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the arbitral hearing closed.
2. The tribunal in its discretion, on its own motion, or upon application of a party, may reopen the arbitral hearing at any time before the award is made.

### Article 28: Waiver

A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.

### Article 29: Awards, Orders, Decisions and Rulings

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings.
2. When there is more than one arbitrator, any award, order, decision, or ruling of the tribunal shall be made by a majority of the arbitrators.
3. When the parties or the tribunal so authorize, the presiding arbitrator may make orders, decisions, or rulings on questions of procedure, including exchanges of information, subject to revision by the tribunal.

### Article 30: Time, Form, and Effect of Award

1. Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.
2. An award shall be signed by the arbitrator(s) and shall state the date on which the award was made and the place of arbitration pursuant to Article 17. Where there

is more than one arbitrator and any of them fails to sign an award, the award shall include or be accompanied by a statement of the reason for the absence of such signature.

3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.
4. The award shall be transmitted in draft form by the tribunal to the Administrator. The award shall be communicated to the parties by the Administrator.
5. If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.

### Article 31: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.
3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.
4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).
5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration.

### Article 32: Settlement or Other Reasons for Termination

1. If the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of a consent award on agreed terms. The tribunal is not obliged to give reasons for such an award.

2. If continuation of the arbitration becomes unnecessary or impossible due to the non-payment of deposits required by the Administrator, the arbitration may be suspended or terminated as provided in Article 36(3).
3. If continuation of the arbitration becomes unnecessary or impossible for any reason other than as stated in Sections 1 and 2 of this Article, the tribunal shall inform the parties of its intention to terminate the arbitration. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

### Article 33: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.
3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.
4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

### Article 34: Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

- a. the fees and expenses of the arbitrators;
- b. the costs of assistance required by the tribunal, including its experts;
- c. the fees and expenses of the Administrator;
- d. the reasonable legal and other costs incurred by the parties;
- e. any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;



- f. any costs incurred in connection with a request for consolidation pursuant to Article 8; and
- g. any costs associated with information exchange pursuant to Article 21.

### Article 35: Fees and Expenses of Arbitral Tribunal

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.
2. As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case.
3. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the Administrator.

### Article 36: Deposits

1. The Administrator may request that the parties deposit appropriate amounts as an advance for the costs referred to in Article 34.
2. During the course of the arbitration, the Administrator may request supplementary deposits from the parties.
3. If the deposits requested are not paid promptly and in full, the Administrator shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the proceedings. If the tribunal has not yet been appointed, the Administrator may suspend or terminate the proceedings.
4. Failure of a party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim.
5. After the final award has been made, the Administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

### Article 37: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.

2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

### Article 38: Exclusion of Liability

The members of the arbitral tribunal, any emergency arbitrator appointed under Article 6, any consolidation arbitrator appointed under Article 8, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, or consolidation arbitrator, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

### Article 39: Interpretation of Rules

The arbitral tribunal, any emergency arbitrator appointed under Article 6, and any consolidation arbitrator appointed under Article 8, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules.

## International Expedited Procedures

### Article E-1: Scope of Expedited Procedures

These Expedited Procedures supplement the International Arbitration Rules as provided in Article 1(4).

### Article E-2: Detailed Submissions

Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer. The arbitrator, in consultation with the parties, shall establish a procedural order, including a timetable, for completion of any written submissions.

### Article E-3: Administrative Conference

The Administrator may conduct an administrative conference with the parties and their representatives to discuss the application of these procedures, arbitrator selection, mediating the dispute, and any other administrative matters.

### Article E-4: Objection to the Applicability of the Expedited Procedures

If an objection is submitted before the arbitrator is appointed, the Administrator may initially determine the applicability of these Expedited Procedures, subject to the power of the arbitrator to make a final determination. The arbitrator shall take into account the amount in dispute and any other relevant circumstances.

### Article E-5: Changes of Claim or Counterclaim

If, after filing of the initial claims and counterclaims, a party amends its claim or counterclaim to exceed USD \$250,000.00 exclusive of interest and the costs of arbitration, the case will continue to be administered pursuant to these Expedited Procedures unless the parties agree otherwise, or the Administrator or the arbitrator determines otherwise. After the arbitrator is appointed, no new or different claim, counterclaim or setoff and no change in amount may be submitted except with the arbitrator's consent.

**Article E-6: Appointment and Qualifications of the Arbitrator**

A sole arbitrator shall be appointed as follows. The Administrator shall simultaneously submit to each party an identical list of five proposed arbitrators. The parties may agree to an arbitrator from this list and shall so advise the Administrator. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the Administrator within 10 days from the transmittal date of the list to the parties. The parties are not required to exchange selection lists. If the parties fail to agree on any of the arbitrators or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator may make the appointment without the circulation of additional lists. The parties will be given notice by the Administrator of the appointment of the arbitrator, together with any disclosures.

**Article E-7: Procedural Conference and Order**

After the arbitrator's appointment, the arbitrator may schedule a procedural conference call with the parties, their representatives, and the Administrator to discuss the procedure and schedule for the case. Within 14 days of appointment, the arbitrator shall issue a procedural order.

**Article E-8: Proceedings by Written Submissions**

In expedited proceedings based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the arbitrator determines otherwise. The arbitrator may require an oral hearing if deemed necessary.

**Article E-9: Proceedings with an Oral Hearing**

In expedited proceedings in which an oral hearing is to be held, the arbitrator shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the arbitrator deems it necessary to extend that period. Hearings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator. Generally, there will be no transcript or stenographic record. Any party desiring a stenographic record may arrange for one. The oral hearing shall not exceed one day unless the arbitrator determines otherwise. The Administrator will notify the parties in advance of the hearing date.

### Article E-10: The Award

Awards shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the award shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions.

### Administrative Fees

#### Administrative Fee Schedules

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT*  
***[www.adr.org/internationalfeeschedule](http://www.adr.org/internationalfeeschedule)***.



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INTERNATIONAL CENTRE  
FOR DISPUTE RESOLUTION®

R-53

RESPONDENT'S EXHIBIT



 KeyCite: [Yeow Fag Negat ve Treatment](#)  
Disagreement Recognized by [Wace v. Red Butte Distributing Co.](#),  
N.D. Ohio, July 23, 2013

131 S.Ct. 1740  
Supreme Court of the United States

AT&T MOBILITY LLC, Petitioner,  
v.  
Vincent CONCEPCION et ux.

No. 09–893.  
|  
Argued Nov. 9, 2010.  
|  
Decided April 27, 2011.

### Synopsis

**Background:** Customers brought putative class action against telephone company, alleging that company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent to the extent that the company charged the customer sales tax on the retail value of the free phone. The United States District Court for the Southern District of California, [Dana M. Sabraw, J.](#), 2008 WL 5216255, denied company's motion to compel arbitration. Company appealed. The United States Court of Appeals for the Ninth Circuit, [Carlos T. Bea](#), Circuit Judge, 584 F.3d 849, affirmed. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice [Scalia](#), held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, abrogating

*Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

Reversed and remanded.

Justice [Thomas](#) filed a concurring opinion.

Justice [Breyer](#) filed a dissenting opinion, in which Justices [Ginsburg](#), [Sotomayor](#), and [Kagan](#), joined.

**\*\*1742 \*333 Syllabus\***

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The cellular telephone contract between respondents (Concepcions) and petitioner (AT & T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT & T in a California Federal District Court. Their suit was consolidated with a class action alleging, *inter alia*, that AT & T had engaged in false advertising and fraud by charging sales tax on “free” phones. The District Court denied AT & T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's *Discover Bank* decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law

and held that the Federal Arbitration Act (FAA), which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2, did not preempt its ruling.

*Held:* Because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581, California's *Discover Bank* rule is pre-empted by the FAA. Pp. 1745–1753.

(a) Section 2 reflects a “liberal federal policy favoring arbitration,” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765, and the “fundamental principle that arbitration is a matter of contract,” *Rent A Center, West, Inc. v. Jackson*, 561 U.S. , , 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Thus, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038, and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488. Section 2's saving clause permits agreements to be invalidated by “generally applicable contract defenses,” but not by defenses that apply \*\*1743 only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902. Pp. 1745–1746.

(b) In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the \*334 agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. Pp. 1745–1747.

(c) The Concepcions claim that the *Discover Bank* rule is a ground that “exist[s] at law or in equity for the revocation of any contract” under FAA § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the inquiry is more complex when a generally applicable doctrine is alleged to have been applied in a fashion that disfavors or interferes with arbitration. Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings. Parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444, to arbitrate according to specific rules, *Volt, supra*, at 479, 109 S.Ct. 1248, and to limit with whom they will arbitrate, *Stolt Nielsen, supra*, at . Pp. 1746–1750.

(d) Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, interferes with fundamental attributes of arbitration. The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes. In litigation, a defendant may appeal a certification decision and a final judgment, but 9 U.S.C. § 10 limits the grounds on which courts can vacate arbitral awards. Pp. 1750–1753.

584 F.3d 849, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

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#### Opinion

\*\*1744 Justice SCALIA delivered the opinion of the Court.

\*336 Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

#### I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT & T Mobility LCC (AT & T).<sup>1</sup> The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” App. to Pet. for Cert. 61a.<sup>2</sup> The agreement authorized AT & T to make unilateral amendments, which it did to the arbitration provision on several

occasions. The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

<sup>1</sup> The Conceptions' original contract was with Cingular Wireless. AT & T acquired Cingular in 2005 and renamed the company AT & T Mobility in 2007. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 852, n. 1 (C.A.9 2009).

<sup>2</sup> That provision further states that “the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. App. to Pet. for Cert. 61a.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T's Web site. AT & T may \*337 then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement

offer, requires AT & T to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees.<sup>3</sup>

<sup>3</sup> The guaranteed minimum recovery was increased in 2009 to \$10,000. Brief for Petitioner 7.

The Conceptions purchased AT & T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged \$30.22 in sales tax based on the phones' retail value. In March 2006, the Conceptions filed a complaint against AT & T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT & T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT & T moved to compel arbitration under the terms of its contract \*\*1745 with the Conceptions. The Conceptions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory \*338 under California law because it disallowed classwide procedures. The District Court denied AT & T's motion. It described AT & T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was “quick, easy to use” and likely to “prompt[t] full or ... even excess payment to the customer *without* the need to arbitrate or litigate”; that the \$7,500 premium functioned as “a substantial inducement for the consumer to pursue the claim in arbitration” if a dispute was not resolved

informally; and that consumers who were members of a class would likely be worse off. *Laster v. T Mobile USA, Inc.*, 2008 WL 5216255, \*11 \*12 (S.D.Cal., Aug.11, 2008). Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. *Laster*, 2008 WL 5216255, \*14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank. Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (2009). It also held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.” 584 F.3d, at 857. In response to AT & T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that “ ‘class proceedings will reduce the efficiency and expeditiousness of arbitration’ ” and noted that “ ‘*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.’ ” *Id.*, at 858 (quoting *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 990 (C.A.9 2007)).

We granted certiorari, 560 U.S. 923, 130 S.Ct. 3322, 176 L.Ed.2d 1218 (2010).

## \*339 II

[1] [2] The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). Section 2, the “primary substantive provision of the Act,” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), provides, in relevant part, as follows:

“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

We have described this provision as reflecting both a “liberal federal policy favoring arbitration,” *Moses H. Cone, supra*, at 24, 103 S.Ct. 927, and the “fundamental principle that arbitration is a matter of contract,” *Rent A Center, West, Inc. v. Jackson*, 561 U.S. , , 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006),

and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

[3] [4] The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see also *Perry v. Thomas*, 482 U.S. 483, 492 493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). \*340 The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

[5] Under California law, courts may refuse to enforce any contract found “to have been unconscionable at the time it was made,” or may “limit the application of any unconscionable clause.” Cal. Civ.Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” *Armendariz v. Foundation Health Pyschcare*

*Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000); accord, *Discover Bank*, 36 Cal.4th, at 159 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108.

In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

“[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” *Id.*, at 162, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110 (quoting Cal. Civ.Code Ann. § 1668).

California courts have frequently applied this rule to find arbitration agreements unconscionable. See, e.g., *Cohen v. DirecTV, Inc.*, 142 Cal.App.4th 1442, 1451 1453, 48 Cal.Rptr.3d 813, 819 821 (2006); *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1297, 36 Cal.Rptr.3d 728, 738 739 (2005); *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544, 556 557, 36 Cal.Rptr.3d 229, 237 239 (2005).

## III

## A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that “exist[s] at law or in equity for the revocation of any contract” under FAA § 2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well. See *America Online, Inc. v. Superior* \*\*1747 Ct., 90 Cal.App.4th 1, 17 18, 108 Cal.Rptr.2d 699, 711 713 (2001).

[6] [7] When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist “at

law or in equity for the revocation of any contract.’ ” *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.” *Id.*, at 493, n. 9, 107 S.Ct. 2520.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy \*342 consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank, supra*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to “any” contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply

to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed “a panel of twelve lay arbitrators” to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in “a great variety” of “devices and formulas” declaring arbitration against public policy. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (C.A.2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 *Hastings Bus. L.J.* 39, 54, 66 (2006); Randall, \*343 *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *Buffalo L.Rev.* 185, 186 187 (2004).

The Concepcions suggest that all this is just a parade of horrors, and no genuine worry. “Rules aimed at destroying arbitration” or “demanding procedures incompatible with arbitration,” they concede, \*\*1748 “would be preempted by the FAA because they cannot sensibly be reconciled with Section 2.” Brief for Respondents 32. The “grounds” available under § 2's saving clause, they

admit, “should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and ‘would wholly eviscerate arbitration agreements.’ ” *Id.*, at 33 (quoting *Carter v. SSC Odin Operating Co., LLC*, 237 Ill.2d 30, 50, 340 Ill.Dec. 196, 927 N.E.2d 1207, 1220 (2010)).<sup>4</sup>

4 The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge “we have not ... applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings, *post*, at 10 (opinion of BREYER, J.), and that “we should think more than twice before invalidating a state law that ... puts agreements to arbitrate and agreements to litigate ‘upon the same footing’ *post*, at 4 5.

[8] [9] We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). As we have said, a federal statute's saving clause “ ‘cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.’ ” *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227 228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907)).



**\*344** We differ with the *Concepcions* only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are “a far cry from this case.” Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

## B

[10] The “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” *Volt*, 489 U.S., at 478, 109 S.Ct. 1248; see also *Stolt Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. , , 130 S.Ct. 1758, 1763, 176 L.Ed.2d 605 (2010). This purpose is readily apparent from the FAA’s text. Section 2 makes arbitration agreements “valid, irrevocable, and enforceable” as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims “in accordance with the terms of the agreement”; and § 4 requires courts to compel arbitration “in accordance with the terms of the agreement” upon the motion of either party to the agreement (assuming that the “making of the arbitration agreement or the failure ... to perform the same” is not at

issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), **\*\*1749** to arbitrate according to specific rules, *Volt, supra*, at 479, 109 S.Ct. 1248, and to limit *with whom* a party will arbitrate its disputes, *Stolt Nielsen, supra*, at , 130 S.Ct. at 1773.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, **\*345** for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, , 129 S.Ct. 1456, 1460, 173 L.Ed.2d 398 (2009); *Mitsubishi Motors Corp., supra*, at 628, 105 S.Ct. 3346.

The dissent quotes *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), as “‘reject[ing] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.’” *Post*, at 4 (opinion of BREYER, J.). That is greatly misleading. After saying (accurately enough) that “the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims,” but to “ensure judicial enforcement of privately made agreements to arbitrate,” 470 U.S., at 219, 105 S.Ct. 1238, *Dean Witter* went on to explain: “This

is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it ....” *Id.*, at 220, 105 S.Ct. 1238. It then quotes a House Report saying that “the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration.” *Ibid.* (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The concluding paragraph of this part of its discussion begins as follows:

“We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act enforcement of private agreements and encouragement of efficient and speedy dispute resolution must be resolved in favor of the latter in order to realize the intent of the drafters.” 470 U.S., at 221, 105 S.Ct. 1238.

In the present case, of course, those “two goals” do not conflict and it is the dissent's view that would frustrate *both* of them.

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. \*346 They have repeatedly described the Act as “embod[ying] [a] national policy favoring arbitration,” *Buckeye Check Cashing*, 546 U.S., at 443, 126 S.Ct. 1204, and “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,” *Moses H. Cone*, 460 U.S., at 24, 103 S.Ct. 927; see also *Hall Street Assocs.*, 552 U.S., at 581, 128 S.Ct. 1396. Thus, in *Preston v. Ferrer*, holding preempted a state-law rule requiring exhaustion of

administrative remedies before arbitration, we said: “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results,’” which objective would be “frustrated” by requiring a dispute to be heard by an agency first. 552 U.S., at 357 358, 128 S.Ct. 978. That rule, we said, would “at the least, hinder speedy resolution of the controversy.” *Id.*, at 358, 128 S.Ct. 978.<sup>5</sup>

<sup>5</sup> Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress “thought that arbitration would be used primarily where merchants sought to resolve disputes of fact ... and] possessed roughly equivalent bargaining power. *Post*, at 6. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases. “Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we have] nevertheless held ... that agreements to arbitrate in that context are enforceable. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); see also *id.*, at 32 33, 111 S.Ct. 1647 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees). Of course the dissent's disquisition on legislative history fails to note that it contains nothing not even the testimony of a stray witness in committee hearings that contemplates the existence of class arbitration.

\*\*1750 California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts, *Discover Bank*, 36 Cal.4th, at 162 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110, but the times in which consumer contracts were anything \*347 other than adhesive are

long past.<sup>6</sup> *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir.2004); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (C.A.7 1997). The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. *Discover Bank, supra*, at 162-163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of \$4,000 are sufficiently small, see *Oestreicher v. Alienware Corp.*, 322 Fed.Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

<sup>6</sup> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class action waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background

principle of contract law that would affect its interpretation. 559 U.S., at \_\_\_\_\_, 130 S.Ct. at 1773-1776. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the “changes brought about by the shift from bilateral arbitration to class-action arbitration” are “fundamental.” *Id.*, at \_\_\_\_\_, 130 S.Ct. at 1776. This is obvious as a \*348 structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that \*\*1751 class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

[11] First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” 559 U.S., at \_\_\_\_\_, 130 S.Ct. at 1775. But before an arbitrator may decide the merits

of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA's Consumer Arbitration Caseload, online at <http://www.adr.org/si.asp?id=5027> (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court's case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had \*349 resulted in a final award on the merits. Brief for AAA as *Amicus Curiae* in *Stolt Nielsen*, O.T.2009, No. 08-1198, pp. 22-24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days. *Id.*, at 24.<sup>7</sup>

<sup>7</sup> The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. *Post*, at 6-7. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration by jury by saying that parties will still prefer it to trial by jury.

[12] Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the

Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at <http://www.adr.org/sp.asp?id=21936>, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a “relatively recent development.” 36 Cal.4th, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. And it \*\*1752 is at the very \*350 least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of

multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “in terrorem” settlements that class actions entail, see, e.g., *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677 678 (C.A.7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award “was procured by corruption, fraud, or undue means”; “there was evident partiality or corruption in the arbitrators”; “the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a

mutual, final, and definite award ... was not made.” The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct \*351 rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.*, 552 U.S., at 578, 128 S.Ct. 1396. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.<sup>8</sup>

<sup>8</sup> The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post*, at 7 8. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards which we have never doubted. The point is that in class action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

[13] The *Concepcions* contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the *Concepcions* admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts

to honor parties' expectations. *Rent A* \*\*1753 *Center, West*, 561 U.S., at , 130 S.Ct. 2772, 2774. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post*, at 9. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will \*352 pay claimants a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be “essentially guarantee[d]” to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action, which “ could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.” *Laster*, 2008 WL 5216255, at \*12.

\* \* \*

Because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941), California's *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice THOMAS, concurring.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The question here is whether California's *Discover Bank* rule, see *Discover Bank v. Superior Ct.*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), is a “groun[d] ... for the revocation of any contract.”

It would be absurd to suggest that § 2 requires only that a defense apply to “any contract.” If § 2 means anything, it \*353 is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to “any contract.” There must be some additional limit on the contract defenses permitted by § 2. Cf. *ante*, at 17 (opinion of the Court) (state law

may not require procedures that are “not arbitration as envisioned by the FAA” and “lac[k] its benefits”); *post*, at 5 (BREYER, J., dissenting) (state law may require only procedures that are “consistent with the use of arbitration”).

I write separately to explain how I would find that limit in the FAA's text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

**\*\*1754** This reading of the text, however, has not been fully developed by any party, cf. Brief for Petitioner 41, n. 12, and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 411, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002) (O'Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, see *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

## I

The FAA generally requires courts to enforce arbitration agreements as written. Section 2 provides that “[a] written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall **\*354** be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Significantly, the statute does not parallel the words “valid, irrevocable, and enforceable” by referencing the grounds as exist for the “invalidation, revocation, or nonenforcement” of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use of only “revocation” and the conspicuous omission of “invalidation” and “nonenforcement” suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses. See *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute” (internal quotation marks omitted)).

Concededly, the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious. The statute does not define the terms, and their ordinary meanings arguably overlap. Indeed, this Court and others have referred to the concepts of revocability, validity, and enforceability interchangeably. But this ambiguity alone cannot justify

ignoring Congress' clear decision in § 2 to repeat only one of the three concepts.

To clarify the meaning of § 2, it would be natural to look to other portions of the FAA. Statutory interpretation focuses on “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2's exception to the enforcement of \*355 arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” the court must order arbitration “in accordance with the terms of the agreement.”

Reading §§ 2 and 4 harmoniously, the “grounds ... for the revocation” preserved in § 2 would mean grounds related to the \*\*1755 making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation

of the agreement to arbitrate, such as fraud, duress, or mutual mistake. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of “fraud in the inducement of the arbitration clause itself” because such claims “g[o] to the ‘making’ of the agreement to arbitrate”). Contract defenses unrelated to the making of the agreement such as public policy could not be the basis for declining to enforce an arbitration clause. \*

\* The interpretation I suggest would be consistent with our precedent. Contract formation is based on the consent of the parties, and we have emphasized that “a[r]bitration under the Act is a matter of consent.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The statement in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), suggesting that § 2 preserves all state law defenses that “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” *id.*, at 493, n. 9, 107 S.Ct. 2520, is dicta. This statement is found in a footnote concerning a claim that the Court “decline d] to address. *Id.*, at 493, n. 9, 107 S.Ct. 2520. Similarly, to the extent that statements in *Rent A Center, West, Inc. v. Jackson*, 561 U.S. , n. 1, 130 S.Ct. 2772, 2778 n. 1 (2010), can be read to suggest anything about the scope of state law defenses under § 2, those statements are dicta, as well. This Court has never addressed the question whether the state law “grounds referred to in § 2 are narrower than those applicable to any contract.

Moreover, every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), this Court said that fraud, duress, and unconscionability “may be applied to invalidate arbitration agreements without contravening § 2. All three defenses historically concern the making of an agreement. See *Morgan Stanley Capital Group Inc. v. Public*



*Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 547, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008) (describing fraud and duress as “traditional grounds for the abrogation of a] contract that speak to “unfair dealing at the contract formation stage ); *Hume v. United States*, 132 U.S. 406, 411, 414, 10 S.Ct. 134, 33 L.Ed. 393 (1889) (describing an unconscionable contract as one “such as no man in his senses and not under delusion would make and suggesting that there may be “contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception (internal quotation marks omitted)).

## \*356 II

Under this reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not.

In *Discover Bank*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, the California Supreme Court held that “class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory.” *Id.*, at 65, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112; see also *id.*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 (“[C]lass action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy”). The court concluded that where a class-action waiver is found in an arbitration agreement in certain consumer contracts of adhesion, such waivers “should not be enforced.” *Id.*, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. In practice, the court explained, such agreements “operate to insulate a party from liability that otherwise would be imposed under California law.” *Id.*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at

1108, 1109. The court did not conclude that a customer would sign such an agreement only if under \*\*1756 the influence of fraud, duress, or delusion.

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover Bank* rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. \*357 15 G. Giesel, *Corbin on Contracts* §§ 85.1, 85.17, 85.18 (rev. ed.2003). Indeed, the court explained that it would not enforce the agreements because they are “ ‘against the policy of the law.’ ” 36 Cal.4th, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 (quoting Cal. Civ.Code Ann. § 1668); see also 36 Cal.4th, at 166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112 (“Agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy” (internal quotation marks omitted)). Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a “groun[d] ... for the revocation of any contract” as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The Federal Arbitration Act says that an arbitration agreement “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which “class action waivers” in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not “stan[d] as an obstacle” to the Act's “accomplishment and execution.” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). And the Court is wrong to hold that the federal Act pre-empts the rule of state law.

## I

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts “which have for their object, directly or in-directly, to exempt anyone from responsibility for his own ... violation of law.” \*358 Cal. Civ.Code Ann. § 1668 (West 1985). The second provision authorizes courts to “limit the application of any unconscionable clause” in a contract so “as to avoid any unconscionable result.” § 1670.5(a).

The specific rule of state law in question consists of the California Supreme Court's application of these principles to hold that “some” (but not “all”) “class action waivers” in consumer contracts are exculpatory and

unconscionable under California “law.” *Discover Bank v. Superior Ct.*, 36 Cal.4th 148, 160, 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1108, 1110 (2005). In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action waiver

“is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury \*\*1757 to the person or property of another.’ ” *Id.*, at 162 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.

In such a circumstance, the “waivers are unconscionable under California law and should not be enforced.” *Id.*, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.

The *Discover Bank* rule does not create a “blanket policy in California against class action waivers in the consumer context.” *Provencher v. Dell, Inc.*, 409 F.Supp.2d 1196, 1201 (C.D.Cal.2006). Instead, it represents the “application of a more general [unconscionability] principle.” *Gentry v. Superior Ct.*, 42 Cal.4th 443, 457, 64 Cal.Rptr.3d 773, 165 P.3d 556, 564 (2007). Courts applying California law have enforced class-action waivers where they satisfy general unconscionability standards. See, e.g., \*359 *Walnut Producers of Cal.*

*v. Diamond Foods, Inc.*, 187 Cal.App.4th 634, 647 650, 114 Cal.Rptr.3d 449, 459 462 (2010); *Arguelles Romero v. Superior Ct.*, 184 Cal.App.4th 825, 843 845, 109 Cal.Rptr.3d 289, 305 307 (2010); *Smith v. Americredit Financial Servs., Inc.*, No. 09cv1076, 2009 WL 4895280 (S.D.Cal., Dec.11, 2009); cf. *Provencher, supra*, at 1201 (considering *Discover Bank* in choice-of-law inquiry). And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

## II

### A

The *Discover Bank* rule is consistent with the federal Act's language. It “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.” 36 Cal.4th, at 165 166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112. Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist “for the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). The majority agrees. *Ante*, at 9.

### B

The *Discover Bank* rule is also consistent with the basic “purpose behind” the Act. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). We have described that purpose as one of “ensur[ing] judicial enforcement” of arbitration agreements. *Ibid.*; see also *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274, n. 2, 52 S.Ct. 166, 76 L.Ed. 282 (1932) (“ ‘The purpose of this bill is to make *valid and enforceable* agreements for arbitration’ ” (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); emphasis added)); 65 Cong. Rec.1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in \*360 admiralty contracts”). As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. See S.Rep. No. 536, 68th Cong., 1st Sess., 2 (1924). The Act sought to eliminate that hostility by placing agreements to arbitrate “*upon the same footing as other contracts.*” *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (quoting H.R.Rep. No. 96, at 2; emphasis added).

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the “appropriate[ness]” of making arbitration \*\*1758 agreements enforceable “at this time when there is so much

agitation against the costliness and delays of litigation.” *Id.*, at 2. And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes. See *Preston v. Ferrer*, 552 U.S. 346, 357, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (discussing “prime objective of an agreement to arbitrate”). See also *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the “enforcement” of agreements to arbitrate. *Dean Witter*, 470 U.S., at 221, 105 S.Ct. 1238. See also *id.*, at 219, 105 S.Ct. 1238 (we “reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims”); *id.*, at 219, 217 218, 105 S.Ct. 1238 (“[T]he intent of Congress” requires us to apply the terms of the Act without regard to whether the result would be “possibly inefficient”); cf. *id.*, at 220, 105 S.Ct. 1238 (acknowledging that “expedited resolution of disputes” might lead parties to prefer arbitration). The relevant Senate Report points to the Act's basic purpose when it says that “[t]he purpose of the [Act] is *clearly set forth in section 2*,” S.Rep. No. 536, at 2 (emphasis added), namely, the section that says that an arbitration agreement “shall be valid, irrevocable, \*362 and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate “upon the same footing.”

### III

The majority's contrary view (that *Discover Bank* stands as an “obstacle” to the accomplishment of the federal law's objective, *ante*, at 9 18) rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require “ultimate disposition by a jury” or “judicially monitored discovery” or use of “the Federal Rules of Evidence.” *Ante*, at 8, 9. Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. See, e.g., *Keating v. Superior Ct.*, 109 Cal.App.3d 784, 167 Cal.Rptr. 481, 492 (1980) (officially depublished); American Arbitration Association (AAA), Supplementary Rules for Class Arbitrations (2003), [http://www.adr.org/sp.asp?id\\_21936](http://www.adr.org/sp.asp?id_21936)

(as visited Apr. 25, 2011, and available in Clerk of Court's case file); JAMS, The Resolution Experts, Class Action Procedures (2009). Indeed, the AAA has told us that it has found class arbitration to be “a fair, balanced, and efficient means of resolving class disputes.” Brief for AAA as *Amicus Curiae* in *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.*, O.T.2009, No. 08 1198, p. 25 (hereinafter AAA *Amicus* Brief). And unlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot **\*\*1759** fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea that individual, rather than class, arbitration is a “fundamental attribut[e]” of arbitration? *Ante*, at 9. The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. See *Mitsubishi Motors, supra*, at 646, 105 S.Ct. 3346 (Stevens, J., dissenting); Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee

on the Judiciary, 67th Cong., 4th Sess., 9 10 (1923); Dept. of Commerce, Secretary Hoover Favors Arbitration Press Release (Dec. 28, 1925), Herbert Hoover Papers Articles, Addresses, and Public Statements File No. 536, p. 2 (Herbert Hoover Presidential Library); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L.Rev. 265, 281 (1926); AAA, Year Book on Commercial Arbitration in the United States (1927). This last mentioned feature of the history roughly equivalent bargaining power suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

**\*363** For another thing, the majority's argument that the *Discover Bank* rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. See *ante*, at 14. And it finds the former more complex. See *ibid*. But, if incentives are at issue, the *relevant* comparison is not “arbitration with arbitration” but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures

whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics “suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court.” AAA *Amicus* Brief 24 (emphasis added). Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. Compare *ante*, at 14 (providing statistics for class arbitration), with Judicial Council of California, Administrative Office of the Courts, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 18 (2010) (providing statistics for class-action litigation in California courts). And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, **\*\*1760** not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because “[a]rbitration is poorly suited to ... higher stakes” lacks empirical support. *Ante*, at 16. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit High-Stake disputes to Arbitration. and There are numerous counterexamples. Loftus, Rivals Resolve Dispute Over Drug,

Wall Street Journal, Apr. 16, 2011, p. B2 (discussing \$500 million settlement in dispute submitted to arbitration); Ziobro, Kraft Seeks Arbitration In Fight With Starbucks Over Distribution, Wall Street Journal, Nov. 30, 2010, p. B10 (describing initiation of an arbitration in which the payout “could be higher” than \$1.5 billion); Markoff, Software Arbitration Ruling Gives I.B.M. \$833 Million From Fujitsu, N.Y. Times, Nov. 30, 1988, p. A1 (describing both companies as “pleased with the ruling” resolving a licensing dispute).

Further, even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. *Rent A Center, West, Inc. v. Jackson*, 561 U.S. , , 130 S.Ct. 2772, 2775 (2010) (arbitration agreements “may be invalidated by ‘generally applicable contract defenses’” (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996))). A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. See, *e.g.*, *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009 Ohio 2054, ¶ 19, 908 N.E.2d 408, 412 (“Unconscionability is a ground for revocation of an arbitration agreement”); *In re Poly America, L. P.*, 262 S.W.3d 337, 348 (Tex.2008) (“Unconscionable contracts, however whether relating to arbitration or not are unenforceable under Texas law”). The *Discover Bank* rule amounts to a variation on this theme. California

is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration. Cf. *Doctor's Associates, supra*, at 687. See also *ante*, at 4, n. (THOMAS, J., concurring) (suggesting that, under certain circumstances, California might remain free to apply its unconscionability doctrine).

**\*365** Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *ante*, at 15 16 (referring to the “greatly increase[d] risks to defendants”; the “chance of a devastating loss” pressuring defendants “into settling questionable claims”). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT & T can avoid the \$7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that “the maximum gain to a customer for the

hassle of arbitrating a \$30.22 dispute is still just \$30.22.” *Laster v. AT & T Mobility \*\*1761 LLC*, 584 F.3d 849, 855, 856 (C.A.9 2009).

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim? See, e.g., *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (C.A.7 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30”). In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to **\*366** insulate an agreement's author from liability for its own frauds by “deliberately cheat[ing] large numbers of consumers out of individually small sums of money.” 36 Cal.4th, at 162 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. Why is this kind of decision weighing the pros and cons of all class proceedings alike not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex

arbitration procedures. *E.g.*, *Mitsubishi Motors*, 473 U.S., at 629, 105 S.Ct. 3346 (antitrust claims arising in international transaction are arbitrable). We have upheld nondiscriminatory state laws that slow down arbitration proceedings. *E.g.*, *Volt Information Sciences*, 489 U.S., at 477-479, 109 S.Ct. 1248 (California law staying arbitration proceedings until completion of related litigation is not pre-empted). But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings. Cf. *Preston*, 552 U.S., at 355-356, 128 S.Ct. 978 (Act pre-empts state law that vests primary jurisdiction in state administrative board).

At the same time, we have repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). See also, *e.g.*, *Vaden v. Discover Bank*, 556 U.S. 49, 129 S.Ct. 1262, 1273-1274, 173 L.Ed.2d 206 (2009); *Doctor's Associates, supra*, at 687, 116 S.Ct. 1652; *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Rodriguez de Quijas v. Shearson American Express, Inc.*, 490 U.S. 477, 483-484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Mitsubishi Motors, supra*, at 627, 105 S.Ct. 3346. And we have recognized that "[t]o immunize an arbitration agreement from judicial challenge" on grounds applicable to all other contracts "would be to elevate it

over other forms of contract." \*367 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also *Marchant v. Mead Morrison Mfg. Co.*, 252 N.Y. 284, 299, 169 N.E. 386, 391 (1929) (Cardozo, C.J.) ("Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficent any more than they may shirk it if their belief happens to be the contrary"); *Cohen & Dayton*, 12 Va. L.Rev., at 276 (the Act "is no infringement upon the right of each State to decide for itself what \*\*1762 contracts shall or shall not exist under its laws").

These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.

#### IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. See, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("[B]ecause



the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action”). But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

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R-54

RESPONDENT'S EXHIBIT

## Chapter 6. Conduct of the Proceedings

### A. Overview

#### (a). Introduction

6.01 An international arbitration may be conducted in many different ways; there are few fixed rules. Institutional and ad hoc rules of arbitration often provide an outline of the various steps to be taken, but detailed regulation of the procedure to be followed is established either by agreement of the parties, or by directions from the arbitrator, or a combination of the two. The flexibility that this confers on the arbitration process is one of the reasons why parties choose international arbitration over other forms of dispute resolution in international trade. The only certainty is that the parties' counsel should not bring with them the rulebooks from their home courts: the rules of civil procedure that govern proceedings in national courts have no place in arbitrations unless the parties expressly agree to adopt them.

6.02 In general, an arbitrator must conduct the arbitration in accordance with the procedure agreed by the parties. If it fails to do so, the award may be set aside, or refused recognition and enforcement.<sup>(1)</sup> However, the freedom of the parties to dictate the procedure to be followed in an international arbitration is not unrestricted. The procedure that they establish must comply with any mandatory rules<sup>(2)</sup> and public policy requirements of the law of the jurisdiction seat of the arbitration.<sup>(3)</sup> It must also take into account the provisions of the international conventions on arbitration, which aim to ensure that arbitrations are conducted fairly.<sup>(4)</sup> Accordingly, a balance must be struck between the parties' wishes concerning the procedure to be followed and any overriding requirements of the legal regime that governs the arbitration.

6.03 In some respects, an international arbitration is like a ship. An arbitration may be said to be 'owned' by the parties, just as a ship is owned by its owners. But the ship is under the day-to-day command of the captain, to whom the owners hand control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone on board who is in command<sup>(5)</sup> and, behind the captain, there will always be someone with ultimate control.

6.04 At the beginning of an international arbitration, the parties are firmly in control of the process. In ad hoc arbitration, in which there is no institution involved, they may – and sometimes do – write a complete set of procedural rules to govern the way in which the proceedings are to be handled. When they subsequently appoint an arbitrator, by whatever method they have agreed, that arbitrator is constrained by that agreed procedural framework. In institutional arbitration, the procedural framework is provided by the institution's rules, to which the parties agreed when they signed the arbitration agreement and which they put into effect when they referred the resolution of disputes between them to the rules of the institution concerned.

6.05 When the arbitrator is established, day-to-day control of the proceedings begins to pass to the arbitrator. However, the transfer of control is not total and is not immediate. The arbitrator usually engages in a dialogue with the parties on procedural matters, and often a first procedural order is issued to design the essential elements of the process and the timetable with which each stage is to take place.

6.06 Many arbitrators make considerable efforts, often adopting compromises in the process, to enable 'Procedural Order No. 1' to carry the subheading 'By Consent'. However, whether or not the procedural order is made by consent, once it is made the procedure will acquire a desirable degree of predictability and authenticity. The arbitrator will be more firmly in control, to ensure that the procedural steps are completed on time, and will have a firm basis for determining the most relevant procedural issues that will arise between the parties as the arbitration moves forward.<sup>(6)</sup> By the time of the witness hearings, the arbitrator is fully in command (in the sense of being captain of the ship); in any event, by that stage the parties usually find it easier to ask the arbitrator for directions on disputed procedural issues than to attempt to reach agreement between themselves.

### Jurisdiction

#### Source

► Chapter 6. Conduct of the Proceedings in Nigel Blackaby, Constantine Partasides et al., Redfern and Hunter on International Arbitration (Sixth Edition) 6th edition (© Kluwer Law International, Oxford University Press 2015) pp 353–414

**(b). Party autonomy**

6.07 Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitration institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law. The legislative history of the Model Law shows that the principle was adopted without opposition,<sup>(7)</sup> and Article 19(1) of the Model Law itself provides that: 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' This principle flows from Article 2 of the 1923 Geneva Protocol, which provides that '[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties ...', and Article V(1)(d) of the New York Convention, under which recognition and enforcement of a foreign arbitral award may be refused if the arbitral procedure was not in accordance with the agreement of the parties'.

6.08 Article 19 of the Arbitration Rules of the International Chamber of Commerce (ICC) historically, a champion of the principle of autonomy of the parties provides:

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

Adopting a similar approach, Article 14(2) of the Rules of the London Court of International Arbitration (LCIA) states that: 'The parties may agree on joint proposals for the conduct of the arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal ...' In the field of investor-state arbitrations, the International Centre for Settlement of Investment Disputes (ICSID) adopts a similar approach, its Arbitration Rule 20(1) requiring that, '[a]s early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure'.

**(c). Limitations on party autonomy**

6.09 In the exercise of their autonomous authority, the parties may confer upon the arbitral tribunal such powers and duties as they consider appropriate to the specific case. They may choose formal or informal methods of conducting the arbitration, adversarial or inquisitorial procedures, documentary or oral methods of presenting evidence, and so forth. The exercise of this autonomy is, however, limited by certain requirements that may be categorized under the following headings.

**(i). Equal treatment**

6.10 If party autonomy is the first principle to be applied in relation to procedure in international arbitration, equality of treatment is the second and this of equal importance. This principle is given express recognition both in the New York Convention<sup>(8)</sup> and in the Model Law, Article 18 of which states: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'

6.11 The concept of treating the parties with equality is fundamental in adversarial systems of civil justice. The provisions in the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) to the effect that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate<sup>(9)</sup> is qualified by the proviso that it must treat the parties with equality. The same concept underlies other sets of arbitration rules.<sup>(10)</sup>

6.12 The requirement that the parties must be treated with equality thus operates as a limitation on party autonomy. For instance, a provision in a submission agreement that only one party should be heard by the arbitral tribunal might well be treated as invalid (for example by an enforcement court) even if both parties originally agreed to it. The UNCITRAL Secretariat recognized the dilemma in the report that led to the Model Law:

[I]t will be one of the more delicate and complex problems of the preparation of a model law to strike a balance between the interest of the parties to freely determine the procedure to be followed and the

**(ii). Public policy**

6.13 The parties must not purport to confer powers upon an arbitrator that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held. One important mandatory rule that has already been considered requires that each party should be given a fair hearing or, as the Model Law expresses it, a 'full opportunity of presenting his case'.

6.14 At first sight, the word 'full' can be misleading: it conjures up visions of a party having an entitlement to present as much argument and evidence as it sees fit. But, in this context, the word 'full' must be given a sensible meaning, and in practice it seems unlikely that a national court would set aside an award where the arbitrator took a clearly reasonable and proportionate approach to limiting the scope of the evidence that a party wished to present. Confirming this, most sets of modern arbitration rules now expressly provide that a party need be given only a 'reasonable' opportunity to present its case', which should encourage arbitrators to balance opportunity with efficiency in determining appropriate arbitration procedures.<sup>(12)</sup>

6.15 Any agreement between the parties purporting to confer power on the arbitrator to perform an act that would be contrary to a mandatory rule (or to the public policy) of the country in which the arbitration is taking place would be unenforceable in that country, at least to the extent of the offending provisions. So would any provisions that purports to give the arbitrator power to perform an act that is not capable of being performed by arbitrators under the law applicable to the arbitration agreement, or under the law of the seat of arbitration.<sup>(13)</sup>

**(iii). Arbitration rules**

6.16 Limitations may also be introduced by the operation of the arbitration rules chosen by the parties. Such rules usually contain few mandatory provisions in relation to the conduct of the proceedings. For example, the UNCITRAL Rules specify on the following:

- under Article 17(1), the parties must be treated with equality and, at an appropriate stage of the proceedings, each party must be given a reasonable opportunity of presenting its case;
- under Article 17(3), the arbitrator must hold a hearing if either party requests one at an appropriate stage of the proceedings;
- under Articles 20 and 21, there must be one consecutive exchange of written submissions (a 'statement of claim' and a 'statement of defence'); and
- under Article 29(5), if the arbitrator appoints an expert, it may give the parties the opportunity to question that expert at a hearing and the parties must be given an opportunity to present their own expert witnesses on the points at issue.

**(iv). Third parties**

6.17 The parties may not validly agree to confer powers on an arbitrator that directly affect persons who are not parties to the arbitration agreement, unless a special provision of the applicable law enables them to do so. This is rare.<sup>(14)</sup> This principle applies to matters of substance, as well as procedure. For example, an arbitrator cannot direct a person who is not a party to the arbitration agreement to pay a sum of money or to perform a particular act.

6.18 Concerning procedural matters, an arbitrator may direct the parties to produce documents, to attend hearings, or to submit to examination but it usually has no power to compel third parties to do so, even if the parties to the arbitration have purported to confer such a power on the arbitrator. The participation of third parties in arbitration proceedings, whether by giving evidence or producing documents, may usually be compelled on by invoking the assistance of a national court of competent jurisdiction.<sup>(15)</sup>

**(d). International practice**

6.19 There is no universally recognised comprehensive set of detailed procedural rules governing international arbitrations. As described in Chapter 1, each arbitrator is different, each

dispute is different, and each case deserves to be treated differently. But there are basic underlying structures, but on three elements: first, the international conventions (and the Model Law), to which reference has been made; secondly, the various established sets of international arbitration rules; and thirdly, the practice of experienced arbitrators and counsel.

6.20 The international conventions and the Model Law do not prescribe the way in which an international arbitration should be conducted, but merely establish general principles intended to ensure a fair procedure and an award that is enforceable both nationally and internationally.

6.21 Even the established sets of international rules – such as those of the ICC, the International Centre for Dispute Resolution (ICDR), and the LCIA and, for ad hoc arbitrations, those of UNCITRAL – do not describe in any detail the way in which an international arbitration should be conducted. This means that, in practice, it is for the arbitrator and the parties to work together to establish procedures suitable to the circumstances of the particular case. Indeed, as many sets of arbitration rules now expressly provide, the arbitrator and the parties have a positive duty to design the procedure so that it provides a fair, expeditious, and cost-effective means for the resolution of the matters in dispute.<sup>(16)</sup> In doing so, the arbitrator and the parties should consider, and find answers to, a series of practical questions, such as the following.

- Is a confidentiality agreement required?
- Is this a case in which it would be helpful for the arbitrator to determine preliminary issues, and if so, what type of issue(s)?
- If, as is usual, there are to be written submissions, should they be exchanged sequentially or simultaneously?
- How is the production of documentary evidence to be handled?
- How is the evidence of witnesses to be presented? Are there to be written witness statements and reply statements, and if so, are there any special considerations to take into account, other than the timing of such statements?
- Is an oral hearing necessary, and if so, how long does it need to be in light of the parties' written submissions and evidence?
- Should there be a pre-hearing conference (if one is not prescribed by the rules adopted by the parties), and if so, at what stage of the proceedings?
- How much time should be reserved for the witness hearing, and when is it likely to be possible to fix dates and make the necessary bookings of hearing rooms, breakout rooms, court reporters, and so forth?

These are all important practical questions that are discussed in this chapter. First, however, it is useful to consider the way in which the procedural 'shape' of an international arbitration differs from that of a civil dispute resolution in national courts.

#### ***(e). Procedural structure of a typical international arbitration***

6.22 Two elements in particular distinguish the procedural shape of an international arbitration from a civil dispute resolution procedure in national courts. The first is that, unlike judges, it would be unusual for a lot of the arbitrators to be resident at the seat of the arbitration. This means that it is difficult to convene a hearing, or procedural meeting, at short notice and at relatively low cost.

#### **Figure 6.1 Initial written submissions (request for arbitration/notice of arbitration, a answer/response, and reply)**

a A request' (in the United States, sometimes described as a demand for arbitration) is delivered to the institution in an institution arbitration; a notice is delivered to the opposing party in ad hoc arbitrations, e.g. under the UNCITRAL Rules.

6.23 The second element is that time spent at hearings is premium time in terms of cost to the parties. Not only is each day for which the arbitrator sits in session extraordinarily costly, but the longer the arbitrators and the parties' counsel are expected to spend together, the more difficult it will be to find a date (or dates) on which a concerned can be assembled.

6.24 The result is that, in formulating a first procedural order,<sup>(17)</sup> arbitrator and parties routinely try to ensure that the procedure is able to keep to a minimum in-person meetings prior to the witness hearing. While there are many different variations and emphasising that a 'standard form' procedure should never replace the designed process that is the essence of arbitration procedure – a typical modern

international arbitration usually proceed along a path such as that illustrated in Figure 6.1.

6.25 This chapter is concerned with the stages that take place after the arbitration tribunal has been established until the proceedings are closed by the arbitration tribunal following delivery of the parties' last submissions. Starting the arbitration and establishing the arbitration tribunal have been covered earlier in this volume;<sup>(18)</sup> the award, and proceedings after the award, are covered later.<sup>(19)</sup>

## **B. Expedited Procedures**

### **(a). Introduction**

6.26 Before turning to the various procedural steps that are normally followed in an international arbitration, brief considerations given to the procedural options available for expedited determinations. Expedited dispute resolution processes are not a recent development. Brief procedures were, for instance, known in Venice between the twelfth and sixteenth centuries, in which decisions were rendered within very short time frames.<sup>(20)</sup>

6.27 Nevertheless, in recent years, there has been a growing sense of frustration among businessmen involved in international commerce, because of the lengthy delays involved in obtaining the hoped-for promised award of the arbitration tribunal's award. A few solutions have emerged that deserve mention.<sup>(21)</sup>

### **(b). Expedited formation**

#### **(i). Emergency arbitrator procedures**

6.28 As described in more detail in Chapter 4, emergency arbitrator procedures have become a common feature of the main institutional arbitration rules.<sup>(22)</sup> These procedures provide parties with a means of obtaining interim relief from an emergency arbitrator appointed on an expedited basis (usually within one or two business days) prior to the constitution of the arbitration tribunal, providing an alternative to seeking relief before the national courts. Under some rules, an emergency arbitrator can be appointed before the notice of arbitration is filed<sup>(23)</sup> and can hear applications *ex parte*.<sup>(24)</sup>

#### **(ii). Expedited formation of the arbitral tribunal**

6.29 The LCIA Rules provide that, in cases of exceptional urgency, a party may apply to the LCIA Court for the expedited formation of an arbitration tribunal.<sup>(25)</sup> The application must be made in writing to the LCIA Court, with copies sent to a other parties to the arbitration, and must set out the specific grounds for the exceptional urgency in the formation of the arbitration tribunal. For obvious reasons, this usually the claimant who requests expedited formation.<sup>(26)</sup>

6.30 The LCIA Court has discretion to shorten the time limits for the formation of the arbitration tribunal. There have been a few cases in which the time limit has been significantly abridged and one case in which a sole arbitrator was appointed within 48 hours of receipt of the request for arbitration.<sup>(27)</sup>

6.31 Amongst more recent entrants into the arbitration field, the Dubai International Arbitration Centre (DIAC) has adopted a similar approach to expedited formation of the arbitration tribunal.<sup>(28)</sup> Nevertheless, examples of such expedited formation remain few and far between, with the criterion of 'exceptional urgency' interpreted and applied strictly.

### **(c). Fast-track procedures**

6.32 Following the constitution of the arbitration tribunal, expedited can be achieved by the adoption of 'fast-track' procedures, either by means of simplified procedures available under certain arbitration rules, or by the tribunal exercising its discretion to abridge time limits.

6.33 Arbitrations can be put on a 'fast track' by adopting simplified procedures and avoiding some of the procedural excesses of modern arbitration practice. Several institutional rules have developed rules for the faster resolution of disputes by means of a simplified procedure.<sup>(29)</sup> As might be expected, the rules differ from one institution to another, but the Swiss Rules serve as a good example of how the procedure can work significantly to reduce the duration of an average arbitration. Under these Rules:

- a sole arbitrator is appointed, unless the arbitration agreement otherwise provides and the parties are unable to agree to the appointment of a sole arbitrator;
- written pleadings are limited to a statement of case, a defence, and (if applicable) a counterclaim and reply;
- unless the parties agree to a documents-only arbitration, a single hearing is held for the examination of witnesses and experts, and for oral argument; and
- the award is made within six months of the date of the transmission of the file to the arbitrator, which states the arbitrator's reasons in summary form (or does not give reasons at all if the parties so agree).

It is noteworthy that, while this procedure is mandatory for cases in which the total amount in dispute does not exceed C\$1 million,<sup>(30)</sup> it is available for disputes of a greater amount if the parties so agree. Such processes offer hope for parties who wish to avoid the delay and cost involved in a traditional international arbitration process.<sup>(31)</sup>

6.34 A notable example of a fast-track arbitration under standard arbitration rules involved the fast world of Formula One (F1) motor racing.<sup>(32)</sup> At the time that the dispute arose, the first grand prix of the season was traditionally held in Melbourne in March. In preparation for the race, teams shipped their cars from Europe in mid-February. At the end of one season, in the mid-1990s, one team fell into dispute with the Fédération Internationale de l'Automobile (FIA), headquartered in Paris, which regulates the F1 championship in accordance with a comprehensive set of rules. The team in question, which was sponsored by a tobacco company, wished to paint one of its cars in the colours of one of its brands of cigarettes and the other, in theivery of another of its brands. The FIA objected, on the grounds that the championship is a team event, and insisted that all cars from the same team must be painted in identical colours. The constitution of the FIA, to which every team must sign up when entering the championship, contained an ICC arbitration clause.

6.35 By Christmas Eve in the year in question, it became apparent that a resolution of the dispute would not be achieved by negotiation. The team and the FIA agreed that they would submit to a 'fast-track' ICC arbitration with a view to obtaining a final decision by the end of January, so that the cars could be painted and shipped in time to reach Australia by the end of February.

6.36 The F1 team filed a request for arbitration with the ICC between Christmas Day and New Year's Eve. A three-member arbitration tribunal was appointed on New Year's Day. The tribunal quickly drafted terms of reference on the same day, which concerned signed within two more days. A sequential exchange of 'memoranda', to which the parties attached the documents on which they relied, then took place at seven-day intervals, followed by a simultaneous exchange of written witness statements within a few more days. A handful of disputed document requests were resolved by prompt procedural orders from the tribunal and an eight-hour witness hearing took place on the last Saturday of January. The tribunal deliberated on the Sunday, and sent its final award to the ICC Court for scrutiny by fax and courier at midnight the next day (Monday), together with separate signed, but undated, signature pages.

6.37 The award was approved at an emergency session of the ICC Court the same afternoon, and the decision was notified to the parties by fax and overnight courier on the same day. The parties received the fully reasoned award on the last day of January, one month precisely from the day on which the tribunal was appointed, and the cars were painted and shipped to Australia in good time for the first grand prix race of the season.<sup>(33)</sup> This case demonstrates what speed can be achieved (even before a grand prix begins) when the parties have a joint wish to obtain early resolution, and the arbitration tribunal is disposed and available to act on that wish.<sup>(34)</sup>

#### ***(d). Early, or summary, determinations***

6.38 An alternative to 'fast-track' procedures is early, or summary, determination. This involves the early determination of one or more claims or defences, upon application by a party or on the tribunal's own initiative, on the basis that the claim or defence in question has no prospect of success.<sup>(35)</sup>

6.39 Such procedures remain uncommon in international arbitration and very few arbitration rules provide for them expressly. Rule 41(5) of the ICSID Arbitration Rules is one such exception, and permits a party to raise a preliminary objection that a claim is manifestly without merit.<sup>(36)</sup>



6.40 In the absence of specific provisions contemplating early disposition or the agreement of the parties, the use of summary procedures are believed by some to introduce due process' risk at the enforcement stage of proceedings.<sup>(37)</sup> How consistent are such procedures, so the question goes, with the requirement to provide a party with a reasonable opportunity to be heard? While such a question is perhaps understandable (particularly when considering the approach to enforcement taken by some national courts), a summary procedure need not prejudice the reasonable opportunity to be heard. Moreover, approached with prudence, such procedures can, in the right circumstances, be entirely consistent with an arbitrator's duty to adopt procedures that avoid unnecessary delay or expense.

### **C. Preliminary Steps**

#### **(a). Introduction**

##### **(i). Preliminary meetings**

6.41 Preliminary meetings at a very early stage of a dispute process are not customary in some countries. Nevertheless, especially where the parties and the representatives come from different legal systems or different cultural backgrounds, it is sensible for the tribunal to convene a meeting with the parties as early as possible in the proceedings. This ensures that the arbitrator and the parties have a common understanding of how the arbitration is to be conducted, and enables a carefully designed framework for the conduct of the arbitration to be established.<sup>(38)</sup> In modern times, this common practice for preliminary meetings to be conducted by teleconference or video conference. This saves the costs inevitably incurred when one (or more) of the arbitrators or counsel has to travel across national boundaries, even across oceans, in order to be present in person. However, there is no real substitute for all of the players coming together in one room as soon as possible after the arbitration has started.

6.42 Some institutional rules now provide expressly for the convening of a preliminary meeting,<sup>(39)</sup> or 'case management conference',<sup>(40)</sup> whilst others provide for such a meeting to be convened at the discretion of the tribunal.<sup>(41)</sup>

6.43 In practice, a preliminary meeting proceeds through various stages. The members of the arbitration tribunal usually arrange to meet privately, before meeting the parties. This is partly to effect introductions and partly to discuss provisional views as to the organization of the arbitration.

6.44 Similarly, substantial benefits may be gained if the representatives of the parties have an opportunity to interact before attending the preliminary meeting with the arbitration tribunal. This is particularly important in ad hoc arbitrations, since matters such as the fees and expenses of the arbitrators are normally dealt with at this stage. To avoid embarrassment, in ad hoc arbitrations, it is important that the representatives of the parties should be able to present an agreed position to the arbitration tribunal on the question of the arbitrators' fees and expenses.

##### **(ii). Representation at preliminary meetings**

6.45 In order to obtain the maximum benefit from a preliminary meeting with the arbitration tribunal, each party should be represented by persons with sufficient authority and knowledge of the case to take on the spot' decisions, both in discussion with the other party's representatives and during the course of the meeting with the arbitration tribunal itself. This means that it is usually necessary for the leader of each party's team of lawyers, as well as a person with appropriate executive authority from the client itself, to attend. It is common practice, particularly where a government is involved, for an 'agent' to be nominated.<sup>(42)</sup> The agent is the person to whom both the arbitration tribunal and the other party are entitled to address communications, and from whom they may seek an authoritative statement on behalf of the government concerned.

##### **(iii). Items to be covered at preliminary meetings**

6.46 The agenda items to be addressed at a preliminary meeting depend partly on the law governing the arbitration (for example, in some jurisdictions, it may be necessary to establish a submission on agreement)<sup>(43)</sup> and partly on whether the parties have already subjected the arbitration to a set of international or institutional

rules, either for administered or for non-administered arbitration. If the arbitration is subject to the rules of one of the major international arbitration institutions, it will not be necessary, for example, for the parties to deal directly with the arbitrators in connection with the tribunal's fees, which will be handled by the institution concerned.

6.47 Whether an arbitration is ad hoc or institutional, the procedure and schedule for the following items will usually be addressed during a preliminary meeting:<sup>(44)</sup>

- preliminary issues such as jurisdictional objections, interim relief applications, and/or bifurcation;
- written submissions including number of rounds, the timing, structure, and length, and whether they are to be accompanied by documentary and witness evidence;
- document production;
- witnesses including the number, the timing of submissions of witness statements or expert reports, and any use of tribunal-appointed experts;
- the pre-hearing conference including the venue and timing;
- the evidentiary hearing including its venue and timing; and
- other procedural and administrative matters such as the role of the IBA Rules on the Taking of Evidence in International Arbitration, the chairman's power to make procedural orders alone, the appointment of an arbitrator secretary, and the means of communication with the tribunal.

**(iv). 'Time out'**

6.48 As mentioned in the last section, private meetings of the arbitrator-tribunal and between the parties themselves may take place before the main case management meeting of the arbitrator-tribunal and the parties. Indeed, this is not uncommon for the main meeting to be adjourned, or even for there to be several short adjournments, while the arbitrators confer in private (or 'caucus', as lawyers sometimes describe it). This also gives the parties' representatives an opportunity for further private discussions. In this way, and with the guidance of the arbitrator-tribunal, the parties may be able to agree on the basic framework and organization of the proceedings.

6.49 Arbitrator-tribunals usually prefer to avoid making rulings on disputed procedural matters in the early stages of the arbitration. Where there is disagreement between the parties, arbitrators often suggest compromise solutions. This appears to derive from the complexities of tribunal psychology,<sup>(45)</sup> as a result of which individual members of the arbitrator-tribunal (and particularly the presiding arbitrator) are reluctant to make rulings at the start of the arbitration that one of the parties may regard (however unjustifiably) as amounting to unfair treatment.

6.50 Nevertheless, if, at the end of a case management meeting, there are still matters outstanding upon which the parties are unable to agree, the arbitrator-tribunal must make a decision. Sometimes, this is done immediately; sometimes, it is reserved and notified to the parties later. It is unusual for a preliminary meeting to extend beyond one day, as a maximum, and it may well be dispensed of within half a day or less. This means that, with careful planning, it is sometimes possible to hold a preliminary meeting without the need for any of the participants to make an overnight stay in a hotel unless international travel is involved.

**(v). UNCITRAL Notes on Organizing Arbitral Proceedings**

6.51 It may be useful, at the beginning of an arbitration, for the parties to consult the UNCITRAL Notes on Organizing Arbitral Proceedings.<sup>(46)</sup> These Notes provide a list of matters that the parties and the tribunal may wish to consider in establishing the procedural rules for the arbitration. Some of these matters such as establishing the language of the arbitration may be thought to be fairly obvious; others are more helpful, including arrangements to protect the confidentiality of proprietary information, arrangements for the exchange of memoranda and other written submissions, means of communication between the parties (including the extent to which email, fax, or other electronic forms of communication should be used), and so forth.

**(vi). 'Procedural Order No. 1'**

6.52 Many experienced international arbitrators have their own model forms of procedural orders. These are sent to the parties' counsel as a first step towards discussing and agreeing the terms of

the first procedural order, which will establish an overall procedural scheme for the arbitration in question. Such a procedural order will usually include dates (or time limits) for the delivery of memoranda, and for the production of documents, witness statements, and expert reports. It may also contain provisions for a witness hearing. A procedural order of this type serves as a useful guide not only to the parties and to the tribunal in discussing what is required for the actual arbitration with which they are concerned. However, there is a risk that the use of such 'model forms', which often go into a considerable degree of detail, may result in the tribunal members adopting rigid procedures that are not appropriately tailored to the particular dispute in question. Indeed, an automatic (one might say 'lazy') reliance on procedures devised for other arbitrations may lead to a failure to acquire a proper understanding of the case and a consequent failure to deliver on the key procedural promise of arbitration – namely, tailor-made efficiency.

**(b). Preliminary issues**

6.53 One of the elements that may emerge from the answers to such a question are 'whether or not there are some issues that should be decided as 'preliminary issues' or 'separate issues'. Apart from jurisdictional issues,<sup>(47)</sup> other questions may arise that either should be determined as preliminary issues before the arbitration tribunal considers the substance of the claims or, alternatively, may be dealt with more conveniently at an early stage as separate issues, in order to facilitate the efficient and economical conduct of the proceedings.

**(i). 'Bifurcation' of liability and quantum**

6.54 A question that often arises is whether or not issues of liability and quantum should be dealt with separately. In many modern disputes arising out of international trade, particularly in relation to construction projects or intellectual property disputes, the quantification of claims is a major exercise. It may involve both the parties and the arbitration tribunal in considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitration tribunal, or both. In such cases, it may involve savings in costs and overall efficiency if the arbitration tribunal determines questions of liability first. In this way, the parties avoid the expense and time involved in submitting evidence and argument on detailed aspects of quantification that may turn out to be irrelevant following the arbitration tribunal's decision on liability.<sup>(48)</sup>

6.55 There are sometimes clear arguments in favour of separating issues of liability from issues of quantum in a large and complex case. For example, a claimant may have suffered a substantial loss (including loss of profit) as a result of the breakdown or failure of an important piece of plant or equipment. The claimant may seek to recover this loss by way of arbitration proceedings against a respondent responsible for the manufacture and/or installation of the equipment. In its defence, the respondent may allege, first, that it is instead a supplier who is liable for any breakdown or failure in the plant or equipment supplied, secondly, that liability is limited under the terms of the contract to a sum much smaller than the amount claimed, and, thirdly, that, in any event, some of the losses claimed (such as loss of profit) are irrecoverable (because of the conditions of contract) and others are not fully recoverable, because they have been quantified on the wrong basis.

6.56 This is a common situation in international disputes, with the respondent putting forward a succession of defences, any one of which, if successful, may limit or even defeat the claim. How should an arbitration tribunal deal with such a situation?

6.57 There are various possibilities. First, the tribunal might decide to hear the general argument as to the effect of the claimant's liability on the basis that if the claim is found to be effective, the respondent may pay the limited amount stated in the claim and the case will then be concluded.

6.58 At first sight, this seems to be an attractive option for both parties. There is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a single point as a preliminary issue. It may emerge, however, that the correct legal interpretation to be put upon the claimant's claims, or purports to limit, liability depends on the facts and that, in order to ascertain and understand the factual situation, it is necessary to enquire fully into all of the circumstances of the case, with the assistance of both fact and expert witnesses on each side. Thus the findings of the arbitration tribunal on the legal issue might be so dependent on its findings on the factual issues as to make it difficult (and indeed undesirable) to

disentangle them. In this event, it would be appropriate for the arbitral tribunal to investigate the relevant facts rather than to attempt to deal with the legal issue in isolation.

6.59 Although, in practice, issues of liability and quantum may, from time to time, prove to be next-cably interwoven, it is sometimes possible to see a broad division between them. It is also sometimes possible to determine the principles on which damages should be awarded, while leaving the pure arithmetic calculations to a second stage.

**(ii). Separation of other issues**

6.60 It is rarer for an arbitral tribunal to separate issues where there is no clear dividing line. To say, in effect, there are only a limited number of issues on which we wish to hear evidence and argument from the parties, and these are as follows'. This course should not be attempted lightly. Before an arbitral tribunal can safely isolate some of the issues for its attention, it must be satisfied that it has been adequately informed of all of the issues that are relevant or likely to be relevant to its decision. This stage is not likely to be reached until the written phase of the proceedings is under way. Where, however, an arbitral tribunal is satisfied that it has been adequately briefed on all of the issues and that the time has come for it to take the initiative in this way, the effect can be dramatic in terms of saving both time and money.

6.61 The *Aminoil* arbitral award provides a classic example.<sup>(49)</sup> Many hundreds of millions of dollars were at stake, depending upon whether the Kuwait government's act of nationalisation was unlawful (as claimed by Aminoil), thereby giving rise to the possibility of an award of damages on a full indemnity basis, which would have a punitive effect, or lawful (as the government claimed), and thus susceptible to resolution by the payment of fair compensation.

6.62 At the close of the written stage of the proceedings, the arbitral tribunal convened a meeting with the parties and the referee to consider various procedural matters relating to the forthcoming oral hearings. Following this meeting, the arbitral tribunal made an order fixing the hearing date in Paris and specifying, amongst other things, seven specific issues that the parties should address, the order in which they would be taken, and which side should speak first on each issue. This is how the hearing was conducted and there is no doubt that this intervention by the arbitral tribunal led to a significant saving in time and money for both parties, and, in the end, to an outcome that both parties regarded as fair.<sup>(50)</sup>

6.63 At that time, in the early 1980s, it was relatively rare for an arbitral tribunal to take control of the proceedings in this way.<sup>(51)</sup> However, since then, international arbitrations have become more complex and costly. As both arbitral tribunals and practitioners search for quicker and more cost-effective ways of handling disputes, it seems essential that arbitrators should seek to direct the conduct of arbitrations from an early stage and, in particular, that they should seek to cut through the fog in order to reach the root issues as quickly as possible. Although, like the showowner mentioned earlier,<sup>(52)</sup> the parties can agree to dismiss the arbitrators if they jointly lose confidence in them, it is no longer appropriate for arbitrators to sit passively behind the tables and say to themselves, this is clearly the wrong way of conducting this case, but the parties have agreed to do it, so we go along with it.<sup>(53)</sup>

6.64 To this end, one experienced arbitrator has advocated the introduction of an early hearing for opening arguments and initial exchanges with the tribunal on the merits prior to the evidentiary hearing.<sup>(54)</sup> This is to be welcomed: such early substantive case review conferences would permit an arbitral tribunal to be actively involved in the streamlining of procedures to focus on those issues and evidence that will be material to the outcome of the case. The timing of such a case review conference would be key. It cannot happen too early, for example at the first case management conference, because at that stage arbitrators and even counsel are often not endowed with sufficient information about the case to reach informed decisions about the most efficient procedure to be followed. In the same way, such a case review conference should not happen too late in the process, because that would defeat the purpose. Timed well, such early substantive engagement by the tribunal can be very effective in fulfilling an arbitrator's promise as a ordered and efficient process.

**D. Written Submissions**

**(a). Introduction**

6.65 In ad hoc international arbitration, when the procedure to be followed has been established, the first step taken in almost all cases is an exchange between the parties of some form of written submission.

6.66 The immediate purposes of the parties' initial statements are to facilitate the appointment of the arbitrator, to guide the institution or the arbitrator in establishing the amount of the deposit to be paid by the parties to secure the costs of the arbitration, to enable the arbitrator to identify the issues that arise for determination, and to make appropriate procedural orders for the next steps. In nearly all cases of any substance, however, the arbitrator orders the exchange of further, further written pleadings, as well as an appropriate level of evidence gathering, before the oral stage of proceedings is reached.

6.67 The LCIA Rules provide that, after the parties have delivered the request for arbitration and response, written pleadings consist of a 'statement of case', 'statement of defence', and 'statement of reply' (and further equivalent written pleadings in the event of a counterclaim, referred to as a 'cross-claim') follow each other with certain time limits. It is clear from these Rules that (subject to any contrary agreement of the parties or directions from the arbitrator) the written statements are intended, in principle, to be the only pre-hearing written submissions in the arbitration.<sup>(55)</sup>

6.68 The ICDR Rules provide for the exchange of initial statements of claim and defence,<sup>(56)</sup> and state that the arbitrator may decide whether the parties shall present any written statements in addition.<sup>(57)</sup> The Swiss Rules adopt a similar approach, and also require a party's statement to be accompanied by all documents and other evidence on which it relies.<sup>(58)</sup>

6.69 The ICSID Arbitration Rules entitle the documents that are to be filed by the parties as a 'memorandum' and a 'counter-memorandum', if necessary, by a reply and a rejoinder. These Rules also allow for simultaneous exchange of written submissions, if the request for arbitration was made jointly.<sup>(59)</sup> The Rules provide that a memorandum should contain a statement of the relevant facts, a statement of law, and submissions, and that the counter-memorandum, reply, or rejoinder should respond to these statements and submissions, and add any additional facts, statements of law, or submissions of its own.<sup>(60)</sup> The Explanatory Note states that the scope of these pleadings represents:

... an adaptation of common law practice to the procedure of the civil law. These provisions, tested by international arbitration practice, are designed to prevent procedural arguments concerning the scope of pleadings, even if the parties have differing legal backgrounds. Where, however, the parties share a common experience with an identical or similar system of procedure, they may agree on different contents and functions for the pleadings.<sup>(61)</sup>

6.70 Written pleadings are usually exchanged sequentially, so that the claimant files the first shot, the statement of claim, and the respondent answers with the statement of defence (and counterclaim, if any). Except occasionally, however, the arbitrator may direct that the parties should submit their written pleadings simultaneously, so that each party delivers a written submission of its claims against the other on a set date, and then, on a subsequent date, the parties exchange their written answers and so forth. Whilst simultaneous exchanges can reduce the overall duration of the written phase, they are more likely to lead to the arbitration equivalent of 'shuttle passes' in the night'. For this reason, simultaneous exchange remains less common than sequential exchange for pre-hearing submissions.<sup>(62)</sup>

**(b). Terminology**

6.71 Many different expressions are used to describe written submissions. Examples are 'statement of claim', 'statement of case', 'memorandum', and 'points of claim'. These tend to correspond to expressions such as 'statement of defence', 'statement of reply', 'counter-memorandum', and so forth, with 'reply', 'rejoinder', 'reply', 'duplication', and similar phrases being used for additional rounds of written submissions.

6.72 The different expressions used to describe written submissions are not wholly interchangeable and none are capable of precise definition. In general, it may be said that the term 'points of

claimant's claim is a relatively short document, the primary purpose of which is to define the issues and state the facts upon which the claimant's claims are founded. By contrast, the express oral statement of claim and memoranda typically comprise a more comprehensive documentary submission, intended to include argument relating to the legal issues, as well as incorporating (in annexes or appendices) the documentary evidence relied upon and the written testimony of witnesses, together with any experts' reports on matters of opinion.

**(c). Time and length limits**

6.73 The practice of arbitrators varies greatly. Sometimes, arbitrators will fix time limits for the submission of written pleadings that are tacitly accepted from the beginning as being unrealistic and which serve merely as targets to make sure that the parties start their preparatory work without delay. Such arbitrators expect applications for extensions of time to be made and will grant them readily. Other arbitrators regard this approach as both artificial and inappropriate, and prefer to assess realistic time limits at an early stage, with the expectation that they will be observed. The second approach is more common and is to be preferred.<sup>(63)</sup>

6.74 There is no such thing as a standard time limit in international arbitration, although periods of up to three months between submissions are not uncommon. Arbitrators should recognise, however, that the longer the time limits, the lengthier the written submissions are likely to be. Whilst this might be considered a matter for the parties (who pay the arbitrators' resulting fees), a trend appears to be developing in international arbitration for the submission of exhaustive written submissions, which are heavy with hyperbole and repetition. Not only does this add considerably to the time and cost of proceedings, but it can hinder an arbitrator's understanding of a case. Increasingly, therefore, arbitrators are now considering the imposition of page limits on (at least some of) the parties' written submissions.<sup>(64)</sup>

**E. Collecting Evidence**

**(a). Introduction**

6.75 It is impossible to collect comprehensive and reliable statistics in relation to private international arbitrations, but it is reasonable to assume that the eventual outcomes in the majority of international arbitrations (perhaps 60-70 per cent) usually turn on the facts rather than on the application of the relevant principles of law. A good proportion of the remainder turn on a combination of facts and law, and only in a minority of cases is the outcome dependent solely on issues of law, with the underlying facts being undisputed or irrelevant.

6.76 It follows that fact-finding is one of the most significant functions of an arbitrator and this is a function that arbitrators take seriously. The relevant facts are determined by international arbitrators either following the presentation by the parties (usually via experienced counsel) of documentary and/or oral evidence, or by arbitrators making their own efforts, with the assistance of the parties, to ascertain the evidence that they consider necessary to establish the relevant facts.

**(i). Civil law and common law procedures**

6.77 In court procedures in most common law countries, the initiative for the collection and presentation of evidence is almost wholly in the hands of the parties. The judge acts as a kind of referee, to administer the applicable rules of evidence and to give a decision at the end on who has 'won' the argument in a combative sense. The judge listens to the evidence and may question the witnesses; in general, however, common law judges leave it to the parties to present their respective cases and then form a judgment on the basis of what the parties elect to present to the court. By contrast, in the courts of most civil law countries, the judge takes a far more active role in the conduct of the proceedings and in the collection of evidence, including the examination of witnesses.<sup>(65)</sup>

6.78 The impression given by these brief summaries of the two systems is that the differences are fundamental. Yet there is a considerable risk of overgeneralisation in drawing distinctions between the so-called common law and civil law systems. Each system has many variations. The rules of procedure in the United States are different from those in England, just as the German and French rules of procedure are different.

6.79 Emphasizing this point, a Swiss international arbitrator once stated:

... My first remark is that there is no such thing as *Civil Law procedure* in civil and commercial litigation. In Common Law countries, there are undoubtedly certain common basic principles of procedure, which go back to the procedure practiced in the English courts. In continental Europe, there is no such common origin. In each country, one finds a different blend of civil procedure, largely influenced by local custom, the legal education received by judges and by course, and, to a varied extent, by the influence of the procedure practiced in the ecclesiastical courts, although such courts were abolished in Protestant countries, at the time of the Reformation...

The result of this is that there is possibly as much difference between the outlook and practice of a French avocat and of a German Rechtsanwalt as between those of an English and of an Italian lawyer. The same applies within my own country, Switzerland, where civil and criminal procedure remain in the realm of the 26 sovereign States of the Confederation, thus leading to the existence of 26 different codes of civil or criminal procedure, plus a Civil Procedure Act for the Federal Supreme Court. There is as much difference between the type of civil procedure practiced in Geneva and that practiced in Zurich as between those featured in Madrid and Stockholm.

These differences are experienced daily in international arbitration, where they are sometimes the source of great difficulties. Certainly these difficulties are due, to a large extent, to the different patterns of civil procedure law, but, in my experience, to a far greater extent to the undisclosed assumptions and prejudices of municipal lawyers faced for the first time in the rves with a system of which they are not aware. Just to take a simple example, a common lawyer expects the claimant as a matter of course to have the last word at the end of the day, whereas a continental lawyer considers it a requirement of natural justice that the defendant should be the last to address the Court.<sup>(66)</sup>

6.80 Nevertheless, there is just enough uniformity in the general approach to questions concerning the presentation of evidence to justify using the expression 'civil law countries' by way of contrast to the 'common law countries' when discussing the presentation of evidence to international tribunals. Where there are differences between the two systems, they are most noticeable in the area of the procedures that lead to fact-finding. The most important elements include the following.

### **(ii). Admissibility**

6.81 In practice, tribunals composed of three experienced international arbitrators from different legal systems approach the question of the reception of evidence in a pragmatic way. Whether they are from common law or civil law countries, they tend to focus on establishing the facts necessary for the determination of the issues between the parties and are reluctant to be misled by technical rules of evidence that might prevent them from achieving their goal. This is especially so where the rules in question were originally designed for use in jury trials, centuries ago, at a time when many jurors were not able to read or write, so that it was necessary for documents to be read aloud at hearings.

6.82 It is essential for practitioners who have been raised in the common law tradition to appreciate this and to learn not to rely overly on technical rules concerning the admissibility of evidence during the course of the proceedings, particularly at witness hearings. Conversely, where a three arbitrators come from a common law background, practitioners from civil law countries should take care that their cases do not depend on proving facts that can be established only by means of the presentation of evidence that may be technically inadmissible under the system with which the members of the arbitration tribunal concerned are familiar.

6.83 Most international arbitration tribunals are hybrid, in the sense that they will comprise members with backgrounds in different systems of law. Where a non-hybrid arbitration tribunal is established,

the team of lawyers retained to represent each party should preferably include a member who is familiar with the approach to the presentation and reception of evidence that the arbitral tribunals use as a key to apply. This precaution should not be necessary where the arbitral tribunals are hybrid, because such tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the arbitral tribunals in establishing the facts, should they be disputed.<sup>(67)</sup>

**(iii). Burden of proof**

6.84 One question that often arises in an international arbitration is that of knowing which party has the responsibility for proving a particular allegation or set of allegations. The generally accepted answer is that the burden of proof of any particular factual allegation is upon that party which makes the allegation. This is recognised explicitly in Article 27(1) of the UNCITRAL Rules: 'Each party will have the burden of proving the facts relied on to support its claim or defence.' The UNCITRAL Rules then go on to make it clear that this burden of proof may be discharged by the evidence of witnesses, including expert witnesses, or by the production of documents, exhibits, or other evidence, or (of course) by a combination of the two. Further, there are some propositions that are so obvious that proof is not required.<sup>(68)</sup>

**(iv). Standard of proof**

6.85 The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the test of the 'balance of probability' (that is, more likely than not). This standard is to be distinguished from the concept of 'beyond a reasonable doubt' required, for example, in countries such as the United States and England to prove guilt in a criminal trial before a jury.<sup>(69)</sup>

6.86 The practice of arbitral tribunals in international arbitrations is to assess the weight to be given to the evidence presented in favour of any particular proposition by reference to the nature of the proposition to be proved. For example, if the weather at a particular airport on a particular day is an important element in the factual matrix, it is probably sufficient to produce a copy of a contemporary report from a reputable newspaper, rather than to engage a meteorological expert to advise the tribunal.

6.87 In general, the more starting the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established. A classic example of this general rule involves allegations of fraud or illegality. Whilst the standard will remain the 'balance of probabilities', an arbitral tribunal is likely to look even more closely at the evidence to determine whether such a standard has been adequately met. In the words of an English case heard in the (then) House of Lords:

The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Brinkhead explained in *In re H (Sexual Abuse: Standard of Proof) (Minors)* [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Asian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.<sup>(70)</sup>

6.88 In deciding what evidence to produce and the means by which it should be presented, the practitioner should therefore make an evaluation of the degree of proof that the tribunal is likely to require before being sufficiently satisfied to make the finding of fact that his or her clients seek.

**(b). Categories of evidence**

6.89 The evidence presented to arbitral tribunals on disputed issues of fact may be divided into four categories:

- (1) production of contemporaneous documents;



- (2) testimony of witnesses of fact (written and/or oral);
- (3) testimony of expert witnesses (written and/or oral); and
- (4) inspection of the subject matter of the dispute.

These methods may be used, or combined, in many different ways for the purpose of discharging the burden of proof to the standard required by an arbitral tribunal. It is important to recognize that each different arbitral tribunal may adopt a different approach not only to the manner in which it wishes the evidence to be presented, but also to the weight that it is willing to give to any particular type of evidence.

6.90 Modern international arbitral tribunals accord greater weight to the contents of contemporary documents than to oral testimony given, possibly years after the event, by witnesses who have obviously been prepared<sup>(71)</sup> by lawyers representing the parties. In international arbitrations, the best evidence that can be presented in relation to any issue of facts is almost invariably contained in the documents that came into existence at the time of the events giving rise to the dispute.<sup>(72)</sup>

6.91 Unsurprisingly, the evidence-gathering activity in international arbitrations usually takes place in the period after the facts in dispute have been identified, through the written submissions delivered by the parties, and before the witness hearings begin.

### ***(c). Documentary evidence***

6.92 The parties produce the documents on which they intend to rely at an early stage in an international arbitration. This is usually by way of the written submissions, which has the merit of placing the principal documents 'on the table' at the earliest practical moment.

6.93 The story becomes more complicated in the context of documents that the parties have not chosen to produce voluntarily. The phrase 'culture clash' is overused in the context of modern arbitration, but it often seems appropriate in the context of document production.

6.94 It is thus not unusual for US lawyers to come to hearings in European (and other) prominent arbitration venues carrying with them a belief in the entitlement to 'discovery'<sup>(73)</sup> of a certain document, or groups of documents. By contrast, in some civil law countries, it may be professionally malpractice for a lawyer to disclose such documents to the arbitral tribunal or to the opposing party.<sup>(74)</sup> The result can be that a huge amount of time and expense is incurred in dealing with disputes concerning document production.

### ***(i). IBA Rules on the Taking of Evidence in International Arbitration***

6.95 In the late 1990s, building on experience gained from the (not particularly successful) Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration that it had adopted in 1983, the International Bar Association (IBA) embarked on a project to produce a new more internationalised version. This project led to the 1999 edition, entitled the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which became a most universally recognised as the international standard for an effective, pragmatic, and relatively economically document production regime. Following a two-year review process that included a public consultation, a substantially revised version of the Rules (now titled the IBA Rules on the Taking of Evidence in International Arbitration<sup>(75)</sup>) was adopted by the IBA Council on 29 May 2010. The 2010 edition retains the general principles of the 1999 edition and also reflects new developments in arbitral practice in the intervening decade. The remainder of this section of the current chapter is therefore presented by reference to the principles and provisions contained in the 2010 edition.<sup>(76)</sup>

6.96 Article 3 of the IBA Rules deals with document production. Its main provisions are as follows:

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties a Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
  - (a) (i) a description of each requested Document sufficient to identify it, or
    - (i) a description sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specifics, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
  - (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
  - (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
    - (i) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, the Documents requested in its possession, custody or control as to which it makes no objection.

[...]

6.97 These provisions are admirably clear and self-explanatory. They establish the principle, referred to earlier, that the parties should produce the evidentiary documents on which they rely as the first stage. They make provisions for requests by each party to the other(s) for further documents, with appropriate limitations. The most significant limitation is the expression 'relevant to the case and material to its outcome' in Article 3(3)(b), which is considered further later in this chapter.<sup>(77)</sup>

6.98 Most legal practitioners are accustomed to the obligation to satisfy a court, or arbitral tribunal, as to the question of relevance of documents or other information that they are seeking from the opposing party. But the requirement of showing 'materiality' to the outcome of the case is an increased burden. It also enables arbitral tribunals to deny document requests where, although the requested documents would generally be relevant, they consider that their production will not affect the outcome of the proceedings.

6.99 Dealing with disputed document production requests can be a laborious and time-consuming process for all concerned, and different arbitral tribunals adopt various techniques to cut through the detail involved in resolving such disputed requests. Article 3 of the IBA Rules (to continue the extract set out above), contains the following relevant provisions:

[...]

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2<sup>(78)</sup> or a failure to satisfy any of the requirements of Article 3.3.
6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to the

[...]

6.100 An increasingly common formatting tool for organizing and presenting this process of document request, objection and decisions is to use a so-called *Redfern* schedule, devised by one of the authors.<sup>(79)</sup> When one party issues a request to produce to the other, an exchange of views takes place between the parties' lawyers, usually by correspondence, but sometimes at a meeting. During this exchange, the parties' positions become clearer: for example, the requested party may say 'we are prepared to produce documents covering this period of time, but not longer, because that would be oppressive', or 'we don't have the management committee minutes, but we are prepared to disclose the relevant board minutes'. In this way, the nature of the requests and the objections may change as the discussion proceeds.

6.101 The purpose of the *Redfern* schedule is to crystallise the precise issues in dispute, so that the arbitral tribunal knows the position that the parties have reached following the exchanges between them.<sup>(80)</sup> This makes it possible for the arbitral tribunal to make an informed decision as to whether or not a particular document, or class of documents, should be produced, without having to be involved in the details of the exchanges between the parties' lawyers and, usually, without the need for a meeting.

6.102 To achieve this purpose, a schedule with at least four columns is drawn up. Each column of the schedule is intended to be completed as briefly as possible by the parties' lawyers.

- In the first column, the requesting party sets out (a) a brief description of the requested document in sufficient detail to identify it, or (b) a description in sufficient detail to identify a narrow and specific category of documents that are reasonably believed to exist.
- In the second column, the requesting party states why the requested document(s) are both relevant to the case and material to its outcome, as well as the statements required by Article 3(3)(c) and (d) of the IBA Rules.
- In the third column, the requested party states the extent to which, if at all, it is prepared to accede to the request, and if it objects, the grounds on which it does so.<sup>(81)</sup>
- The fourth column is left blank for the arbitral tribunal's decision.

If the tribunal considers that the schedule as it stands does not contain sufficient information for it to make a properly informed decision, the arbitral tribunal will either (a) call for additional information, or (b) exceptionally, arrange a meeting with the parties to consider the disputed requests in more detail.

6.103 To reach a determination, where practicable, the arbitral tribunal may convene a case review conference with the parties' counsel with the objective of working out a way forward on most of the categories of documents requested.<sup>(82)</sup> Indeed, not only can such a physical hearing prove to be an efficient way in which to resolve document production disputes, but it can also prove to be a valuable early opportunity for the tribunal to engage the parties directly on the substance of the dispute.

#### **(ii). Production of electronic documents**

6.104 It has been said that at least 90 per cent of documents, correspondence, and other information generated is now stored in electronic form.<sup>(83)</sup> It is therefore not surprising that there has been much discussion concerning the ways in which such materials (known generically as electronically stored information, or ESI) may, or should, be used in commercial litigation.

6.105 In national court procedures in civil law countries, there is generally no obligation on the parties to produce documents other

than those on which they rely unless, except on a jury, the judge orders a party to produce documents as part of his or her investigation of the facts. It follows that, in many civil law systems, the existence of many hundreds of thousands of pages of ESI relating to a transaction does not give rise to practical problems.

6.106 However, in many common law countries,<sup>(84)</sup> the rules of procedure in civil litigation place an obligation on the parties to disclose all documents 'relevant' to the issues in dispute. The sheer scale of complying with this obligation may place an intolerable burden in terms of cost and effort not only on the producing party, but also on the opposing party, and on the judges who have to make the findings of fact on which the judgments are based.

6.107 In the litigation context, a party's solution was developed in the form of the so-called Sedona Principles,<sup>(85)</sup> which are a model primarily at containing a reasonable level of the extent of the human resources that parties may be obliged to expend in identifying documents that might be required to be disclosed in litigation.

6.108 As stated earlier in this chapter,<sup>(86)</sup> rules of court do not apply in international arbitrations unless either the parties agree to adopt them or, except on a jury, the arbitral tribunal imposes them by a procedural order.<sup>(87)</sup> It follows that, absent agreement of the parties, the basis for production of documents is in the discretion of the arbitral tribunal.

6.109 It is therefore appropriate to assess the question of production of ESI against the background of the current version of the IBA Rules, by which many tribunals will today be guided in the exercise of the discretion. First, the IBA Rules define the term 'document' as 'a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means'.<sup>(88)</sup>

6.110 In the context of production of documents pursuant to Article 3 of the IBA Rules, it seems clear that there is no difference in principle between 'hard copy' documents and 'soft copy' documents. It follows that the same general criteria should apply to the approach by arbitral tribunals to resolving disputes between the parties as to whether or not they should order the production of requested documents. The most important of these are 'unreasonable burden', 'proportionality', and 'considerations of procedural economy, fairness or equity'. To a certain extent, these elements are intertwined. It is for the arbitral tribunal to weigh the materiality to the outcome against 'proportionality' (including the cost and burden involved in complying with the contemplated procedural order).<sup>(89)</sup>

#### ***(iii). Documents in the possession of third parties***

6.111 An arbitral tribunal lacks power to order production of documents in the possession of a third party even where such documents may be relevant to the matters in issue. However, in some countries, a third party may be compelled by subpoena to attend at the hearings to give evidence and the courts can assist the arbitral tribunal in enforcing the attendance of such witnesses. In England, a party may apply to a court to compel the attendance of a witness who is within the jurisdiction of the court and to bring with him or her any material documents in his or her possession.<sup>(90)</sup> Similarly in the United States, the Federal Arbitration Act of 1925 (FAA) provides that the arbitrators may summon a person to attend before them and to produce any material documents.<sup>(91)</sup>

6.112 It sometimes happens in arbitration proceedings that a third party appears voluntarily at the request of one of the parties to provide testimony helpful to that party. On questioning by the other party's counsel, the witness may then object to the production of requested documents. Where the arbitral tribunal may not have the power to order such a third party to produce documents, it may draw an adverse inference in respect of the evidence of the witness in question if the witness appears to the tribunal that the witness's withholding documents without good reason.

#### ***(iv). Adverse inferences***

6.113 A technique followed by arbitral tribunals coming from different systems and cultures is to draw an 'adverse inference' from the silence of a party, or failure to comply with an order of the arbitral tribunal for the production of documentary or witness evidence.<sup>(92)</sup> These are covered in Article 9(5) and (6) of the IBA Rules, which state:

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitration Tribunal, the Arbitration Tribunal may infer that such document would be adverse to the interests of that Party.
6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitration Tribunal to be produced, the Arbitration Tribunal may infer that such evidence would be adverse to the interests of that Party.

6.114 In this way, two important matters apply where the IBA Rules are applicable. The first is that there must have been an order of the arbitration tribunal for production of the documents or other testimony concerned; the second is that the requested party must have failed to provide a satisfactory explanation for not having produced the material in question. Whether or not an explanation to the effect that the material 'does not exist' or 'no longer exists' is satisfactory is a matter for the arbitration tribunal to decide after taking account of the relevant circumstances into consideration.

6.115 For example, if a document had been destroyed before the dispute arose, pursuant to a well-established (and reasonable) corporate document retention policy, many arbitration tribunals would consider such an explanation to be reasonable. However, if a document had been destroyed soon after a new document retention policy had been implemented, particularly if the policy was devised after the dispute arose, it would not be surprising if the tribunals were to take a sceptical view of the explanation.

**(v). Presentation of documents**

6.116 It is of considerable assistance to the arbitration tribunal if the parties are able to present the documentary evidence in the form of a volume (or volumes) of documents, in chronological order, with each page numbered like those of a book, for use at the hearing. In this way, each member of the arbitration tribunal, and each party, has a complete set of documents with identical numbering. If there is a huge number of documents, it may be a good idea to identify the most important documents and include them in a separate volume, or volumes (sometimes known as a 'core bundle'). This has the additional benefit of avoiding tiresome and unnecessary duplication of documents.

6.117 The use of the word 'agreed' in the context of volumes of documents occasionally gives rise to misunderstanding. The word is not intended to indicate that the parties are agreed on the meaning of the contents of the document, or its evidential weight, or even its admissibility. It simply indicates that the authenticity of the document is 'agreed' in the sense that each party agrees that it is an accurate copy of an existing document.

6.118 When the authenticity of documents is disputed, the arbitration tribunal usually orders that the originals (or certified copies, when appropriate) must be produced for inspection.<sup>(93)</sup> This may be carried out by forensic experts, if necessary. If the originals are not produced, the arbitration tribunal may disregard the documents in question as unreliable.

**(vi). Translations**

6.119 It is usually necessary to provide translations of any documents that are not already in the language of the arbitration. Such translations should, if possible, be submitted to the arbitration tribunal jointly by the parties as 'agreed translations'. The most convenient practice is to include the document in its original language first, immediately following it in the volume with the translation into the language of the arbitration.<sup>(94)</sup> If the correctness of the translation is disputed, each party's version may be inserted following the original and the tribunal may involve an expert translator of its own to resolve such a dispute.

**(d). Fact witness evidence**

6.120 The role of fact witnesses is to explain or supplement the evidential documents, so as to help the arbitration tribunal to perform its fact-finding function. In commercial transactions, as compared with accident cases, for example, most of the witnesses are likely to have had some connection with the transaction on one side or the other. They therefore tend to have a direct or indirect interest in the

outcome of the case. It is not surprising that most arbitral tribunals regard the testimony of fact witnesses as sometimes less reliable than the documents that were brought into existence at the time of the events that gave rise to the dispute.

6.121 Article 4 of the IBA Rules deals with the presentation of fact witness evidence. It provides, in part, as follows:

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
5. Each Witness Statement shall contain:
  - (a) the full name and address of the witness, a statement regarding his or her present and past relationships (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
  - (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
  - (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
  - (d) an affirmation of the truth of the Witness Statement; and
  - (e) the signature of the witness and its date and place.

[...]

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.<sup>[95]</sup>

[...]

In effect, this scheme codifies the procedures that have been developed by international arbitrators and arbitral institutions over the years,<sup>(96)</sup> during which it has gradually become common practice to present the direct testimony of fact witnesses in writing in advance of the witness hearing.

**(i). Presentation of witness evidence**

6.122 It is increasingly rare for the written witness statements to be submitted on oath in the form of affidavits. More frequently, the statements are simply signed by the witnesses. The IBA Rules require each party to indicate to the arbitral tribunal which of the other party's witnesses should be required to attend the hearing for oral examination; the arbitral tribunal itself indicates to the parties which, if any, of the other witnesses wishes to hear in person.<sup>(97)</sup> It is relatively rare for the arbitral tribunal to require a witness to be present if neither party requires that witness to attend.<sup>(98)</sup>

**(ii). Preparation of witnesses**

6.123 An important aspect of the presentation of witness evidence is the question of whether, and if so, to what extent, it is permissible for a party, its employees, or counsel to interview and prepare those witnesses whose testimony they intend to present to the arbitral tribunal. This is largely a cultural matter, although the rules of some national courts (and/or bar associations) forbid, or make unethical for, parties or their counsel to contact witnesses before they give their testimony in person.<sup>(99)</sup>

6.124 In international arbitration, it is well recognized that witnesses may be interviewed and prepared prior to giving their oral testimony.<sup>(100)</sup> This is confirmed by at least three of the sets of institutional rules in common use. The LCIA Rules expressly permit it, subject to any mandatory provisions of any law governing the arbitration, other rules of law, or an order of the tribunal to the contrary,<sup>(101)</sup> and the Swiss Rules and the Rules of the Singapore International Arbitration Centre (SIAC) also permit such contact.<sup>(102)</sup> Article 4(3) of the IBA Rules also provides: It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.<sup>(103)</sup> However, it is generally accepted that there are certain limits. It would be professionally misconduct for a lawyer were to try to persuade a fact witness to tell a story that both the lawyer and the witness know to be untrue, and to prepare the witness to make such a story sound as credible as possible.<sup>(104)</sup> It would also almost always be counterproductive. Experienced arbitrators tend to have good noses for sniffing out inaccuracies in stories told by witnesses, and invariably cross-check oral testimony against the available corroborative documentary and other evidence.

### ***(iii). Parties as witnesses***

6.125 Another cultural division arises between lawyers from jurisdictions in which a party cannot be a witness as such. This stems from the rules of court in some civil law countries under which a person (or officer, or employee, in the case of corporate entities) cannot be treated as a witness in his or her own cause.<sup>(105)</sup> However, even in the courts of these countries, a party can be heard; the rule merely forbids him or her from being categorized as a witness.

6.126 As in the case of other rules of national court procedure, this rule does not apply in international arbitrations,<sup>(106)</sup> unless the parties have expressly agreed that such rules should be applied. It may be that an arbitral tribunal will tend to give greater weight to the testimony of a witness who has no financial or other interest in the outcome of the arbitration, but that is a different question.<sup>(107)</sup>

### ***(iv). Admissibility and weight of witness evidence***

6.127 The rules concerning admissibility of witness testimony are, in principle, the same for written testimony as those that are applied to witnesses when they are giving oral testimony at a hearing before the arbitral tribunal.<sup>(108)</sup> In practice, it is rare for an arbitral tribunal to order written witness testimony to be withdrawn as inadmissible; rather, an arbitral tribunal is far more likely to address such issues as a matter of the evidentiary weight to be accorded the contents of the witness evidence concerned.

6.128 An arbitral tribunal has discretion to determine the evidentiary weight to be given to witness evidence.<sup>(109)</sup> This arises from the general principles applicable to arbitration proceedings and is expressly affirmed, for example, in Article 27(4) of the UNCITRAL Rules.<sup>(110)</sup>

6.129 In general, arbitrators tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents. Arbitrators also give greater weight to the evidence of a witness that has been tested by cross-examination, or by an examination by the arbitral tribunal itself. Arbitrators usually reject any submission that they should not hear the evidence of any particular witness, even if it is secondary or 'hearsay' evidence. However, an arbitral tribunal will give less weight to secondary evidence if, in its opinion, the party claiming that evidence could have produced a witness who would have been able to give direct first-hand evidence on the factual issue in question.

### ***(v). Taking evidence outside the seat***

6.130 Problems arise when an arbitral tribunal wishes to obtain evidence from outside of the jurisdiction in which the arbitration

takes place. In most countries, arbitrators do not have subpoena powers and thus have to request the assistance of courts if they want to compel the attendance of third-party witnesses, or to compel the production of documents in the possession of third parties, whether they are located within the seat of the arbitration or beyond.

6.131 The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters streamlines procedures for obtaining evidence in response to a request for assistance from judicial authorities<sup>(111)</sup> but an arbitrator is not a judicial authority. Accordingly, a request made from an arbitrator does not fall within the scope of the 1970 Hague Convention. Nonetheless, many of the signatory states to the Hague Convention extend the judicial assistance to an arbitrator within its jurisdiction seat in another contracting state, or have otherwise enacted legislation.<sup>(111)</sup> In the United States, courts have the power to order non-parties within the jurisdiction to give testimony or to produce documents for use in proceedings in a foreign or international arbitration at the request of the arbitrator or any interested person.<sup>(112)</sup> Although this power is designed primarily to provide judicial assistance with foreign judicial proceedings, parties are increasingly seeking to rely on it to secure court-ordered documentary evidence in a domestic arbitration.<sup>(113)</sup> However, there remains controversy both as to whether the courts' power applies to foreign arbitration proceedings and the circumstances in which an order can be made at the unilateral request of a party without the arbitrator's approval.<sup>(114)</sup>

6.132 The Model Law also deals with court assistance in the production of evidence.<sup>(115)</sup> However, it was determined that questions of international cooperation in the taking of evidence should not be governed by a model law, but through bilateral or multilateral conventions. Thus it is restricted to obtaining evidence where both the state in which the arbitration takes place and the state in which the evidence is located are signatories of the Model Law. In the light of inherent limitations, the most common way of compelling the production of evidence in arbitration is indirectly, by means of the ability of arbitrators to draw adverse inferences from unexcused failure to produce the requested evidence.<sup>(116)</sup>

#### **(e). Experts**

##### ***(i). Role of experts in international arbitration***

6.133 We have already discussed the presentation of evidence to a arbitrator, first by means of the production of contemporaneous documents, and secondly, by means of the testimony of witnesses of fact. The third method of presenting evidence to an arbitrator is by means of the use of expert witnesses. Some issues can be determined only by the arbitrator deciding on differences that are essentially matters of opinion. Thus, in a construction dispute, the contemporary documents, comprising correspondence, progress reports, and other memoranda, and the evidence of witnesses who were present on the site may enable the arbitrator to determine what actually happened. There may then be a further question to be determined – namely, whether or not what actually happened was the result of, for example, a design error or defective construction practices. The determination of such an issue can be made by the arbitrator only with the assistance of experts, unless it possesses the relevant expertise itself. Equally, in shipping arbitrations, the performance of a vessel or its equipment may need to be evaluated by experts, so that the arbitrator may make the relevant findings of fact.

6.134 There are two basic methods of proceeding in a situation in which the arbitrator itself does not have the relevant expertise. The first is for the arbitrator to appoint its own expert or experts; the second is for the parties to present expert evidence to the arbitrator and, since this evidence will presumably be in conflict, for the arbitrator to evaluate it. This evaluation is usually carried out after it has been tested by cross-examination, or by some other method, which may include the appointment by the arbitrator of its own expert.

##### ***(ii). Experts appointed by the arbitral tribunal***

6.135 In international arbitration, the arbitrator is usually composed of lawyers.<sup>(117)</sup> Where matters of a specialist or technical nature arise, such an arbitrator often needs expert assistance in reaching its conclusions, in order to obtain any technical information that might guide it in the search for the truth.<sup>(118)</sup>



6.136 International arbitrators have the power to appoint experts under most arbitration rules.<sup>(119)</sup> Although it is a well-established principle of most national systems of law that someone to whom a duty has been delegated must not delegate that duty to someone else, it is difficult to see any objection in principle to the appointment of an expert by an arbitrator.<sup>(120)</sup> If an arbitrator needs expert technical assistance in order to understand complex technical matters and it decides that it is in need of expert assistance to understand these matters in order to arrive at a proper decision, there is no good reason to prevent it from obtaining such assistance.

6.137 As a corollary to this power, the arbitrator should give the parties an opportunity to comment on any expert selected upon which the arbitrators have relied. The measures adopted by the Iran-United States Claims Tribunal in certain of its cases to involve the parties in the appointment and work of a tribunal-appointed expert are instructive. In naming an expert, the Tribunal has first given the parties the opportunity to agree on an expert, then presented the parties with a list of individuals and institutions from which to choose, stating that if the parties are still unable to agree, the Tribunal will choose the expert itself. Similarly, the Tribunal has sought input from the parties concerning the expert's terms of reference. Once the expert has prepared a preliminary report, the parties are given an opportunity to comment and the expert is expected to take these comments into account when finalizing his or her report.<sup>(121)</sup> In this way, the parties can assist the expert in making the report complete, while being reassured that important aspects of the case are not being decided without their involvement.<sup>(122)</sup>

***(iii). Expert witnesses presented by the parties***

6.138 One of the most satisfactory features of modern international arbitrations is the prevailing practice of presenting conflicting expert evidence of opinion on matters of great technical complexity. However, when the advocates for the parties are able to test evidence of expert opinion presented by the other side through cross-examination, how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to the juror?<sup>(123)</sup>

6.139 Although professional triers of fact should fare better than a jury, it is sometimes difficult for an arbitrator to make a reasoned judgment as between two conflicting professional opinions on complex technical matters. Nevertheless, this remains by far the most common method of presenting expert evidence, regardless of where the arbitration takes place.<sup>(124)</sup>

6.140 The parties' expert evidence is normally delivered in the form of written expert reports, usually at the same time as any written statements of witnesses of fact, or shortly thereafter, but in any event well in advance of the hearing.<sup>(125)</sup>

6.141 Article 5(2) of the IBA Rules provides a useful summary of the expected contents of a party-appointed expert report:<sup>(126)</sup>

2. The Expert Report shall contain:
- (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationships (if any) with any of the Parties, the legal advisors and the Arbitration Tribunal, and a description of his or her background, qualifications, training and experience;
  - (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
  - (c) a statement of his or her independence from the Parties, the legal advisors and the Arbitration Tribunal;
  - (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
  - (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
  - (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the evidentiary hearing;
  - (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
  - (h) the signature of the Party-Appointed Expert and its date and place; and
  - (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

***(iv). Admissibility of expert evidence***

6.142 Where expert evidence is introduced by the parties, the rules regarding the admissibility of expert evidence applied by arbitration tribunals will be, in general, the same as those applied to other forms of evidence in the same arbitration. If the evidence of technical opinions is conflicting (which is usually the case), the expert witnesses must be prepared to appear in person before the arbitration tribunal for examination. Consistent with the approach to fact witnesses, the IBA Rules provide that party-appointed experts need not appear for testimony at an evidentiary hearing unless they are requested to do so and that, in the absence of any such request, the other parties shall not be deemed to have accepted the correctness of the expert's report.<sup>(127)</sup>

***(v). Categories of expert evidence***

6.143 The evidence of experts is presented in relation to a kinds of matters of opinion. Engineers and scientists are frequently called upon to present reports, and to give evidence, in relation to disputes in which the quality of building work or the performance of plant and equipment is in issue. Accountants are called upon to give evidence as to the quantum of claims; lawyers may sometimes be required to give evidence where provisions of a foreign system of law have to be explained to the arbitration tribunal. In addition, it is not unknown for handwriting experts, or other persons expert in the forensic examination of documents, to be called upon where the authenticity of a document is in question.

***(vi). Experts on 'foreign' law***

6.144 In the common law system, judges sitting in the national courts expect the substantive law of a foreign country to be proved as fact by expert evidence. This convenient fiction has worked satisfactorily for hundreds of years in the court system. However, it takes only a brief moment of reflection to appreciate that the convenient fiction that foreign law is fact does not work in the context of an international arbitration. Imagine three French lawyer arbitrators, sitting in England, with French avocats presenting arguments on the applicable French substantive law: any suggestion that English procedural law would require the relevant foreign French substantive law to be proved as fact would surely be greeted with some hostility.

6.145 In practice, the international arbitration community has solved this dilemma in a pragmatic and efficient way. Nowadays, in almost all international arbitrations, law is treated as fact. Such law is proven either as a matter of submission by counsel (or its local co-counsel), or by way of expert testimony in the form of an expert opinion by a legal expert of the substantive law in issue. Whilst different tribunals will have different preferences, there is a natural

scepticism amongst many arbitrators as to the value of receiving such evidence as testimony involving lawyers being cross-examined by lawyers before other lawyers.

**(f). Inspection of the subject matter of the dispute**

6.146 The fourth method of presenting evidence to an arbitral tribunal is for the arbitral tribunal itself to inspect the subject matter of the dispute. This is usually a site inspection, and many arises in connection with construction contracts and disputes arising out of the performance of process plant and so forth. However, it may also apply in other types of case, for example it is common in commodity arbitrations for the arbitrator to inspect the cargo or consignment if the dispute concerns the quality of the goods supplied.<sup>(128)</sup>

6.147 Article 7 of the IBA Rules provides that:

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and the representatives shall have the right to attend any such inspection.<sup>(129)</sup>

6.148 Although this power exists, arbitral tribunals do not often use this opportunity to supplement the information and evidence available to them, probably because the additional expense involved is likely to be substantial in relation to the benefit gained. It is more common, in modern practice, for models, photographs, drawings, or even films to be used to fulfil the purpose that would have been served by a site inspection. For example, in an ICC arbitration, it was proposed to charter a helicopter to make a video showing the terrain in which a road was constructed over a length of some 60 km.<sup>(130)</sup> And in public international law cases between states, for example involving a boundary dispute, film and photographic evidence is often presented at hearings.<sup>(131)</sup>

**(i). Procedure for inspection**

6.149 An arbitral tribunal has broad discretion as to the manner in which it undertakes an inspection of the subject matter of the dispute. Unless the parties specifically agree otherwise, the arbitral tribunal will normally be careful to ensure that the principle of equality of treatment is strictly observed. In particular, the arbitral tribunal will not normally make a site inspection except in the presence of representatives of both parties, and the arbitrators will not normally put questions directly concerning the case to persons working on the site unless counsel for each of the parties is so has the right to ask additional questions of those persons.

6.150 Occasionally, parties may agree that the arbitral tribunal should inspect a site, or the subject matter of the dispute, without being accompanied at all. However, it would be inappropriate, and potentially dangerous when the award comes to be enforced, if the arbitral tribunal were to make an inspection in the presence of one party alone.<sup>(132)</sup>

6.151 If a site inspection is to be made, it is good practice for the arbitral tribunal to issue a procedural direction in advance. Who is to be present? Who will make the arrangements? Will questions and answers or any discussion be transcribed and form part of the record? In general, it is suggested that best practice is to direct that there will be no transcript and that what is said should not form part of the record.<sup>(133)</sup> Otherwise, much of the usefulness of the inspection may be lost as a result of the inevitable delay and formality that accompanies the presence of a reporter.

**(ii). Inspection under ad hoc and institutional rules of arbitration**

6.152 The UNCITRAL Rules and the ICC Rules are silent on the question of inspection of the subject matter of the dispute, although the UNCITRAL Rules refer to the obligation of the parties to make available to any experts appointed by the arbitral tribunal any relevant information for inspection.<sup>(134)</sup> The LCIA Rules,<sup>(135)</sup> the SIAC Rules,<sup>(136)</sup> the Rules of the China International Economic and Trade Arbitration Commission (CIETAC),<sup>(137)</sup> the DIAC Rules,<sup>(138)</sup>

the American Arbitration Association (AAA) Rules,<sup>(139)</sup> and the World Intellectual Property Organization (WIPO) Rules<sup>(140)</sup> make specific provisions for any inspection or investigation that the arbitral tribunal may require.

6.153 The ICSID Arbitration Rules contemplate that a site inspection may be necessary. They contain power for the arbitral tribunal to visit any place connected with the dispute or conduct inquiries there if the arbitral tribunal deems it necessary,<sup>(141)</sup> and they call upon the parties to cooperate in this, with the expenses forming part of the expenses of the parties.<sup>(142)</sup>

6.154 The WIPO Rules also provide for experiments to be conducted,<sup>(143)</sup> and for the provisions by the parties of 'primers' and 'models'.<sup>(144)</sup>

## **F. Hearings**

### **(a). Introduction**

6.155 It has been said that the only thing wrong with documents only arbitrations is that there are not enough of them. Such arbitrations are commonplace in certain categories of domestic arbitrations – notably, in relation to small claims cases. In the international context, the main examples of documents only arbitrations are those conducted under the Rules of the London Maritime Arbitrators Association (LMAA) in connection with disputes arising out of charterparties and related documents.

6.156 However, in mainstream international arbitration, it is unusual for the arbitral proceedings to be concluded without at least a brief hearing at which the representatives of the parties have an opportunity to make oral submissions to the arbitral tribunal, and at which the arbitral tribunal itself is able to ask for clarification of matters contained in the written submissions and in the written evidence of witnesses.

6.157 A lot of the rules of the major international arbitration institutions provide for a hearing to take place at the request of either party, or at the instigation of the arbitral tribunal itself. Whilst an arbitral tribunal must proceed to make its award without a hearing if the parties have expressly so agreed,<sup>(145)</sup> such an agreement is rare in modern international arbitration.

### **(b). Organisation of hearings**

6.158 Hearings are normally held on a date fixed by the arbitral tribunal, either at the request of one or both of the parties, or on its own initiative. The administrative arrangements may be made by one of the parties, often the claimant, with the agreement of the other. Alternatively, they may be made by the sole or presiding arbitrator, or by the arbitral secretary (if there is one).

6.159 In fully administered arbitrations, the institution itself (for example the AAA or the LCIA) sometimes makes the arrangements; in others, these matters are left to the arbitral tribunal and the parties.<sup>(146)</sup>

6.160 The task of organising hearings in a major international commercial arbitration should not be underestimated nor should the cost. A suitable hearing room must be provided, with ancillary breakout rooms and facilities for the parties and the arbitral tribunal. Access to printing facilities, and a W-F connection, is invariably essential. A verbatim transcript and verbatim record of the proceedings is often considered essential. Accommodation is also required for witnesses, experts, and the parties' legal teams.<sup>(147)</sup>

6.161 In short, oral hearings are the most cost-intensive periods of any arbitration and the scheduling often leads to the greatest delays, because availability of a essential participants must be coordinated. Efforts should therefore be made by arbitrators and counsel to limit the duration. To this end, the following matters should be considered.

- Should there be one hearing or several?
- Should there be time limits for the presentation of oral arguments?
- Should there be a limit on the time allowed for the examination and re-examination of witnesses?
- Should there be post-hearing briefs, rather than oral closing submissions?<sup>(148)</sup>

**(i). Location**

6.162 In most cases, hearings may be held at any location that is convenient for all concerned. Subject to any mandatory provisions of law in the seat of the arbitration, there is generally no requirement that a hearing be physically conducted in the territory of the seat of the arbitration.<sup>(149)</sup> As a result, most modern arbitration rules allow for the conduct of oral hearings at any location that the tribunal considers appropriate.<sup>(150)</sup> While it remains common to hold the main evidentiary hearing in the place of arbitration, the option not to do so can, on occasion, bring real benefits and savings in convenience and cost (for example when many of the participants in a hearing are based in another city), and should be explored in appropriate cases.

**(ii). Pre-hearing conference**

6.163 In large and complex cases, a properly planned pre-hearing meeting or conference can pay substantial dividends in terms of saving time and money at the hearing itself. Such conferences should be organized efficiently, both as to timing and content. The timing is extremely important. If a pre-hearing conference takes place too near to the hearing itself, it will be too late for the 'shape' of the hearing to be influenced. However, if it takes place too early, the arbitral tribunal is not sufficiently well informed about the issues or the evidence needed to supplement the material submitted in writing to enable useful decisions to be taken with regard to the structure of the hearing.

6.164 Agenda items to be covered at a pre-hearing conference can include tribunal sitting times, the division of time between the parties, the running order, length, and format of opening statements, the sequestration of witnesses, the scope and length of direct cross- and re-direct examination, oral closing statements and/or post-hearing briefs, transcription, and the preparation of hearing bundles. These matters may be agreed by the parties, and if they cannot agree, decided by the tribunal, and memorialized in a procedural order.<sup>(151)</sup>

6.165 Pre-hearing conferences have been used to considerable effect by arbitral tribunals since the early days of the Iran-United States Claims Tribunal. The potential value of pre-hearing conferences has also been accepted by ICSID, which formulated a Rule to provide for them:

- (1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.
- (2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.<sup>(152)</sup>

6.166 The first part of this Rule envisages a conventional role for the pre-hearing conference – namely, that of helping to ensure that time is saved at the hearing itself. The second part of the Rule is less conventional. It seeks to take advantage of the fact that the claims and counterclaims of the opposing parties tend to change shape under the hammer of contested proceedings, as each side begins to understand its opponent's case better, and it envisages that, at the request of the parties, a conference may be held, with a view to arriving at an amicable settlement of the dispute prior to the main hearing.

6.167 Whether rules provide for oral pre-hearing conferences explicitly or not,<sup>(153)</sup> they have become common practice in the exercise of an arbitral tribunal's general procedural discretion. Indeed, the most proactive tribunals will use them to go beyond a purely organizational agenda and indicate to the parties issues on which it would like the parties to focus at the hearing.<sup>(154)</sup>

**(c). Procedure at hearings**

6.168 Individual arbitral tribunals approach the determination of the procedure to be followed at the hearing in different ways. Most have the common aim of keeping the duration of the hearing to a minimum so far as practicable, in order to assist the busy schedules of the arbitrators and parties and to reduce expense.

6.169 Ideas as to what is a reasonable length of time for a hearing

different. Formerly,<sup>(155)</sup> in English court practice, hearings could last for many weeks, causing great inconvenience, expense, and exhaustion to all concerned.<sup>(156)</sup> By contrast, arbitrators from the civil law countries tend to regard any hearing that takes more than three days as a long one. Although one hears of exceptions, the general tendency in international arbitrations towards shorter hearings, with greater reliance upon documentary evidence. This is a necessary step in the interests of economy of time and costs in cases that often involve arbitrators, lawyers, experts, company executives, and other participants operating away from their home bases.

6.170 The procedure at a hearing is not fixed in stone. As the UNCITRAL Notes on Organization of Arbitration Proceedings describe:

Arbitration rules typically give broad latitude to the arbitrator to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and the review of details; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitrator makes careful arrangements in advance of the hearings, the manner in which to conduct the hearings, at least in broad lines.<sup>(157)</sup>

6.171 Against the backdrop of procedural freedom, a usual practice (or practices) has emerged in international arbitration that is described next.

**(i). Opening statements**

6.172 The usual practice in international arbitration, given the necessary time limits, is to allocate to each side only a limited opening statement, in which the advocates assume that the arbitrators have a full knowledge of the written submissions and evidence that is already on the record. This is followed by the main event: the oral testimony of the witnesses for each party. An English international arbitrator put it thus:

Finally, since the arbitrators are likely to be busy professional people and often from different countries, the oral hearings will usually be remarkably short by English standards. The main purpose is to hear the cross-examination of the witnesses, bracketed by short opening and closing remarks from both sides, which are often supplemented by written post-hearing submissions.<sup>(158)</sup>

**(ii). Examination of witnesses**

6.173 Although the examination of witnesses owes much to the common law tradition, it has become a standard feature of evidentiary hearings in international arbitration. For this reason, witness preparation has become a significant part of hearing preparation for parties involved in international arbitration and cross-examination has become a key arbitration course skill in the conduct of a hearing.

6.174 Of course, there are important limits in the preparation of witnesses. The role of counsel should be to assist witnesses in developing the confidence and clarity of thought required to testify truthfully and effectively based upon their own knowledge or recollection of the facts.<sup>(159)</sup> Counsel should not be instructed to change the evidence. In this regard, the IBA Guidelines on Party Representation contain advice as to the appropriate limits of such preparation, providing that contact between counsel and witnesses should not affect the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances.<sup>(160)</sup> It should be borne in mind that being examined in the witness box's, for most witnesses, an unfamiliar and intimidating experience.<sup>(161)</sup> Once the hearing begins, styles of witness examination vary and tribunals typically allow counsel some leeway to test the evidence in the way that they prefer. As a general matter, however, tribunals tend not to appreciate overly aggressive or discourteous attacks by counsel. Since being examined in the witness box's, for most witnesses, an intimidating experience, an aggressive comportment by counsel can easily

backfire. Experienced arbitrators often discount severe or bullying cross-examinations on the basis that they evidence the self-importance of the cross-examiner rather than the lack of credibility of the witness.<sup>(162)</sup>

6.175 Article 8 of the IBA Rules confirms the current international standard previously adopted by many international arbitration tribunals:

[...]

2. The Arbitration Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitration Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
  - (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses;
  - (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitration Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
  - (c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
  - (d) the Arbitration Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
  - (e) if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitration Tribunal may order the scheduling of testimony separately on each issue or phase;
  - (f) the Arbitration Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);
  - (g) the Arbitration Tribunal may ask questions to a witness at any time.
4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitration Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitration Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.
5. Subject to the provisions of Article 9.2, the Arbitration Tribunal may request any person to give oral or written evidence on any issue that the Arbitration Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitration Tribunal may also be questioned by the Parties.

6.176 In the courts of common law countries, elaborate rules of evidence are still deployed even though they were designed for use in jury trials, which (other than in the United States) are largely used only in criminal cases. Such rules of evidence are not necessary in the courts of civil law countries because, in general, fact-finding is the responsibility of the judge based on his or her own enquiries and conduct of the evidence. In any event, the civil procedure rules applicable in national courts do not apply to international arbitrations unless the parties agree otherwise, or the local law at the seat of arbitration provides that they do apply to international arbitrations held in that country as the judicial seat.

6.177 Fact witnesses are usually first examined by counsel for the party presenting that witness, then cross-examined by counsel for the other party, then re-examined by the first counsel, if necessary.

Add to a cross-examination may be introduced, with permission of the arbitrator, where the witness has given new direct testimony during the re-examination.<sup>(163)</sup>

6.178 Arbitrators may sustain objections to direct or redirect examination questions based on characterizing them as 'leading', or 'closed' (that is, questions that prompt the answer that the examining counsel wishes to obtain).<sup>(164)</sup> This is not because there is a binding evidentiary rule against putting such questions in international arbitration, but because the value of a witness's testimony is reduced if it is given pursuant to a question that has suggested the answer. This constraint does not apply to cross-examination counsel, who may ask any type of question as long as it is fair and relevant to the issues in dispute.

6.179 Witnesses are sometimes excluded, or 'sequestered', until they have given their testimony, although this practice is often dispensed with, particularly if a witness also happens to be a party representative. Much depends on whether or not a party seeks to gain an unfair advantage by having a particular witness present while the corresponding witness presented by the opposing party gives evidence. Fact witnesses are not allowed to discuss the case with any member of the 'team', whether lawyers or other witnesses presented by the same party, during overnight or refreshment breaks while they are under examination. This is an obvious way of ensuring that the witness is not 'coached' on how to answer questions during an examination or re-examination ('redirect'). Sometimes, they are permitted to eat meals together, or drink coffee, on the understanding that the case will not be discussed in his presence.

### **(iii). 'Witness conferencing'**

6.180 An alternative to traditional cross-examination is to put two or more witnesses together to answer questions from the arbitrator. This technique, which was described in the 1999 edition of the IBA Rules as 'witness confrontation', is now better known as 'witness conferencing'. Where fact witnesses are concerned, this is a somewhat adventurous path for an arbitrator to take. But, used together with traditional cross-examination, it may provide an effective way of identifying areas of agreement and disagreement between witnesses. It also offers an opportunity for an immediate and direct comparison between the witness's earlier testimony, both in writing and at the hearing.

6.181 In the context of expert witnesses, the practice of witness conferencing is much better established. It can be a very effective way of highlighting the points of agreement and disagreement between the experts, and it often leads, if not to agreement, then at least to a narrowing of the points of difference—that is, the conflicting expert testimony between which the arbitrator may have difficulty deciding.<sup>(165)</sup>

6.182 Where a bridge has collapsed into a river, for example, a fact witness will testify as to what he or she saw and in what way the bridge fell, while the expert witness will testify as to what, in his or her opinion, caused the bridge to collapse. Was it defective design, or defective workmanship or materials? Where the parties' respective experts disagree, after submitting lengthy and persuasive expert reports, how is the arbitrator to decide which examination is more persuasive?

6.183 The role of experts in this context is to assist, educate, and advise the arbitrator, in a fair and impartial manner, in specific fields (such as technical, forensic accountancy, or legal) relevant to specific issues in dispute between the parties in which (some of) the arbitrators do not themselves have relevant expertise. The result is that arbitrators find themselves faced with deciding between the opinions of opposing experts who have provided diametrically opposite opinions to questions such as, 'why did the bridge fall down?',<sup>(166)</sup> with little or no unbiased expert advice to guide them.

6.184 In an effort to find a practical solution, a number of experienced international arbitrators<sup>(167)</sup> developed expert conferencing techniques instead of, or (more typically) in addition to, traditional cross-examination. In this kind of procedure, either before or (more commonly) after the experts have drafted their written expert reports, the experts are required to meet and draw up lists of (a) matters on which they agree, and (b) matters on which they do not agree, and the reasons for their disagreement.<sup>(168)</sup>

6.185 Based on list (b), the arbitrator prepares an agenda designed to encompass the matters on which the experts are not agreed, and presents it to the parties and their advocates in advance



of the hearing. Then, after a set of the fact witnesses from both sides have been heard and often after the experts have been subject to individual cross-examination, the independent experts retained by the opposing parties come before the arbitrator, seated alongside each other at the witness table.<sup>(169)</sup>

6.186 The chairman of the arbitrator then takes the experts through the agenda, item by item. The experts are requested to explain in their own words the basis for reaching the opinions set out in their written reports and to answer each other's main points. They may also be encouraged to debate these points directly with each other. If the arbitrator considers that this would be useful.

**(iv). Closing submissions**

6.187 As with opening statements, it is relatively rare in modern international arbitration for lengthy oral submissions to be made after the witness testimony has been heard. There are two reasons for this. The first relates to time and cost. It has been noted already that the most expensive phase of an international arbitration is the time during which a set of the parties must be gathered in a city that will be foreign to most of them. The accommodation costs are high, but these are dwarfed by the 'time costs' of the parties: the arbitrator, the parties' representatives, the counsel, and the witnesses. The second reason is that it can be challenging, alongside intensive witness examination, for counsel to review quickly and evaluate the transcripts obtained throughout the hearing, and to craft a closing statement that will adequately address the arbitrator's concerns.

6.188 It is more usual, in modern international arbitrations, for the closing submissions to be written, in the form of post-hearing briefs, delivered after the parties have had the opportunity to review (and, where necessary, correct) the transcripts, with a time for delivery to be agreed between the parties or fixed by the arbitrator. These documents will contain footnote references to the transcripts of the evidence and are designed to facilitate the drafting of the award.

6.189 However, this does not exclude the possibility of counsel being permitted to present some form of oral closing statement after the witness testimony has been heard, if they prefer, or to answer questions from the arbitrator.

**(v). Who has the last word?**

6.190 In common law practice, it is the claimant (or plaintiff, in some jurisdictions) in a national court that is given the 'last word', on the basis that the claimant bears the burden of proof. In international arbitrations, however, this practice is rarely followed, since arbitrators tend to favour, instinctively, that due process is generally served if the respondent has the privilege of having the 'last word' to balance the claimant's privilege of going first. Furthermore, the burden of proof points not wholly valid, because, in most international arbitrations, the burden falls on each party to prove the facts on which they rely.

**(d). Default hearings**

6.191 An arbitrator may, and indeed should, proceed *ex parte* if one of the parties (a most invariably the respondent) refuses or fails to appear. In such cases, the arbitrator should proceed with the hearing and issue its award, making sure that the precise circumstances in which the proceedings have taken place are specified in the award itself.<sup>(170)</sup>

6.192 This is necessary because it is key that a party who boycotts an international arbitration intends to resist enforcement of any award ultimately rendered. Since this is a legitimate ground for refusal of recognition or enforcement of an award, whether under the New York Convention or otherwise, that a party has not had a reasonable opportunity to present its case, it is desirable that the award should itself show, on its face, the circumstances in which the respondent did not participate. Two main problems commonly arise in relation to such *ex parte* hearings: the first is what constitutes a 'refusal' to participate; the second is how the arbitrator should proceed in such circumstances.

**(i). Refusal to participate**

6.193 In some circumstances, the situation is clear. This was so in the three Libyan national court cases<sup>(171)</sup> in which the Libyan government stated at the outset that it refused to take any part in the proceedings, on the grounds that the arbitrators, in each

case, had no jurisdiction. It would also be clear for a respondent expressly refuses to reply to correspondence from the arbitrator, or to comply with any procedural directions as to the submission of written pleadings, and so forth.

6.194 There are two other circumstances in which an arbitrator should proceed *ex parte*, but these are more difficult to identify. The first is where a party does not notify its unwillingness to participate, but creates a delay so unreasonable that the arbitrator (on the application of the other party) would be justified if it were to treat the party in default as having abandoned its right to present its case. It is impossible to specify precisely when this point arises in any given proceedings and an arbitrator must use its best judgment, balancing the various factors involved. However, the arbitrator should bear in mind that it may not be doing the claimant any favours if it accedes too early to an application to proceed *ex parte*, because the award may become the subject of a successful challenge when the claimant seeks to enforce it.<sup>(172)</sup>

6.195 The second situation is where a party so disrupts the hearing that it becomes impossible to conduct it in an orderly manner. Experience of such a situation is hard to find, but theoretically it could happen; the arbitrator would then need to treat the defaulting party's conduct as being equivalent to a refusal to participate.

### **(ii). Procedure in default hearings**

6.196 Unlike a court, an arbitrator has no authority to issue an award akin to a default judgment. Its task is to make a determination of the disputes submitted to it. Accordingly, even if a party fails to present its case, the arbitrator must consider the merits and make a determination of the substance of the dispute. Where it is clear from the beginning that a party (usually the respondent) does not propose to take part, the arbitrator usually ensures that a notice of hearings and correspondence continue to be sent to the defaulting party, and that all of the participating party's submissions and evidence are placed before the defaulting party in written form. The arbitrator will then be justified in holding on to a brief hearing, on an *ex parte* basis, to review the claims and raise any questions.

6.197 A reasonable guideline as to how such a proceeding should take place is that the party who is taking part must prove its case to the satisfaction of the arbitrator. The arbitrator has no duty to act as advocate for a party who has elected not to appear, but it must examine the merits of the arguments of law and fact put to it by the participating party, so as to satisfy itself that these are well founded. It must then make a reasoned determination of the issues.

6.198 The practice of arbitrators varies as regards hearings in such situations. Much will depend on the form in which the written stages of the arbitration have taken place. If the written stages have been comprehensive, the arbitrator may feel justified in holding a brief and purely formal hearing prior to issuing its award. If, on the other hand, the written pleadings have been skeletal, formal documents in which only the issues have been defined and no documentary or witness evidence has been submitted in writing, the arbitrator would probably consider it necessary to hear oral evidence before being satisfied that the participating party has discharged the burden of proof in relation to its claims (or defences).

6.199 The Model Law contains a provision empowering the arbitrator to continue the proceedings and to make an award where a party fails to comply with the requirements of the procedure agreed by the parties or established by the arbitrator.<sup>(173)</sup> Similar provisions are to be found in modern laws of arbitration, even if they are not directly based on the Model Law.

## **G. Proceedings after the Hearing**

### **(a). Introduction**

6.200 In theory, the hearing should conclude the participation of the parties in the arbitration. Indeed, it is good practice for the arbitrator to declare the evidentiary record closed.<sup>(174)</sup> This will not prevent the parties, if so agreed by the arbitrator, from submitting post-hearing briefs, but it will prevent them from submitting new unsolicited material after the hearing, which will require further procedural orders to enable the other party to reply.

### **(b). Post-hearing briefs**

6.201 It is increasingly common for the parties to submit post-hearing briefs, often of limited length, summarising the main points that have emerged in evidence and argument. The emergence of such a practice may be seen as a direct corollary of the practice of limiting the length of the hearing and, indeed, of imposing time constraints on the parties at the hearing.<sup>(175)</sup>

6.202 Thus the most frequently adopted form of proceedings after the closure of the hearings is an exchange of post-hearing briefs. Such a final written opportunity to make submissions is particularly useful where the arbitrator has raised questions during the closing arguments and the parties' counsel wish to have time to undertake research before giving the answers. One of the authors experienced such a situation at a hearing, when the question of whether or not the United Nations Convention on Contracts for the International Sale of Goods 1980 (Vienna Sales Convention) applied to the transaction in question was raised during the closing arguments. This was not a matter upon which the parties' counsel could reasonably be expected to respond off the cuff and, accordingly, the parties were directed to submit post-hearing memoranda on the question.<sup>(176)</sup>

**(c). Introduction of new evidence**

6.203 The post-hearing briefs may not always be the end of the proceedings. First, fresh evidence may come to light after the hearing, but before the arbitrator has issued its award. In these circumstances, the arbitrator has discretion to reopen the proceedings at the request of the party wishing to present the new evidence.<sup>(177)</sup> Carefully, it should refuse to do so where the fresh evidence is not needed for the deliberations, or if the new material appears to be a spurious attempt to delay the proceedings. But, in general, arbitrators prefer to determine a dispute with the benefit of all of the relevant evidence in their possession. If the fresh evidence turns out to be valuable, or without merit, the opposing party may be compensated by the arbitrator in relation to the additional costs incurred, and by an award of interest where this is appropriate.

6.204 The course that should be adopted by the arbitrator depends on the circumstances of each case and the nature of the material to which a response must be made. However, arbitrators normally (and rightly) try to ensure that additional hearings do not take place unless they are really necessary; they generally permit one party to put in further written evidence and submissions only if the other has presented fresh material, or subsequent to, the hearing.

<sup>1</sup> An award may be set aside under the Model Law if the arbitration procedure was not in accordance with the agreement of the parties, and this is also a ground for refusal of recognition or enforcement: Arts 34(2)(a)(v) and 36(1)(a)(v). See also New York Convention, Art. V(1)(d).

<sup>2</sup> See the above provisions of the Model Law and the New York Convention, and see [Chapter 2](#).

<sup>3</sup> For a discussion of the seat of the arbitration, see [Chapter 3](#), paragraph 3.53ff.

<sup>4</sup> See [Chapter 1](#) for an introduction to the arbitration process.

<sup>5</sup> See Veeder, 'Whose arbitration is it anyway: The parties' or the arbitrator's? An interesting question', in [and Newman \(eds\) \*The Leading Arbitrators' Guide to International Arbitration\*](#) (2nd edn, Juris, 2008), p. 337, at pp. 340-341.

<sup>6</sup> Rowley and Wsner, 'Party autonomy and its discontents: The limits imposed by arbitrators and mandatory laws' (2011) 5 *World Arb & Med Rev* 321, at 321, conceive of this as an expression of party autonomy in which the arbitrator 'gives effect to the parties' choices in running the arbitration'. Pryles, 'Limits to party autonomy in arbitration procedure' (2007) 24 *J Int Arb* 327 explains the procedural autonomy of the tribunal as a product of a tripartite contract between parties and tribunal, mandatory law, and institutional rules.

<sup>7</sup> See, e.g., United Nations Commission on International Trade Law (UNCITRAL), *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/207 (UN, 1981), para. 17: 'Probably the most important principle on which the Model Law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations.'

<sup>8</sup> New York Convention, Art. V(1)(b): 'Recognition and enforcement of the award may be refused ... if ... [t]he party against whom the

award invoked was ... unable to present his case ...'

<sup>9</sup> UNCITRAL Rules, Art. 17(1).

<sup>10</sup> See, e.g., World Intellectual Property Organization (WIPO) Arbitration Rules, Art. 38(b); International Centre for Dispute Resolution (ICDR) Rules, Art. 16(1); American Arbitration Association (AAA) Commercial Arbitration Rules, Art. 32(a). See also the Swiss Rules, Art. 15(1), and the Rules of the Hong Kong International Arbitration Centre (HKIAC), Art. 13(1), which both refer to 'equal treatment'. The corresponding provisions of the ICC Rules, Art. 22(4), the LCIA Rules, Art. 14(4)(c), and the Dubai International Arbitration Centre (DIAC) Rules, Art. 17(2) do not expressly mention 'equality', but the phrase 'fairly and impartially' must encompass it.

<sup>11</sup> UNCITRAL, n. 7, para. 21.

<sup>12</sup> See, e.g., UNCITRAL Rules, Art. 17(1); ICC Rules, Art. 22(4); LCIA Rules, Art. 14(4)(c); Rules of the Stockholm Chamber of Commerce (SCC), Art. 19(2); China International Economic and Trade Arbitration Commission (CIETAC) Rules, Art. 33(1); HKIAC Rules, Art. 13(1). Compare DIAC Rules, Art. 17(2); Vienna International Arbitration Centre (VIAC) Rules, Art. 28(1); Swiss Rules, Art. 15(1).

<sup>13</sup> For example, the administration of oaths by arbitrators in a country in which the law allows oaths to be administered only by judicial officers.

<sup>14</sup> For example, in the United States, the Federal Arbitration Act of 1925 (FAA), § 7, allows an arbitrator to issue a summons to order the attendance of a third party as a witness at the arbitration proceedings; but court assistance is necessary to enforce the summons if the third party refuses to obey it.

<sup>15</sup> This is considered in more detail in Chapter 7, paragraphs 7.13ff.

<sup>16</sup> See, e.g., ICC Rules, Art. 22; UNCITRAL Rules, Art. 17(1); LCIA Rules, Art. 14(4) and (5); Swiss Rules, Art. 15(1) and (7); SCC Rules, Art. 19(2); ICDR Rules, Art. 16(1) and (2); SIAC Rules, Art. 16(1); HKIAC Rules, Art. 13(1).

<sup>17</sup> See [Chapter 4](#).

<sup>18</sup> See [Chapter 4](#).

<sup>19</sup> See [Chapter 9](#).

<sup>20</sup> Marre and Mozzato, *Alle origini dell'arbitrato commerciale internazionale: L'arbitrato a Venezia tra Medioevo ed età moderna* (CEDAM, 2001).

<sup>21</sup> The debate that followed also gave birth to the notion of 'fast-track' arbitration. The aim of such processes is to accelerate a lot of the steps, thereby achieving a binding result as quickly as possible, reducing overall costs, and encouraging settlements.

<sup>22</sup> ICC Rules, Art. 29 and Appendix V; ICDR Rules, Art. 37; Swiss Rules, Art. 43; SCC Rules, Appendix II; HKIAC Rules, Sch. 4; SIAC Rules, Sch. 1; LCIA Rules, Art. 9B. Since 1990, the ICC has offered the option to parties to expressly adopt the Pre-Arbitration Referee Rules, which provide for the immediate appointment of a pre-arbitration referee empowered to make certain interim orders prior to the constitution of the arbitration tribunal. However, the Rules have rarely been used, primarily because they require parties to opt in, and are now rendered practically obsolete by the introduction of the emergency arbitrator provisions in Art. 29 and Appendix V of the 2012 ICC Rules, which apply unless the parties expressly opt out.

<sup>23</sup> See, e.g., the ICC, SCC, and Swiss Rules.

<sup>24</sup> Swiss Rules, Art. 26(3).

<sup>25</sup> LCIA Rules, Art. 9A ('Expedited Format of Arbitration Tribunal') provides:

9.1 In exceptional urgency, any party may apply for the emergency format of the Arbitration Tribunal by the LCIA Court under Article 5.

9.2 Such an application shall be made in writing to the Registrar (preferably by electronic means), together with the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), delivered or not delivered to another party to the arbitration. The application shall set out the specific grounds for exceptional urgency in the format of the Arbitration Tribunal.

9.3 For the purpose of forming the Arbitration Tribunal, the LCIA Court may abridge any period of time under the Arbitration Agreement or other agreement of the parties (pursuant to Article 22.5).

<sup>26</sup> Turner and Mohtasham, *Guide to the LCIA Arbitration Rules* (Oxford University Press, 2009), paras 4.86ff.

<sup>27</sup> Information provided by the LCIA's Registrar.

<sup>28</sup> DIAC Rules, Art. 12 ('Expedited Format') provides:

12.1 On or after the commencement of the arbitration, any party may apply to the Centre for the expedited format of the Tribunal, including the appointment of any replacement arbitrator where appropriate.

- 12.2 Any such application shall be made to the Centre in writing, copied to all other parties to the arbitration and shall set out the specific grounds for exceptional urgency in establishing the Tribunal.
- 12.3 The Centre may, in its complete discretion, adjust any timetable under these Rules for formation of the Tribunal, including service of the Answer and of any matters or documents adjudged to be missing from the Request.
- 29 These include the AAA, SIAC, CIETAC, KIAC, WIPO, SCC, and the Swiss Chambers' Arbitration Institution. See, e.g., AAA Commercial Arbitration Rules, Expedited Procedures, Sections E-1-E-10; see also the ICDR Arbitration Model Clause for Expedited Cases; SIAC Rules, Art. 5; CIETAC Rules, Ch. IV (Titled Summary Procedure); KIAC Rules, Art. 41; WIPO Expedited Arbitration Rules; SCC Rules for Expedited Arbitration; Swiss Rules, Art. 42.
- 30 Swiss Rules, Art. 6(4).
- 31 The Swiss Federal Supreme Court ruled on a challenge to an award rendered in accordance with the Swiss Chamber's expedited procedure and held, in the circumstances, that the respondent had not been denied its right to be heard nor had it been treated unequally: Decisions No. 4A\_294/2008, Swiss Federal Supreme Court, 28 October 2008.
- 32 ICC Case No. 10211. None of the material published in this book is confidential, because the proceedings and the procedure were fully reported in various motor racing journals. See also Kaufmann-Kohler and Peter, 'Formula 1 racing and arbitration: The FIA tailor-made system for fast track dispute resolution' (2001) 17 *Arb Int* 173.
- 33 As a postscript, one of the present authors, who was a member of the Tribunal (which unanimously upheld the FIA's position), recalls one of the other arbitrators during the deliberation making the observation: 'Of course, you know what they [the F1 team] will do... they'll paint each car the same, one side of the car in the livery of one brand and the other side in the livery of the other brand.' This is not served him well: this is precisely what the team did.
- 34 See also Rawding, Fuleo, and Marten, 'International arbitration in England: A procedural overview', in Greenaway, Fuleo, Lew, and Bor (eds) *Arbitration in England with Chapters on Scotland and Ireland* (Kluwer Law International, 2013), p. 361, at paras 18-34-18-38.
- 35 G., 'Applications for the early disposition of claims in arbitration proceedings' (2009) 14 *ICCA Congress Series* 513. National court procedures often permit a court to make a summary judgment where a plaintiff or a defendant has no reasonable prospects of succeeding on its claim or defence. However, as G. points out, it is uncontroversial to suggest that Tribunals generally do not possess the powers of summary disposition conferred on national courts: *ibid.*, at 515. See also the Centre for Public Resources (CPR) International Commission on Arbitration, *Guidelines on Early Disposition of Issues in Arbitration*, available online at [http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration.a...](http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration)
- 36 ICSID Rules, r. 41(6), provides that: 'If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that a claim is manifestly without legal merit, it shall render an award to that effect.' See also AAA Rules, Art. 33. More generally, IBA Rules, Art. 2.3, encourages the arbitration Tribunal to identify to the Parties, as soon as it considers it to be appropriate, any issues: '... (b) for which a preliminary determination may be appropriate'. See also 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2011) 5(1) *DRI* 45, at 51: 'While the Working Party did not want to encourage litigation-style motions in practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case.'
- 37 Born and Beale, 'Party autonomy and default rules: Reframing the debate over summary disposition in international arbitration' (2010) 21 *ICC International Court of Arbitration Bulletin* 19.
- 38 It is necessary to distinguish between a preliminary meeting (or preliminary hearing) and a pre-hearing conference. A preliminary meeting takes place as early as possible in the proceedings, and certain days before the written stage. A pre-hearing conference takes place after the written stage, and has as its primary objective the organization and order of proceedings at the evidentiary hearing.
- 39 SIAC Rules, Art. 16(3); DIAC Rules, Art. 22.
- 40 ICC Rules, Art. 24. See also ICC Rules, Appendix IV (Case Management Techniques).
- 41 AAA Rules, Art. 21 (and Sections P-1 and P-2); ICDR Rules, Art. 16(2). Most rules require the Tribunal to consult with the parties before it prepares the procedural timetable for the arbitration: see, e.g., ICSID Rules, r. 20; KIAC Rules, Art. 13(2); SCC Rules, Art. 23; Swiss Rules, Art. 15(3). See also UNCITRAL Rules, Art. 17(2).

- 42 As in the *Aminoil* arbitration: *Government of the State of Kuwait v The American Independent Oil Co (Aminoil)* (1982) 21 ILM 976, at 983.
- 43 By the twenty-first century, this had become rare: see [Chapter 2, n. 6](#).
- 44 See also Böckstegge, 'Party autonomy and case management: Experiences and suggestions of an arbitrator' [2013] *SchiedsVZ* 1.
- 45 See [Chapter 9](#).
- 46 These are set out at in Appendix I. The UNCITRAL Working Group II (Arbitration and Conciliation) produced a draft revised version of the Notes in its Sixty-second Session in New York, 2-6 February 2015, but at the time of writing this draft had yet to be approved.
- 47 See [Chapter 5](#).
- 48 See also the discussion of partial and interim awards in relation to the separation of liability and quantum in Chapter 9. See also ICC Rules, Appendix IV, para. (a); ICDR Rules, Art. 16(3); AAA Rules, Art. 32(b); SIAC Rules, Art. 16(4).
- 49 See Redfern, 'The arbitration between the Government of Kuwait and Amnoco' (1984) 55 *BYIL* 65.
- 50 See Unter and Sinclair, 'Aminoil revisited: Reflections on a story of changing circumstances', in Weir (ed.) *International Investment Law and Arbitration: Leading Cases from the ICSID NAFTA Bilateral Treaties and Customary International Law* (Cameron May, 2005), pp. 347-381.
- 51 Note that a number of sets of institutional rules permit the tribunal to direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case': ICDR Rules, Art. 16(3); AAA Rules, Art. 32(b); SIAC Rules, Art. 16(4). See also ICC Rules, Appendix IV, para. (a); LCIA Rules, Art. 19(2).
- 52 See paragraph 6.03.
- 53 In this vein, one arbitrator has remarked, 'I am sometimes shocked when I write the award that although we heard 25 witnesses, I am only referring to two, and I think, "why did we spend time hearing them, why did the parties bear the costs of preparing them ...?": Due process must trump efficiency, says Derans', *Globe Arbitration Review*, 23 September 2014.
- 54 Kaplan, 'If it ain't broke, don't change it' (2014) 80 *Arbitration* 172. See also Partasides and Vese, pp. 167-168.
- 55 LCIA Rules, Art. 15(1).
- 56 ICDR Rules, Arts 2 and 3.
- 57 ICDR Rules, Art. 17(1).
- 58 Swiss Rules, Arts 18(3) and 19(2).
- 59 ICSID Rules, r. 31(1) and (2).
- 60 ICSID Rules, r. 31(3).
- 61 The Note was included in the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of January 1968, referring to r. 30(3), which is r. 31(3) in the current 2006 edition of the Rules: see Rayfuse, *ICSID Reports Vol 1: Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965* (Grotius, 1993), p. 93.
- 62 White & Case and Queen Mary University of London, *Current and Preferred Practices in the Arbitral Process* (2012), available online at <http://www.arbitration.qmu.ac.uk/research/2012/index.htm>, found that 82 per cent of respondents said that sequential exchange was the most common approach, with 79 per cent expressing a preference for it.
- 63 The practice developed under the UNCITRAL Rules by the Iran United States Claims Tribunal is summarised, with case citations, in Oetzmann, 'Fact-finding by the Iran United States Claims Tribunal', in Lach (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 101-133. In deciding upon the admissibility of late-filed submissions, the tribunal considered, in light of the circumstances of each case, the needs for equality and fairness, the possibility of prejudice to the other party, and the requirements for orderly conduct of the proceedings.
- 64 The Iran United States Claims Tribunal considered the reasons for the delay, the prejudice to the other party, and the effect of admitting the late-filed counterclaim on the orderly progress of the case: Oetzmann, 'Some lessons of the Iran United States Claims Tribunal', in Landwehr (ed.) *Private Investors Abroad: Problems and Solutions in International Business* (Bender, 1988), p. 5. See also UNCITRAL Rules, Art. 22.
- 65 See the discussion of comparative arbitration practices in (1987) 3 *ICCA Congress Series* 98. The extent to which the Iran United States Claims Tribunal took an active role in obtaining evidence is described by Oetzmann, 'Fact-finding by the Iran United States Claims Tribunal', in Lach (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 106-110.

- 66 Reymond, Part 2: Common law and civil law procedures 'Which is the more rigorous for a?' (1989) 55 *Arbitration* 155, at 159.
- 67 Götzmann, Fact-finding by the Iran-United States Claims Tribunal', in L. Ch. (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 118-119. See also Götzmann, Streamlining arbitration proceedings: Some technical questions of the Iran-United States Claims Tribunal' (1995) 11 *Arbitration & International Law* 39; Strauss, The practice of the Iran-US Claims Tribunal in receiving evidence from parties and from experts' (1986) 3 *Journal of International Arbitration* 57. See also IBA Rules, Art. 9(1).
- 68 One such proposition might be that the earth is a sphere, although members of the flat earth society would not agree.
- 69 In *Parker* (1926) 4 *Rep. Int. Arb. Awards* 25, at 39, the Mexican-US General Claims Commission held that, '... when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former produce evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubt'. See also Eveleigh, 'Notau, Menzies, Philip, Redfern, Reiner, and Reymond, The standards and burden of proof in international arbitration' (1994) 10 *Arbitration & International Law* 317, at 320-321; Petrowski, *Evidence in international arbitration* (2006) 22 *Arbitration & International Law* 373.
- 70 *Secretary of State for the Home Department v Rehman* [2001] UK L 47, at [140] [141] *per* Lord Hoffmann. See also Partasides, 'Proving corruption in international arbitration: A balanced standard for the real world' (2010) 25 *ICSID Review - Foreign Investment LJ* 472.
- 71 Sometimes actually rehearsed with the aid of video cameras.
- 72 In two cases before the Iran-United States Claims Tribunal, fact-finding on jurisdictional issues was based entirely on documentary evidence consisting of official documents, corporate documents prepared in the ordinary course of business, publications of which the Tribunal took judicial notice, certificates by independent certified public accountants, and affidavits of corporate officers: see Götzmann, Fact-finding by the Iran-United States Claims Tribunal', in L. Ch. (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 110-114.
- 73 The word 'discovery' is a term of art used in the United States and some other common law countries (no longer in England, where the term was abolished under the Civil Procedure Rules 1996) to describe a process whereby the parties (and their lawyers) are legally obliged to produce documents that are relevant to the pleaded issues, even if they are prejudicial to that party's case. Subject to any mandatory rules of the *lex arbitri*, or agreement of the parties, the process known as 'discovery' has no place in international arbitration.
- 74 Other than where the applicable arbitration rules expressly permit such an order.
- 75 The definition of the word 'Commercial' from the title was intended to reflect the fact that the Rules may be, and indeed are, applied in both commercial and investment treaty arbitration.
- 76 The Preamble to the Rules provides that:

They are designed to supplement the legal provisions and the institution, *ad hoc* or other rules that apply to the conduct of the arbitration ... Parties and Arbitration Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitration Tribunals are free to adapt them to the particular circumstances of each arbitration.

Article 1 of the Rules further includes various provisions aimed at resolving conflicts between the Rules, mandatory provisions of law, and the institution, *ad hoc*, or other rules that apply to the conduct of the arbitration.

- 77 See paragraph 6.102. This formulation was intended to be a clarification, rather than a modification, of the criteria under the 1999 Rules, which required a document to be 'relevant and material to the outcome of the case'. The change of wording is not mentioned in the IBA Commentary on the 2010 Rules: Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), paras P-5-P-38. See also Käsemer, 'The duty of good faith in the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010) 13 *International Arbitration LR* 160.

- 78 Article 9(2) states:

2. The Arbitration Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
- (a) lack of sufficient relevance to the case or materiality to its outcome;
  - (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitration Tribunal to be applicable;
  - (c) unreasonable burden to produce the requested evidence;
  - (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
  - (e) grounds of commercial or technical confidentiality that the Arbitration Tribunal determines to be compelling;
  - (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitration Tribunal determines to be compelling; or
  - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitration Tribunal determines to be compelling.

<sup>79</sup> See [Chapter 1](#), paragraph 1.238 and Figure 1.1.

<sup>80</sup> The requirement to present document requests in the form of a *Redfern* schedule is often set out in the first procedural order, or a subsequent procedural order dealing with document production issues. Successful iterations of the parties' *Redfern* schedules are then filed with the arbitration tribunal. Typically, the *Redfern* schedules are the primary, or may even be the sole, channel of consultation between the parties on the requests to the other party's document production requests.

<sup>81</sup> As a further efficiency on the use of *Redfern* schedules, VV Veeder QC has proposed a set of 'Veeder codes', in the form of abbreviations of the reasons for objection set out in IBA Rules, Art. 3(5), for use in the drafting of objections to documents requests made in *Redfern* schedules. For example, where the requested party objects on the grounds that the requested document is not material to the outcome of the case (pursuant to Arts 3(3)(b) and 9(2)(a)), it would enter the code 'M' in the third column of the *Redfern* schedule; where the requested party objects on the basis that the request is excessively broad (pursuant to Art. 3(3)(a)), it would enter the code 'B'.

<sup>82</sup> Such an approach is now expressly encouraged by IBA Rules, Art. 3(6), and may be agreed in advance by the parties during the consultation on evidential issues that is now provided for by Art. 2(1). See also IBA Rules, Art. 2(2)(c); ICC Rules, Appendix IV, para. (d)(v).

<sup>83</sup> In 2003, a project of the School of Information Management and Systems at the University of California at Berkeley, entitled 'How Much Information?', estimated that 92 per cent of the new information produced in 2002 was stored in magnetic form usually on a hard drive and 70 per cent of this information is never printed: see online at <http://groups.schoo.berkeley.edu/arch/ve/how-much-info-2003/>

<sup>84</sup> See paragraph 6.77.

<sup>85</sup> *Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2nd edn, 2007), named after The Sedona Conference (held at the Sedona Convention in the United States). The first edition of the Principles published in 2004 clearly inspired the conclusions reached by the Cresswell Committee in England, whose report is turned into a Practice Direction under the English Civil Procedure Rules, Pt 31, and, later, to an amendment of the US Federal Rules of Civil Procedure. See also Sedges, 'Litigation Lessons? US Federal Rules of Civil Procedure, The Sedona Principles, and Part 31 of the English Civil Procedure Rules', in Lowe (ed.) *Electronic Disclosure in International Arbitration* (JurisNet, 2008), pp. 107-117.

<sup>86</sup> See paragraph 6.01.

<sup>87</sup> Which would generally be inappropriate unless both parties come from the seat of the arbitration, in which case the arbitration would not, in fact, be an *international* arbitration.

<sup>88</sup> IBA Rules, Definitions. The Introduction to the Sedona Principles defines ESI as including:

... emails, web pages, word processing files, audio and video files, images, computer databases ... including but not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players. Technically, information is electronic if it exists in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as computer hard



drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

As the definition of Documents' contained in the 1999 edition of the IBA Rules was sufficiently broad to encompass most forms of ESI, it was decided that minor changes would be made in the 2010 edition to ensure that all known forms of ESI evidence would be subject to the IBA Rules: 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2011) 5(1) DRI 45, at 49.

<sup>89</sup> In respect of the production of electronic documents, the power of the tribunal under IBA Rules, Art. 3(3)(a) ( ), to require a requesting party to identify specific files, search terms, and videos or other means of searching for such Documents in an efficient and economical manner' provides a way in which to reduce the burden imposed on a requested party. See also Art. 3(12)(b) (a party need produce electronic documents only in the form most convenient or economical to that party reasonably usable by the recipients') and (c) (a party is not required to produce multiple copies of Documents which are essential to the party). See also Smith, E-discovery under the Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 13 Int ALR 201.

<sup>90</sup> English Arbitration Act 1996, s. 43.

<sup>91</sup> US FAA, § 7.

<sup>92</sup> The Iran United States Claims Tribunal drew adverse inferences from the silence of a party in the face of a alleged breach or non-performance of the contract when some complaint would have been expected, and from failure of a party to mention a point in a contract or in contemporaneous correspondence consistent with that party's position in the arbitration: *Wotzmann, Fact-finding by the Iran United States Claims Tribunal*, in Lach (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 126-127.

<sup>93</sup> IBA Rules, Art. 3(12)(a).

<sup>94</sup> IBA Rules, Art. 3(12)(d).

<sup>95</sup> This provision and Art. 8(1) are intended to save on time and expense by requiring witnesses to attend only where they are requested to do so, and by providing that a witness statement is not deemed to be accepted by the other parties in the absence of any such request (whether by agreement or otherwise): 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2011) 5(1) DRI 45, at 64-66; Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), paras 4-13-4-14.

<sup>96</sup> See, e.g., LCIA Rules, Art. 20; SIAC Rules, Art. 22.

<sup>97</sup> This was a revision introduced in 2010 that was intended to align the IBA Rules with current best practice: 1999 IBA Working Party, n. 95, at 65. Article 8(2) provides that the right to call witnesses is subject to the tribunal's power to exclude any appearance that it considers to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2.

<sup>98</sup> See also IBA Rules, Arts 3(10) and 8(5).

<sup>99</sup> See the paper presented by Doak Bishop at the 2012 ICCA Congress held in Singapore in the context of a panel discussion on the merits of uniform ethical regulation of international arbitration. See also Bishop and Stevens, 'The compelling need for a code of ethics in international arbitration: Transparency, integrity and legitimacy' (2011) 15 ICCA Congress Series 391, at 394.

<sup>100</sup> Backaby, Witness preparation: A key to effective advocacy in international arbitration' (2010) 15 ICCA Congress Series 118.

<sup>101</sup> LCIA Rules, Art. 20(5).

<sup>102</sup> Swiss Rules, Art. 25(2); SIAC Rules, Art. 22(5).

<sup>103</sup> The final phrase, and to discuss the prospective testimony with them', was introduced in the 2010 edition to clarify that such an interview need not remain general, but may indeed relate to the subject-matter of the prospective testimony: 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2011) 5(1) DRI 45, at 63-64; Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), paras 4-7-4-8. See also the IBA Guidelines on Party Representation in International Arbitration, Guide 24, which states in part that: 'A Party Representative ... may meet or interact with Witnesses and Experts in order to discuss and prepare the prospective testimony.' See also the UNCITRAL Notes on Organizing Arbitration Proceedings, paras 61 and 67. However, in exercise of its discretion under IBA Rules, Art. 9(1), a tribunal may

take into account extensive interviewing and preparation in determining the weight that it will accord to a witness's evidence.

<sup>104</sup> See the IBA Guidelines on Party Representation in International Arbitration, Guidelines 26 and 27. See also LCIA Rules, Annex.

<sup>105</sup> Germany is a significant example, followed by countries in which the code of civil procedure broadly follows the German tradition, such as Austria and the Czech Republic. See also 1999 IBA Working Party, n. 103, at 63.

<sup>106</sup> IBA Rules, Art. 4(2).

<sup>107</sup> 1999 IBA Working Party, n. 103, at 63.

<sup>108</sup> See above.

<sup>109</sup> IBA Rules, Art. 9(1). The practice of the Iran-United States Claims Tribunal concerning the weight to be given to affidavits is discussed by Oetzmann, Fact-finding by the Iran-United States Claims Tribunal, in Leach (ed.) *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (Transnational, 1991), pp. 113-114.

<sup>110</sup> See also, e.g., LCIA Rules, Art. 22(1)(v); Swiss Rules, Art. 24(2); SCC Rules, Art. 26(1); KIAC Rules, Art. 22(1).

<sup>111</sup> For example, s. 44 of the English Arbitration Act 1996 permits English courts to provide assistance to foreign arbitrations, but s. 2(3) provides that the courts can refuse to do so if the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

<sup>112</sup> 28 USC § 1782.

<sup>113</sup> This is particularly so after the US Supreme Court's decision in *Intel Corporation v. Advanced Micro Devices, Inc.* 542 US 241 (2004), in which it adopted an expansive view of the scope of § 1782, holding that the Court's power extends to administrative and quasijudicial proceedings abroad.

<sup>114</sup> See the discussion in [Chapter 7](#), at paragraphs 7.39-7.44. See also Beale, Lugar, and Schwartz, 'Solving the § 1782 puzzle: Bringing certainty to the debate over 28 USC § 1782's application to international arbitration' (2011) 47 SJIL 51. However, it has been noted that '[f]ederal courts uniformly agree that Section 1782 applies to investment arbitration and they routinely order discovery, American-style, in aid of such international proceedings': Aford, 'Ancillary discovery to prove denial of justice' (2013) 53 VJIL 127, at 128 and 136-137. See, e.g., *In re Application of Chevron Corporation (Berlinger)* 709 F.Supp.2d 283 (SDNY 2010); *aff'd Chevron Corporation v. Berlinger* 629 F.3d 297 (2nd Cir. 2011). See also IBA Rules, Art. 3(9).

<sup>115</sup> Mode Law, Art. 27.

<sup>116</sup> IBA Rules, Art. 9(4) and (5).

<sup>117</sup> See [Chapter 4](#), paragraphs 4.55ff.

<sup>118</sup> See *Starrett Housing Corporation v. Government of the Islamic Republic of Iran* (1987) 16 Iran-US CTR 112, Award No. 314-21-1, 14 August 1987, at [264], quoting the International Court of Justice (ICJ) in *United Kingdom of Great Britain and Northern Ireland v. Albania (Corfu Channel)* [1949] ICJ Rep 4, at 20.

<sup>119</sup> See, e.g., UNCITRAL Rules, Art. 29; ICC Rules, Art. 25(4); Swiss Rules, Art. 27; SCC Rules, Art. 29; ICDR Rules, Art. 22; SIAC Rules, Art. 23; KIAC Rules, Art. 25; LCIA Rules, Art. 21.

<sup>120</sup> This principle was expressed by the Iran-United States Claims Tribunal in *Starrett Housing*, at [266]: 'No matter how qualified an expert may be, however, it is fundamental that an arbitrator cannot delegate to him the duty of deciding the case.' In applying this principle, the Tribunal cited earlier international tribunals and stated, at [273]: '[T]he Tribunal adopts as its own the conclusions of the Expert on matters within his area of expertise when it is satisfied that sufficient reasons have not been shown that the Expert's view is contrary to the evidence, the governing law, or common sense.' See also the comment and cases cited at [271]-[272]. See also IBA Rules, Art. 6(7).

<sup>121</sup> See *Starrett Housing*, at [6].

<sup>122</sup> In the same way, the IBA Rules provide for the involvement of the parties in the appointment of the expert, and also recommend that the parties (or the experts) have an opportunity to comment on and question the expert's report: see IBA Rules, Art. 6(1), (2), (5), and (6).

<sup>123</sup> Learned and, 'storica and practica considerations regarding expert testimony' (1901) 15 *Harv L Rev* 40, at 54-55.

<sup>124</sup> A number of international arbitration rules provide for the use of party-appointed experts: see, e.g., UNCITRAL Rules, Art. 27(2); LCIA Rules, Art. 20; Swiss Rules, Art. 25(2) and (4); SCC Rules, Art. 28; SIAC Rules, Art. 22; KIAC Rules, Art. 22(5).

<sup>125</sup> IBA Rules, Art. 5(1). See also Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), para. 2-10.

<sup>126</sup> The key amendments introduced in the 2010 edition of the

Rules were the requirements to (a) include a description of expert's instructions, (b) provide a statement of independence, and (c) append copies of the documents on which the experts rely, unless they are already on the record of the arbitration. The report must also now include statements regarding translation and be signed with an affirmation of genuine belief in the opinions expressed (rather than an affirmation of the truth of the report, as was required under the 1999 edition of the Rules). See also *ibid.*, at paras 5-4 5-27, and the Chartered Institute of Arbitrators (CIArb) Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

<sup>127</sup> IBA Rules, Arts 8(1), and 5(5) and (6).

<sup>128</sup> Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), para. 7-02.

<sup>129</sup> See IBA Rules, Art. 6(3) and (5), subject to Art. 9(2). See also the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, para. 5.

<sup>130</sup> In fact, the dispute was settled before this was done.

<sup>131</sup> Regarding inspections, see Art. 66 of the 1978 ICJ Rules of Court (adopted on 14 April 1978 and entered into force on 1 July 1978).

<sup>132</sup> UNCITRAL Notes on Organizing Arbitration Proceedings, para. 57.

<sup>133</sup> *ibid.*, para. 58.

<sup>134</sup> UNCITRAL Rules, Art. 29(3). See also the LCIA Rules, Art. 21(3); Swiss Rules, Art. 27(2); ICDR Rules, Art. 22(2); SIAC Rules, Art. 23(1)(b); KICAC Rules, Art. 25(2); CIETAC Rules, Art. 42(2).

<sup>135</sup> LCIA Rules, Art. 22(1)(v).

<sup>136</sup> SIAC Rules, Art. 24(e).

<sup>137</sup> CIETAC Rules, Art. 41.

<sup>138</sup> DIAC Rules, Art. 27(4).

<sup>139</sup> AAA Rules, Art. 36.

<sup>140</sup> WIPO Rules, Art. 50.

<sup>141</sup> ICSID Rules, r. 24(2)(b).

<sup>142</sup> ICSID Rules, r. 34(3) and (4).

<sup>143</sup> WIPO Rules, Art. 49 (on motion of a party).

<sup>144</sup> WIPO Rules, Art. 51 (with the agreement of the parties).

<sup>145</sup> See, e.g., LCIA Rules, Art. 19(1).

<sup>146</sup> See UNCITRAL Notes on Organizing Arbitration Proceedings, paras 24-25. The ICC Secretariat is usually willing to make the necessary arrangements if requested to do so by the arbitration tribunal.

<sup>147</sup> For further discussion of administrative arrangements of an arbitration tribunal, see [Chapter 4](#), paragraphs 4.169ff

<sup>148</sup> See UNCITRAL Notes on Organizing Arbitration Proceedings, paras 76-79.

<sup>149</sup> In a decision that was widely criticized, the Swedish Svea Court of Appeal held, in *Titan Corporation v Alcatel CIT SA*, Case No. R 2005:1 (T 1038-05) YCA XXX (2005), 139, that Titan Corporation could not request the Swedish courts to set aside an ICC award in an arbitration in which the seat was Stockholm because the parties had not conducted any of the hearings in Stockholm (consistent with the discretion to hold hearings other than in the place of arbitration that exists under the ICC Rules). In 2010, the Supreme Court reversed the decision. See Decision by the Svea Court of Appeal in Sweden rendered in 2005 Case No. T 1038 05' (2005) 2 Stockholm Int Arb Rev 259; Eweröf, Chapter 10 application of the New York Convention by Swedish courts', in Waan, Regnwaald, Magnusson, and Franke (eds) *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law International, 2013), p. 267, at pp. 270-271.

<sup>150</sup> See, e.g., SCC Rules, Art. 20(2); ICC Rules, Art. 18(2); UNCITRAL Rules, Art. 18(2); LCIA Rules, Art. 16(3). See also Model Law, Art. 20(2).

<sup>151</sup> Michael Moser has proposed a useful 'pre-hearing check list' to be distributed to the parties well in advance of the hearing: Moser, 'The "pre-hearing check list": A technique for enhancing efficiency in international arbitration proceedings' (2013) 30 J Int Arb 155.

<sup>152</sup> ICSID Rules, r. 21.

<sup>153</sup> Only a few do: see WIPO Rules, Art. 47; CIETAC Rules, Art. 33(5).

<sup>154</sup> In this regard, see ICC Rules, Appendix IV, para. (g) ('Case Management Techniques').

<sup>155</sup> Under the English Civil Procedure Rules 1998, however, the length of the hearings is restricted according to the value or complexity of the case.

<sup>156</sup> The oral tradition in England owes its origin to the man who is no longer there' that is, the juror. Jury trials used to have two inescapable procedural features. First, once started, the oral proceedings had to be completed, because, once assembled, there was no real practical possibility of reconvening the same jury many weeks, or even months, later. Secondly, although jurors had to be properly

- owners, there was no guarantee that they were terate; hence the need for a of the documents to be read a oud at the hearing.
- <sup>157</sup> UNCITRAL Notes on Organ s ng Arb tra Proceed ngs, para. 80.
- <sup>158</sup> Kerr, 'Concord and conf ct n nternat ona arb trat on' (1997) 13 Arb Int 121, at 126-127.
- <sup>159</sup> Roney, 'Effect ve witness preparat on for nternat ona commerc a arb trat on: A pract ca gu de for course ' (2003) 20 J Int Arb 429, at 430. Th s art c e provdes a usefu pract ca s-x-step gu de for the preparat on of witnesses.
- <sup>160</sup> See IBA Gu de nes on Party Representat on, Gu de nes 20 24, and the accompany ng commentary.
- <sup>161</sup> *Ib d.*
- <sup>162</sup> Veeder, 'The 2001 Goff Lecture: The awyer's duty to arb trate n good faith' (2002) 18 Arb Int 431, at 445.
- <sup>163</sup> A though witnesses sha ' appear n person, the tribuna may perm t a witness to provide test mony by vdeconference or s m ar techno ogy': IBA Ru es, Art. 8(1).
- <sup>164</sup> See IBA Ru es, Art. 8(2).
- <sup>165</sup> See Peter above.
- <sup>166</sup> One s de's expert says, wth great convct on, 'fauly des gn of the brdge'; equa y convnc ng y, the other s de's expert says, 'defect ve materia s used n construct on of the brdge'. Cross-exam nat on of experts by course s cons dered by many nternat ona arb trat ors to be an adequate too to he p them to make a determ nat on between the oppos ng vews of such experts.
- <sup>167</sup> Notably Peter, 'W tness conferenc ng' (2002) 18 Arb Int 47.
- <sup>168</sup> IBA Ru es, Art. 5(4). See also the CI Arb Protoco for the Use of Party-Appointed Expert W tnesses n Internat ona Arb trat on, Arts 6 and 7(2).
- <sup>169</sup> IBA Ru es, Art. 8(3)(f).
- <sup>170</sup> For a d scuss on of pract ce under var ous arb trat on ru es and nat ona aws, see van den Berg, 'Prevent ng de ay and d r u p t on of arb trat on' (1990) 5 ICCA Congress Seres 17. See also ICSID Ru es, r. 42; UNICTRAL Ru es, Art. 30; Sw ss Ru es, Art. 28; SCC Ru es, Art. 30; ICDR Ru es, Art. 23; AAA Ru es, Art. 31; KIAC Ru es, Art. 26.
- <sup>171</sup> The *Texaco BP*, and *Liamco* arb trat ons; see [Chapter 3](#), paragraphs 3.140ff.
- <sup>172</sup> It s rare, but not unknown, for the respondent to want the proceed ngs to go ahead, when the c a mant has fa ed to take them forward, n order to obta n an award that w put an end to the c a m. In such a case, s m ar cons derat ons w appy: the respondent w requre a so d award, capab e of be ng *recognised* by the courts, f th s becomes necessary.
- <sup>173</sup> Mode Law, Art. 25.
- <sup>174</sup> Some sets of nst tut ona ru es requre t: e.g., ICC Ru es, Art. 27; DIAC Ru es, Art. 34; SIAC Ru es, Art. 28(1).
- <sup>175</sup> See sect on on 'ear ngs' above.
- <sup>176</sup> AAA Case No. 13T1810031097.
- <sup>177</sup> See, e.g., UNCITRAL Ru es, Art. 31(2); Sw ss Ru es, Art. 34; VIAC Ru es, Art. 32; SIAC Ru es, Art. 28(1).

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R-55

RESPONDENT'S EXHIBIT

**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review

DOT REGISTRY, LLC,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

**PROCEDURAL ORDER NO. 8**

Independent Review Panel:

August 26, 2015

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

1. The Panel designates the place of these proceedings as New York, New York. In the event that in the future the Panel should determine that there shall be an in-person hearing, the Panel may designate a different location for the holding of any such hearing, as provided in ICDR International Rules, Art. 17.2, and without legal impact on the consequences, if any, of the designation of the place of these proceedings as New York, New York.
  
2. The Panel requests that the parties address the following matters in additional written submissions. The Panel will not accept further submissions unless specifically requested by the Panel. The Panel imposes no page limitations on the parties. However, any and all such submissions are due no later than October 12, 2015. The Panel requests that such submissions be focused, succinct, and not repeat matters already addressed in material fashion in that party's previous submissions or expert report. Please note: NO EXTENSIONS OF THIS DATE WILL BE GRANTED ABSENT A SHOWING OF GOOD CAUSE.

(a) Paragraph 3 of the ICANN Articles of Incorporation states that ICANN "is organized under the California Nonprofit Benefit Corporation Law for charitable and public purposes." (Emphasis added.) Further, Paragraph 4 of the ICANN Articles of Incorporation provides that:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

What are the "relevant principles of international law and applicable International conventions" encompassed by Paragraph 4 of the Articles for purposes of this dispute, and why? What principles of "local law" referred to in Paragraph 4 are relevant to this dispute, and why?

As the IRP Provider selected by ICANN pursuant to Article 1, Section 3.7 of the Bylaws is the International Centre for Dispute Resolution

("ICDR"), which calls for the application of the ICDR International Rules of Arbitration and supplementary rules thereto in any IRP, does the phrase "relevant principles of international law" include relevant principles of international arbitration?

Does (i) California law applicable to nonprofit public benefit corporations, and/or (ii) the statement in Paragraph 3 of the Articles that ICANN is "organized under the California law for companies under the California Nonprofit Public Benefit Corporation Law . . . *for public purposes*," (emphasis added) and/or (iii) the statement in Paragraph 4 of the Articles that "[t]he Corporation shall operate for the benefit of the Internet community as a whole" impose any specific responsibilities (whether in the nature of fiduciary duties, due process, non-discrimination, transparency or otherwise) on ICANN under California law beyond those binding on a California corporation generally? Under relevant principles of international law?

To what extent, if any, are the determinations of the Board of ICANN in the course of managing allocation of a gTLD subject to principles of due process under either relevant California law or relevant international law?

- (b) Article 3, Section 1 of the Bylaws provides that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

Article 4, Section 1 of the Bylaws provides that "[t]he provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III . . . ."



Article 4, Section 3.4 of the Bylaws provides that the IRP is to consider *inter alia* whether “the Board exercised due diligence and care in having a reasonable amount of facts in front of them” and whether “the Board members exercised independent judgment” in taking the decision at issue in the dispute.

Does Article 4, Section 3.4 limit the IRP’s review of Board diligence and care solely to “having a reasonable amount of facts in front of them?” And, if so, is that limited scope of review consistent with Article 4, Section 1 of the Bylaws or with the Articles of Incorporation and/or applicable law? Or is the IRP charged under the Articles, the Bylaws, the ICDR Rules, the Supplementary Procedures and/or relevant law with reviewing the Board’s exercise of diligence and care more generally?

What are the duties of the Board under relevant principles of international law, international conventions and/or local law in evaluating recommendations of the EIU or ICANN staff as to the issues in dispute, taking into account these provisions of the Bylaws and paragraph 4 of the ICANN Articles of Incorporation? Can those duties be delegated to EIU or ICANN staff under relevant legal principles, and would such delegation be consistent with the reference to “independent judgment” in Article 4, Section 3.4 of the Bylaws? If so, what standard is applicable under the Bylaws, the Articles of Incorporation, applicable California law, or applicable international law to the taking of, or omitting to take, action by the Board in reliance on work performed by EIU or ICANN staff pursuant to such delegation, and why?

- (c) Does California law discuss the legal effect of a “declaration,” as that term is used in Article 4, Sections 3.18 and 3.21 of the Bylaws?

(d) Both Dot Registry and ICANN have referred the Panel to the Final Declaration by the *Booking.com* IRP Panel. Paragraph 53 of that Final Declaration states: "As was clearly established during the hearing, it is common ground between the parties that the term 'action' (or 'actions') as used in Article IV, section 3 of the Bylaws is to be understood as actions or *inactions* by the ICANN Board." (Emphasis in original). Footnote 75 of that Final Declaration states, "Both parties agree that, as submitted by Booking.com, the 'rules' at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook." Do the parties believe that these statements are also applicable to this IRP as well? If not, why not?

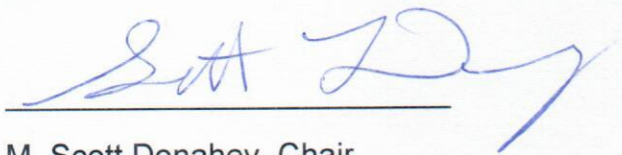
(e) Do the applicable laws set out in Article 4 of the Articles of Incorporation, the Articles of Incorporation themselves, and/or the Bylaws mandate or prohibit the holding of an in-person hearing, or otherwise provide guidance as to the conduct of any such in-person hearing, including whether it is necessary or advisable at any such hearing for EIU or ICANN officials to be examined before or by the Panel? If so, which such EIU or ICANN officials?

3. In Paragraph 6 of Procedural Order No. 2, the Panel postponed consideration of whether or not Dot Registry should be permitted to make requests to ICANN for production of documents. In Procedural Orders Nos. 2, 3, 4, and 6, the Panel requested of ICANN that it produce to the Panel and to Dot Registry certain documents. ICANN has certified in its communication of June 19, 2015 that it has complied completely, except for fourteen items as to which it has submitted a privilege log. At this point the Panel is satisfied that ICANN has complied with the Panel's document requests.

Should Dot Registry wish to request that it be given the opportunity to propound any additional document request(s), it should make its request to the Panel, specifying the precise request(s) it wishes to propound and (i) an explanation as

to why it believes that the documents responsive to each such request would not have already been produced in response to the document requests propounded by the Panel, (ii) setting forth in detail why it believes such requested document(s) to be relevant and material to this proceeding, and (iii) setting forth why it believes such document(s) actually exist in the possession custody or control of ICANN. This request for an opportunity to propound additional document request(s) should be received by the Panel no later than September 11, 2015. ICANN shall have the opportunity to respond to any such request made by Dot Registry to the Panel, such response to be filed no later than September 25, 2015.

On behalf of the Panel

A handwritten signature in blue ink, appearing to read "Scott Donahey", is written over a horizontal line. The signature is stylized and cursive.

M. Scott Donahey, Chair