

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and  
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00224 08

**WITNESS STATEMENT OF VINTON G. CERF**

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## **I. BACKGROUND**

1. My name is Vinton G. Cerf. I am currently the vice president and chief Internet evangelist for Google, where I am primarily responsible for identifying new enabling technologies to support the development of advanced Internet-based products and services from Google. I have a bachelor of science degree in Mathematics from Stanford University and master of science and Ph.D. degrees in Computer Science from the University of California, Los Angeles.

2. For over thirty years, my work has focused on the development of Internet technologies and the Internet protocols. From 1976-1982, I worked with the U.S. Department of Defense Advanced Research Projects Agency (DARPA) in the development of Internet and Internet-related packet data and security technologies.

3. From 1982-1986, I was the vice president of MCI Digital Information, where I led the engineering of MCI Mail, the first commercial email service to be connected to the Internet.

4. From 1987-1993, I was the vice president of the Corporation for National Research Initiatives. I rejoined MCI Digital Information in 1994 as senior vice president and held that position until 2005, when I joined Google.

5. I served as the founding president of the Internet Society from 1992-1995 and in 1999 served a term as Chairman of the Board. In addition, I am an honorary Chairman of the IPv6 Forum, which is dedicated to raising awareness and speeding introduction of the new Internet protocol. I also served as a member of the U.S. Presidential Information Technology Advisory Committee (PITAC) from 1997 to 2001 and continue to serve on several national, state and industry committees focused on cyber security.

6. In December 1997, President Clinton presented me and my colleague, Robert E. Kahn, with the U.S. National Medal of Technology “for creating and sustaining development of Internet Protocols and continuing to provide leadership in the emerging industry of internetworking.” We were also named the recipients of the ACM Alan M. Turing award, which is given to “an individual selected for contributions of a technical nature made to the computing community,” in 2004, “for pioneering work on internetworking, including the design and

implementation of the Internet's basic communication protocols, TCP/IP, and for inspired leadership in networking." In 2005, President George W. Bush awarded us the Presidential Medal of Freedom for our work.

7. In 1999, I was seated on the Board of Directors for the Internet Corporation for Assigned Names and Numbers ("ICANN"), having been selected by the Protocol Supporting Organization at ICANN's Annual Meeting. On November 16, 2000, I was elected to serve as ICANN's Chairman of the Board and held that position until November 2, 2007, at which time I left the Board. As a member and Chairman of the Board from 1999 through 2007, I was integrally involved in the initial "proof of concept" round ICANN launched for assessing methods for introducing new gTLDs and also the 2003 Request for Proposal for a limited number of new sTLDs. Among the applications ICANN received in the "proof of concept" round was an application from ICM for an unsponsored .XXX TLD; ICM then submitted an application for a sponsored .XXX TLD in the 2003 round, which is the subject of this proceeding.

## **II. THE CREATION AND PURPOSE OF THE INDEPENDENT REVIEW PROCESS**

8. ICANN created the Independent Review Process ("IRP") to provide a meaningful check on the power and actions of the ICANN Board of Directors. The mission of the IRP is to create "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." *See* Bylaws, Art. IV(3(1)).

9. When the IRP was created, it was intended that an Independent Review Panel would consider claims that the ICANN Board violated ICANN's Articles of Incorporation or Bylaws, would conduct a reasoned analysis of those claims, and would make public its conclusion and rationale so that members of the Internet community would understand the results of the process. An Independent Review Panel, when constituted, was never meant to have the authority to overrule, nullify, or stay decisions of the ICANN Board; such a power would create an unintended "Super Board" or "Supreme Court of ICANN." Rather, at all times, the ICANN Board retains ultimate authority over ICANN's affairs. After all, it is the ICANN Board, as envisioned by the Bylaws, that is intended to be and is broadly representative of the

entire range of ICANN stakeholders, and is thus the most appropriate body to make final decisions on ICANN's policies. Of course, the ICANN Board would seriously consider any declaration by any Independent Review Panel, but the Board itself retains the ultimate authority to act on the Independent Review Panel's conclusions.

10. ICANN's Bylaws demonstrate that the ICANN Board retains ultimate authority over ICANN's affairs, and that any declaration by the Independent Review Panel is not binding on the ICANN Board. For instance, the Independent Review Panel's mandate is set forth in Article IV, Section 3(3) as follows:

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.

The Bylaws limit the Independent Review Panel's authority to declarations and recommendations. There is no indication that any declaration or recommendation by the IRP would be binding on the ICANN Board.

11. Likewise, Article IV, Section 3(8) of ICANN's Bylaws sets forth the Independent Review Panel's authority as follows:

The Independent Review Panel 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.

12. And finally, Section 3(15) of ICANN's Bylaws defines how the Board must treat the Independent Review Panel's declaration:

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

This language necessarily means that, where not feasible, the Board would not even consider the Independent Review Panel's declaration at its next meeting but presumably would do so at a subsequent meeting.

### **III. THE PROCESS FOR EVALUATING THE sTLD APPLICATIONS**

13. ICANN's Board decided in 2003 that it would entertain applications for new sponsored TLDs. No TLDs that were unsponsored would be approved during this particular round of TLD applications.

14. Each sTLD application was evaluated independently and objectively by independent panels of evaluators, ICANN Staff, and the ICANN Board itself with reference to the selection criteria and evaluation methodology outlined in the Request for Proposal ("RFP").

15. Pursuant to the RFP, before the ICANN Board could approve a sponsored TLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including technical, business/financial, and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. I understand that ICM has taken the position that ICANN intended this to be a rigid "two-step" process, but in truth, this was intended to be a fluid process, and there were two overlapping phases in the evaluation of the sTLDs. ICANN never intended that this would be a formal "two-step" process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship. Indeed, had approval to proceed to contract negotiations constituted formal approval of an applicant's success, I doubt the Board would have authorized many of the applicants (including ICM) to proceed to contract negotiations because, as explained below, there remained serious questions as to the ability of some applicants (again, including ICM) to satisfy the selection criteria.

16. In fact, as I address below, the Board's conduct (and ICM's conduct) makes clear that ICM's application had not been approved following the Board's initial vote in June 2005.

17. Permitting applicants to proceed to contract negotiations (despite the Board having unresolved concerns and open questions about the applicant's ability to satisfy the baseline selection criteria) allowed the Board to evaluate whether its concerns could be alleviated

through the contract negotiations and terms. In other words, during contract negotiations, the Board was able to focus on the relevant issues and concerns with the application, and to determine whether those concerns could be satisfied in real world operations via the registry contract.

18. Since three of the applicants (ICM included) failed to win approval from the independent evaluation panel, the Board decided to grant each of those applicants the additional accommodation of allowing them to work through, via the contractual process, some of the issues identified by the independent evaluation panel. Despite allowing ICM and the other applicants that had failed to meet the baseline selection criteria to proceed to contract negotiations, the Board continued to engage in serious discussions about whether the applicants were able to satisfy the baseline selection criteria.

19. With respect to ICM, the Board continued to evaluate ICM's ability to satisfy the sponsorship selection criteria, based on the increasing body of available information (including information about contract terms being developed in negotiations) at subsequent Board meetings up to and including the March 30, 2007 Board meeting when the Board ultimately rejected the .XXX application and ICM's proposed registry contract. ICM was aware that the Board remained concerned about the sponsorship issue at all times prior to March 2007 and continued to provide the Board with additional information.

20. An sTLD evaluation process divided into two inflexible sequential phases would be unworkable in practice. For example, with respect to ICM, the Board could not know if ICM's application was able to satisfy the RFP criteria, including sponsorship, until it was shown how ICM's ideas would be implemented in the contract.

21. The evaluation process called for each application to be reviewed first by an independent panel of experts to review and make recommendations about which sTLD applications met the selection criteria detailed in the Request for Proposal. The independent evaluation panel was comprised of a program manager and three independent panels that evaluated the technical, business and financial, and sponsorship aspects of each application. This independent panel concluded in 2004 that ICM met both the technical and business selection criteria set forth in the RFP, but that ICM failed to meet the sponsorship selection criteria in the

RFP, for several reasons. First, the panel did not believe ICM's .XXX sTLD represented a clearly defined community. Second, the panel determined that the interests of ICM's proposed .XXX sTLD community were unclear, and that the application lacked the requisite community support. Finally, the panel was not convinced that the .XXX sTLD added new community value – throughout the world – to the Internet name space.

22. Despite the independent evaluation panel's rejection of the ICM .XXX sTLD based on its failure to satisfy the sponsorship criteria, the ICANN Board decided to give ICM an opportunity to respond to the independent evaluation panel's specific concerns. ICM responded to ICANN's request for additional information, and ICANN Staff worked with ICM to present the ICANN Board with as much information concerning ICM's ability to satisfy the baseline selection criteria as possible.

#### **IV. THE BOARD'S JUNE 1, 2005 VOTE**

23. On June 1, 2005, the ICANN Board held a Special Meeting via teleconference. As Chairman of the Board, I presided over the entire meeting. The Board engaged in extensive discussion regarding ICM's .XXX sTLD application and ultimately passed two resolutions (with a 6-3 vote in favor, two abstentions and four Board members who were not able to participate in the call):

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 terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.

24. I voted in favor of these Resolutions, the purpose of which was to permit ICM to proceed to contract negotiations in an effort to determine whether the Board's sponsorship concerns could be resolved in the contract. The Board had discussed the sponsorship issue extensively and knew that this issue would be challenging. Allowing ICM to proceed to contract negotiations allowed us to truly test ICM's ability to satisfy the sponsorship selection criteria,

among other things. Had this not been a viable option for testing ICM's proposal, I likely would have voted "no," and I believe ICM's sTLD proposal would have been turned down at that time.

25. The Resolutions did not constitute approval of ICM's .XXX application. First, the Resolutions make no mention of any decision (final or otherwise) by the Board that the .XXX sTLD application satisfied the selection criteria (including the sponsorship criteria) set forth in the RFP. As is clear on the face of the Resolutions, the Board's action was intended only to permit ICM to proceed with contract negotiations, nothing more. The alternative was simply to reject the .XXX sTLD application at that time, without giving ICM the opportunity to demonstrate that the concerns that had been raised could be addressed adequately by negotiated contractual provisions.

26. Second, as of June 1, 2005, there were a number of unanswered questions and concerns regarding ICM's ability to satisfy the requisite sponsorship criteria, including concerns relating to ICM's definition of Sponsored Community and the level of support from the community. This is reflected in the Meeting Minutes from the June 1, 2005 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-01jun05.htm> (With respect to the .XXX sTLD application, "[t]he topics of discussion among board members, liaisons and staff surrounded the adequacy of the application with particular focus on the "sponsored community" issues"). Many Board members, myself included, believed that the best way to test whether ICM could satisfy the sponsorship criteria was to determine whether the sponsorship concerns could be addressed through contract negotiation and ultimately through ICANN's agreement with ICM. And ICM was not alone: the Board also permitted other applicants – .JOBS and .MOBI – to proceed to contract negotiations despite unresolved questions relating to the initial RFP selection criteria.

27. Third, the Board continued to raise sponsorship concerns after the June 1, 2005 vote, which confirms that the Board did not conclusively find on June 1, 2005 that ICM had satisfied the sponsorship selection criteria set forth in the RFP. For example, the sponsorship criteria was discussed extensively at the September 15, 2005 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-15sep05.htm> ("after a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria"); at the May 10, 2006



Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (ICANN Board and staff “entered a detailed discussion on the following points: agreement terms against the application statements and promises made by ICM in support of their proposal; concerns regarding ICANN’s ability to enforce the promises made by ICM through a contractual framework and the potential harm if such enforcement could not be maintained; the sponsorship criteria in the RFP and materials submitted in support by ICM and others; community input including letters and emails from industry and consumers regarding the proposed sTLD; GAC advice contained in the GAC Communiqué from the Wellington Meeting and whether the terms of the proposed agreement achieved the terms of that advice; and ICM’s submission and supporting letters and documentation.”); and again at the February 12, 2007 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-12feb07.htm> (where the Board discussed the “splintering” of support for the .XXX sTLD in the online adult entertainment community, a topic that “had been the subject of debate by the Board in earlier discussion in 2006;” and where a straw poll as to who had “serious concerns” about the sponsorship issue resulted in eleven Board members expressing “serious concern”).

28. I understand that ICM now takes the position that the June 1, 2005 Board vote constituted “approval” of the .XXX TLD. However, ICM was aware of all of the Board’s discussions subsequent to June 1, 2005 expressing concerns about the TLD, noting concerns of governments and the Government Advisory Committee to the TLD, and noting efforts to deal with these concerns via contract language. ICM had to have known that its application remained “pending” after June 2005, and that subsequent reaction to the Board’s June 1, 2005 vote had placed the application in jeopardy.

## **V. ICANN’S GOVERNMENTAL ADVISORY COMMITTEE**

29. ICANN’s Governmental Advisory Committee (the “GAC”) is one of three advisory committees that serve the ICANN Board. ICANN receives input from governments around the world through the GAC. The GAC’s primary function is to provide advice to ICANN on issues of public policy. In particular, the GAC considers ICANN’s activities and policies as they relate to the concerns of governments, particularly in matters where there may be interaction between ICANN’s policies and national laws or international agreements. The GAC’s meetings are regularly attended by over thirty national governments, distinct economies, and multinational

governmental organizations, such as the ITU and the World Intellectual Property Organization (WIPO).

30. The ICANN Board is required under ICANN's Bylaws to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. Through the GAC, many of the governments around the world formally participate in the ICANN process and communicate their advice to ICANN. (*See* Bylaws, at Art. XI(2)(i)). In those situations where the Board seeks to take actions that are inconsistent with the GAC's advice, the Bylaws require that the Board enter into a consultation with the GAC, and if the Board chooses not to follow the GAC's advice, the Board must inform the GAC and publicly state the reasons why the Board has decided not to follow the GAC's advice on public policy issues.

31. On August 12, 2005, not long after ICANN posted ICM's first draft/proposed registry agreement, the Chairman of the GAC, Mohamed Sharil Tarmizi, sent me a letter expressing the GAC's "diverse and wide ranging" concerns (concerns that echoed those of the ICANN Board) with the .XXX sTLD and requesting that the Board provide additional time for governments to express their public policy concerns before the Board reached a final decision on the proposed registry agreement. Not only was the Board evaluating similar concerns from individual GAC members, ICANN's Bylaws require the Board to consider and try to address the GAC's concerns. Thus, at the Board's August 15, 2005 meeting, the Board deferred consideration of the .XXX sTLD application to allow for additional time for comments by all interested parties.

32. I did not respond in writing to the substantive concerns in Mr. Tarmizi's correspondence because a response would have been premature. The ICANN Board had not yet approved the .XXX sTLD application, and contract negotiations were still pending. There was therefore no need to respond to the Chairman's concern that the Board would reach a final decision on the contract before the GAC had an opportunity to voice its concerns. The GAC would have ample opportunity to express its views before the Board would consider the .XXX sTLD application for final approval.

33. Mr. Tarmizi's August 12, 2005 letter was the first communication I received from the GAC where the GAC expressed concern with the .XXX application. I believe there are two likely reasons why the GAC and individual GAC members did not comment on the .XXX sTLD earlier. First, some countries believed that, because ICM's unsponsored or uTLD application for .XXX had been rejected in the 2000 "proof of concept" round, it would not be considered in the new sTLD round. Second, because the independent evaluation panel had recommended that the .XXX sTLD application be rejected for failure to satisfy the sponsorship selection criteria, many countries may have believed that the application would not be permitted to proceed. Thus, the GAC probably had not expressed concerns with the .XXX application prior to June 2005 because the GAC had no reason to believe that the Board would vote in favor of allowing the .XXX application to proceed to contract negotiations.

#### **VI. THE BOARD'S MAY 10, 2006 VOTE ON ICM'S DRAFT REGISTRY AGREEMENT**

34. The next vote on the .XXX sTLD application took place on May 10, 2006, at a Special Meeting of the Board. After a detailed discussion, the Board voted 9-5 against ICM's then current draft of the proposed .XXX sTLD registry agreement. This was a difficult vote, and the Board was quite polarized on the question of whether the contract negotiations produced the required or expected results.

35. I voted against the draft registry agreement. By this time, I was beginning to reach the conclusion that negotiations with ICM would not be able to develop contractual provisions that would adequately address the concerns about sponsorship criteria. While I had voted in June 2005 to allow ICM to proceed to contract negotiations in an effort to give ICM the opportunity to satisfy the sponsorship criteria during that process, the contractual provisions being produced by negotiation were beginning to show that it just could not be done.

36. First, ICM had not set forth a precisely defined community. ICM's proposed community definition was limited to those members of the online adult entertainment industry who supported the creation of the .XXX sTLD, and thus did not include all online adult entertainment industry members (namely those opposed to .XXX). Limiting the community in this manner required almost exclusive self-identification of the members, and thus was not capable of precise or clear definition, as the RFP clearly required. Such self-selection and

extreme variability and subjectivity in what defined the .XXX community made it nearly impossible to determine objectively which persons or services would be in or out of the community. Contrasted with the clearly defined communities of other sTLD applicants, it was evident that ICM had not proposed a clear and precisely defined community sufficient to satisfy the sponsorship selection criteria of the RFP. To the contrary, ICM's proposed community appeared to be "whoever subscribes to a name in this particular TLD," which was very much at odds with the notion of sponsorship.

37. In addition, the language in the draft registry agreement would have been nearly impossible for ICM to implement. ICM was proposing to monitor illegal and offensive content according to all law globally. That is, ICM was suggesting that IFFOR, ICM's proposed sponsoring organization, be responsible for identifying responsible adult online content providers – across all nations – who would be permitted to register a .XXX domain name. In its application and contract terms developed in negotiations, however, ICM did not include the structural guarantees that it or IFFOR could effectively monitor or enforce the activities of their applicants. Nor did ICM provide how it would resolve any disputes that might arise over ICM's identification of responsible adult online content providers. Moreover, to the extent interested parties were dissatisfied with ICM's resolution of these issues, complaints would inevitably come to ICANN. This would put ICANN in the untenable position of making content-based decisions, which is outside its mandate.

## **VII. THE BOARD'S MARCH 30, 2007 VOTE ON ICM'S PROPOSED sTLD**

38. As the contract negotiations went on, it became increasingly clear that ICM was not going to be able to meet the criteria required by the Request for Proposal. Thus, on March 30, 2007, the Board approved (by a 9-5 vote) a resolution rejecting ICM's revised agreement and denying ICM's application for the .XXX sTLD. This vote came after extensive review, analysis and debate among ICANN Board members, as reflected by the considerable discussion at the Board's March 30, 2007 Meeting in Lisbon, Portugal, *transcript available at* <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>. During the Lisbon meetings alone, there were over six hours of Board discussion on the matter. Ultimately, the Board reasoned that ICM's application and revised agreement failed to satisfy, among other things, the "sponsored community" requirements of the RFP specification.

39. The Board as constituted in March 2007 was somewhat different than the Board as constituted in June 2005. ICANN's Board members take office on a staggered schedule every six months, and the regular term of office for persons other than the President is three years. Thus, over the Board's nearly two-year consideration of ICM's application for an .XXX TLD, the terms of some Board members expired, and the terms of others commenced. As a result, several new Board members believed that it was incumbent on them to make their own evaluations of the appropriateness of ICM's application because they were considering the application for the very first time. As reflected in the Board's minutes, some of these new Board members voted against the application based on their conclusions that the ICM proposal, as sought to be embodied in the proposed contract that was negotiated, did not meet the sponsorship criteria set forth in the RFP.

40. Ultimately, the nine members of the Board who voted against ICM's proposal each expressed their own views as to what was influencing their vote. I can best summarize these influences as follows.

41. First, ICM still had not set forth a precisely defined community. Because inclusion in the proposed .XXX sTLD was self-selecting, it was very difficult to determine which content and associated persons would be in or out of the community. Thus, the majority of us recognized that ICM could not meet the RFP selection criteria that expressly required a "precisely defined" community that can readily determine which persons or entities make up that community. Moreover, the definition of "adult entertainment" varies considerably from region to region and culture to culture, depending on one's moral, religious, national, or cultural perspective, such that there was not a global definition that could be applied to the proposed .XXX sTLD community.

42. Second, the RFP required that the community be comprised of persons that have "needs and interests in common but which are differentiated from those of the general global Internet community." While on its face ICM's Sponsored Community appeared to have common needs and interests, the Revised Agreement posted in 2007 failed to meet this portion of the RFP specification because of its selective membership. The Sponsored Community as defined by ICM was but a subset of all online adult entertainment providers, and ICM never

provided any means to identify providers with separate needs or interests from the Sponsored Community ICM sought to represent. Online adult entertainment providers, whether they seek the type of self-regulation proffered by ICM or not, all face similar issues of privacy, free expression and child protective, among others. By limiting the Sponsored Community, ICM had created a global Internet community with the same needs, if not interests, as the Sponsored Community defined in the proposed ICM contract.

43. Third, community support for ICM's proposed .XXX sTLD had splintered as ICANN and ICM engaged in contract negotiations. During the final public comment period, between January 5, 2007 through February 5, 2007, the majority of the comments posted to the public forum and sent to ICANN Staff were opposed to ICM's .XXX sTLD. By limiting its Community definition to those that voluntarily elect for self-identification mechanisms, ICM found some support from within that artificially defined Sponsored Community, as one might expect. However, ICM was not able to provide evidence that the larger online adult entertainment provider community supported the .XXX sTLD, ICM, or the policy-formation process, and even those that had initially supported the sTLD began to change their minds. For example, support from major child advocacy organizations and major law enforcement organizations was notably absent. There was also insufficient support from the freedom of expression community, which ICM had initially hoped to include as a supporting organization.

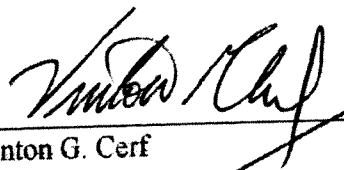
44. Finally, the RFP also required that "[t]he proposed new sTLD must create a new and clearly differentiated space, and satisfy needs that cannot be readily met through the existing TLDs." ICM's .XXX sTLD did not satisfy this requirement either. For many who registered adult entertainment web sites, the .XXX sTLD would represent merely a duplicate space on the Internet. The existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met through the existing TLDs.

45. In short, the sTLD was controversial worldwide, and no consensus had emerged as to how it could address the concerns of the many who had questioned its value. Despite being given every opportunity to do so, ICM could not demonstrate that its proposed .XXX sTLD could satisfy the criteria set forth in the RFP. The majority of the Board was ultimately too

uncomfortable approving an sTLD application that failed to meet these foundational requirements.

46. I do not believe there is any basis whatsoever to challenge the Board's compliance with ICANN's Bylaws or Articles of Incorporation in connection with its evaluation of the .XXX sTLD application. To the contrary, the Board's evaluation of ICM's .XXX TLD application was done publicly, extensively, and with great commitment; throughout the process, the Board acted in good faith and at all times afforded ICM an opportunity to be heard. The Board was as engaged on this issue as any other issue during this time period; there was an enormous amount of debate, and the members of the Board truly were committed to finding what they believed was the most appropriate resolution of this issue.

Being in full agreement with the contents of this witness statement, I hereby sign it and acknowledge its contents on this 2<sup>nd</sup> day of May \_\_\_\_\_ 2009.

  
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Vinton G. Cerf

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

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Internet Corporation For Assigned Names and  
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CASE MANAGER: Carolina Cardenas

**ICDR Case No. 50 117 T 00224 08**

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## **I. BACKGROUND**

1. My name is Paul Twomey. I am currently the Chief Executive Officer and President of the Internet Corporation for Assigned Names and Numbers (“ICANN”), and have been an *ex officio* member of the Board of Directors for ICANN since being named President on March 23, 2003. From 1998 to 2002, I served as Chair of ICANN’s Governmental Advisory Committee.

2. I received a Bachelor of Arts degree with First Class Honors from the University of Queensland, in St. Lucia, Australia, a Master of Arts degree in Political Science and International Relations from Pennsylvania State University, and a Ph.D. degree in History (International Relations) from the University of Cambridge. I started my career as a Judge’s Associate in the Supreme Court of Queensland, Australia. I worked in the mid-1980s for non-profits on dispute analysis and refugee issues, particularly concerning Cambodian and Vietnamese refugees on the Thai-Kampuchea border. Later I was a senior consultant with McKinsey & Company, a global management consultancy, where I advised major corporations primarily in the telecommunications, financial services and tourism sectors in Australia, the United States, Japan and Hong Kong.

3. From 1994 to 1997, I was the Executive General Manager of Strategic Development for the Australian Trade Commission (“Austrade”), where I was responsible for the development of corporate strategy, business process and operational management within Austrade. From 1997 to 2000, I served as the first Chief Executive of the Australian government’s National Office for the Information Economy. I also served as the Australian federal government’s Special Adviser for the Information Economy and Technology, and as Australia’s technology representative at international fora, such as the OECD and APEC.

4. In 2000, I founded Argo Pacific, a high-level international advisory and investment firm that assists governments, Fortune 500 companies and start-up companies in building global Internet and technology businesses and strategic alliances. As noted above, I joined ICANN on March 23, 2003.

## **II. ICANN'S HISTORY AND FUNCTION**

5. ICANN is a not-for-profit public benefit corporation organized in 1998 under the laws of California. ICANN's mission is to protect the stability, integrity and utility of the Internet's domain name system ("DNS") on behalf of the global Internet. Pursuant to a series of agreements with the United States Department of Commerce, ICANN is responsible for administering certain aspects of the DNS, including the designation of qualified entities with the ability to run top-level domain ("TLD") registries by entering into contracts with those entities to operate the registries and by entering these TLD strings into the authoritative Root Zone for the Internet.

6. The Internet's DNS allows users of the Internet to refer to websites using easier-to-remember domain names (such as "google.com") rather than the all-numeric Internet Protocol (IP) addresses (such as "192.0.34.65") assigned to each computer on the Internet. Each domain name is made up of a series of character strings (called "labels") separated by dots. The right-most label in a domain name is referred to as its "top-level domain" or TLD. A single registry is maintained for each TLD to ensure that each name registered in that domain is unique.

7. There are several types of TLDs within the DNS. The TLDs with three or more characters often are referred to as "generic" TLDs, or "gTLDs," which can be subdivided into two types – "unsponsored" TLDs (uTLDs) and "sponsored" TLDs (sTLDs). Generally speaking, a uTLD (also sometimes referred to simply as a "generic" TLD or gTLD) operates for the benefit

of the global Internet community, while an sTLD is a specialized TLD that has a “Sponsor” representing a specified community that wishes to operate the TLD for the benefit of that specific community. Examples of sTLDs that ICANN has approved include “.museum” and “.aero.” Although an sTLD represents a specified community, members of that community are not forced to migrate their Internet domain names from a uTLD, *i.e.*, a member of the specified sTLD community may choose to continue to operate a domain name in the uTLD in addition to the sTLD. For example, domain names such as “www.getty.museum” and “www.srilankan.aero” may be operated in their respective sTLDs concurrently with their related uTLD counterparts at “www.getty.edu” and “www.srilankanusa.com.”

8. Each sTLD has a “Charter” that defines the purpose for which the sTLD has been created and will be operated. In addition, a “Sponsor” organization is delegated with the authority to define the manner in which the sTLD is operated. The Sponsor is also responsible for selecting the company that will operate the sTLD's registry, for establishing the roles played by registrars, and for developing policies on the delegated topics so that the sTLD is operated for the benefit of a defined group of stakeholders, known as the “Sponsored TLD Community,” that are most directly interested in the operation of the sTLD.

### **III. THE “PROOF OF CONCEPT” ROUND**

9. At the time ICANN was incorporated, there were only three gTLDs – “.com,” “.net,” and “.org” – that were generally available to the public (in addition to two-letter TLDs that were operated for the benefit of specific countries or territories, referred to as “country code TLDs” or “ccTLDs,” and a few special-use gTLDs, e.g., “.gov” and “.mil”).

10. Since ICANN's founding, the introduction of new TLDs has been a central focus of ICANN's operation and policy development work. Accordingly, ICANN began to explore the possibility of adding new TLDs to the DNS shortly after its formation.

11. On July 16, 2000, the ICANN Board adopted a policy for the introduction of new TLDs, which involved a process in which those interested in operating or sponsoring new TLDs could apply directly to ICANN. On August 15, 2000, ICANN posted the selection criteria for assessing a new set of TLD applications, also referred to as the "proof of concept" round.

ICANN was clear that only seven TLD applications would be selected, essentially doubling the number of TLDs in existence. ICANN further stated that it would consider the extent to which the new TLD would: (1) maintain the Internet's stability; (2) promote effective evaluation of the new TLD; (3) enhance competition for registration services; (4) enhance the utility of the DNS; (5) meet previously unmet types of needs; (6) enhance the diversity of the DNS and of registration services generally; (7) promote effective evaluation of the policy-formulation functions; (8) protect the rights of others in connection with the operation of the TLD; and (9) demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.

12. Among the forty-seven proposals ICANN received was an unsponsored or uTLD application from ICM for the creation of an .XXX TLD. .XXX was not selected during the "proof of concept."

#### **IV. THE PLAN TO LAUNCH NEW sTLDs**

13. The launch of the seven new TLDs was generally viewed as a success. They did not impair the security or the stability of the Internet, and they facilitated additional competition. As a result, ICANN continued to consider means to add new TLDs. On October 18, 2002, then-

President Stuart Lynn published “A Plan for Action Regarding New gTLDs,” recommending that the Board consider initiating a new round of proposals for up to three “sponsored” TLDs. Lynn proposed the sTLD round be launched as an extension of the original “proof of concept” round, following similar, streamlined criteria, and he suggested that unsuccessful applicants from the original proof of concept round be invited to update and resubmit their proposals.

14. On October 31, 2003, the ICANN Board met in Carthage, Tunisia, and passed resolutions for the introduction of new sponsored TLDs. The Board also determined that a policy process should commence through ICANN’s newly-formed Generic Names Supporting Organization to establish the policy and process for how the regular addition of new uTLDs or “generic” TLDs into the Root Zone could be determined and implemented. This policy process culminated with the ICANN Board vote in June 2008 for the policy to introduce new gTLDs. Preceding the adoption of that policy, the sTLD round presented a natural extension of the original “proof of concept” round.

15. Over the next several months after the meeting in Carthage, ICANN developed the proposed criteria and processes for evaluating sTLD proposals. In keeping with its mandate to be open and transparent, ICANN posted the criteria and draft RFP for public comment.

16. On December 15, 2003, after much deliberation and consultation with its supporting organizations and advisory committees, as well as with the general public through media attention and open consultation postings on its web site, ICANN launched the proposed next round of the sTLD selection process by posting an open request for proposals for any interested party to apply for the delegation of a new sTLD. Unlike the “proof of concept” round, this new round was expressly limited to “sponsored” TLDs. Thus, the question of sponsorship was one of the most critical elements associated with the applications that were to be submitted

in this round, and the application itself contained numerous questions related to sponsorship that an applicant was required to address. A proposed TLD that was not truly “sponsored” would be rejected in this round, although it could be approved in later rounds under a “new GTLD” policy that ICANN envisioned for future TLD rounds where sponsorship was not considered likely to be an element of the application.

## **V. THE PROCESS FOR EVALUATING THE sTLD APPLICATIONS**

17. Each sTLD application was evaluated independently and objectively by an independent panel of evaluators, ICANN Staff, and the ICANN Board itself with reference to the selection criteria and evaluation methodology outlined in the Request for Proposal (“RFP”).

18. There were two overlapping phases in the evaluation of the sTLDs. Applicants had to satisfy the baseline selection criteria set forth in the RFP, including technical, business/financial, and sponsorship criteria, and also negotiate acceptable contract terms with ICANN staff regarding the technical and commercial aspects of the registry contract. Despite ICM’s position in this proceeding, it was never ICANN’s intent that this would be a formal “two-step” process, whereby a decision by the Board to proceed to contract negotiations would automatically constitute a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship. Indeed, on several occasions during the sponsored TLD process, I recall that, during discussions among Board members concerning applicants, members of the Board specifically stated that any decision on proceeding to contract negotiations would not necessarily mean that the Board had approved the application.

19. In several instances, the Board permitted an applicant to proceed to contract negotiations despite the Board having unresolved concerns and open questions about the applicant’s ability to satisfy the baseline selection criteria. This practice allowed the Board to

evaluate whether its concerns could be alleviated through the contract negotiations and ultimate contract terms. In other words, during contract negotiations, the Board was able to continue to focus on the relevant issues and concerns with the application, and to determine whether those concerns could be satisfied in real-world operations via the registry agreement. Indeed, the applicants' ability to demonstrate, through contract negotiations, how they would satisfy the selection criteria was fundamental to the Board's review and final approval. Thus, with respect to ICM, if ICM's proposed sTLD could not support (and was not supported by) a community of responsible online adult entertainment providers, it would fail as a sponsored TLD.

20. Moreover, despite allowing three of the applicants (ICM included) that had failed to meet the baseline selection criteria to proceed to contract negotiations, the Board continued to engage in serious discussion about whether the applicants were able to satisfy the baseline selection criteria. Many Board members, myself included, believed that the best way to test whether these applicants (ICM included) could satisfy the sponsorship criteria was to determine whether some of the sponsorship concerns could be addressed through contract negotiation and ultimately through the registry agreement.

21. The Board also permitted two other applicants – “.jobs” and “.mobi” – to proceed to contract negotiations despite open questions relating to the initial RFP selection criteria.

22. An sTLD evaluation process divided into two concrete and nonflexible phases would have been unworkable in practice, at least for TLDs where there were significant concerns with respect to sponsorship. It would have been contrary to TLD management for the Board to commit to a new sTLD without knowing the identity of the Sponsor organization and its ability to operate the proposed sTLD for the benefit of a clearly defined Sponsored TLD Community from which there was broad-based support. In particular with respect to ICM's application

for .XXX, the Board could not know if ICM's application was able to satisfy the RFP criteria, including sponsorship, until it was shown how ICM's ideas would be implemented in the contract. Thus, an authorization by the ICANN Board to negotiate contract terms was not an unconditional approval of the .XXX sTLD and, as noted below, ICM must have understood this because ICM continued to interact with the Board on the sponsorship issue for nearly two years following the Board's June 2005 vote in an attempt to demonstrate that it had met the sponsorship criteria.

23. The evaluation process called for each application to first be reviewed by an independent panel of experts to review and recommend those sTLD applications that best met the selection criteria detailed in the Request for Proposal. The independent evaluation panel was comprised of a program manager and three independent panels that evaluated the technical, business and financial, and sponsorship aspects of each application. This independent panel concluded in 2004 that ICM met both the technical and business selection criteria set forth in the RFP, but that ICM failed to meet the sponsorship selection criteria in the RFP, for several reasons. First, the panel did not believe ICM's .XXX sTLD represented a clearly defined community. Second, the panel determined that the interests of ICM's proposed .XXX sTLD community were unclear, and that the application lacked the requisite community support. Finally, the panel was not convinced that the .XXX sTLD added new community value – globally – to the Internet name space.

24. The independent evaluation panel proposed the rejection of many of the sTLD applications. As a result, the Board asked the evaluation panel to reconsider some of its findings. However, even after a second evaluation, the independent panel still found that ICM had failed to meet the sponsorship criteria.



25. Notwithstanding the independent evaluation panel's recommendation of rejection with respect to the ICM application for a .XXX sTLD, the ICANN Board decided to give ICM an opportunity to respond (directly to the Board) to the independent evaluation panel's specific concerns. ICM responded to ICANN's request for additional information, and ICANN Staff worked with ICM to present the ICANN Board with as much information as possible concerning ICM's ability to satisfy the baseline selection criteria.

## VI. THE BOARD'S JUNE 1, 2005 VOTE

26. On June 1, 2005, the ICANN Board held a Special Meeting via teleconference and engaged in extensive discussion regarding ICM's .XXX sTLD application. In a vote split 6-3 (with two abstentions and four Board members who were not able to participate in the call), the Board passed two Resolutions allowing ICM to proceed to contract negotiations:

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 terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.***

[emphasis added]

27. I voted in favor of these Resolutions, the purpose of which were to permit ICM to proceed to contract negotiations in an effort to determine whether the contract could resolve the Board's concerns with the sponsorship criteria. Although I had serious reservations about ICM's ability to meet the sponsorship criteria (and had, unfortunately, missed ICM's presentation to the Board due to illness), I believed that allowing ICM to proceed to contract negotiations was the best way to test ICM's ability to satisfy those requirements. Had the option of testing ICM's

proposal through contract negotiations not been available, I am confident that I would simply have voted “no.”

28. There can be no doubt that these Resolutions did not constitute approval of ICM’s .XXX application, despite ICM’s argument in this proceeding to the contrary. First, the Resolutions make no mention of a final decision by the Board that the .XXX application satisfied the sponsorship (or any baseline selection criteria) set forth in the RFP. To the contrary, the language of the Resolutions makes clear that the Board’s action was intended only to permit ICM to proceed with contract negotiations -- nothing more. Further, the Resolutions made clear that, if a contract was successfully negotiated, the contract then would be presented to the Board so that the Board could (at that time) make a final decision on the application.

29. Second, as of June 1, 2005, there were a number of unanswered questions and concerns regarding ICM’s ability to satisfy the requisite sponsorship criteria, including concerns relating to ICM’s definition of Sponsored Community and the level of support from the community. This is reflected in the Meeting Minutes from the June 1, 2005 Special Meeting of the Board, available at <http://www.icann.org/en/minutes/minutes-01jun05.htm> (With respect to the .XXX sTLD application, “[t]he topics of discussion among board members, liaisons and staff surrounded the adequacy of the application with particular focus on the “sponsored community” issues”). Many Board members, myself included, believed that the best way to test whether ICM could satisfy the sponsorship criteria was to determine whether the sponsorship concerns could be addressed through contract negotiation and ultimately through the registry agreement with ICM. In fact, the Board continued to debate ICM’s ability to satisfy the sponsorship selection criteria at every subsequent Board meeting up to and including the March 30, 2007 Board meeting when the Board ultimately rejected the .XXX application and ICM’s proposed registry

contract. ICM was fully aware that the Board remained concerned about the sponsorship issue and that the issue had been discussed at numerous Board meetings subsequent to the June 2005 meeting.

30. Third, and as I just explained, the Board did in fact continue to raise sponsorship concerns after the June 1, 2005 vote, confirming that members of the Board continued to have serious concerns as to whether ICM could satisfy the sponsorship selection criteria set forth in the RFP. For example, the sponsorship criteria was discussed extensively:

- at the September 15, 2005 Special Meeting of the Board, available at <http://www.icann.org/en/minutes/minutes-15sep05.htm> (“after a lengthy discussion involving nearly all of the directors regarding the sponsorship criteria”);
- at the May 10, 2006 Special Meeting of the Board, available at <http://www.icann.org/en/minutes/minutes-10may06.htm> (ICANN Board and staff “entered a detailed discussion on the following points: agreement terms against the application statements and promises made by ICM in support of their proposal; concerns regarding ICANN’s ability to enforce the promises made by ICM through a contractual framework and the potential harm if such enforcement could not be maintained; the sponsorship criteria in the RFP and materials submitted in support by ICM and others; community input including letters and emails from industry and consumers regarding the proposed sTLD; GAC advice contained in the GAC Communiqué from the Wellington Meeting and whether the terms of the proposed agreement achieved the terms of that advice; and ICM’s submission and supporting letters and documentation.”); and

- at the February 12, 2007 Special Meeting of the Board, available at <http://www.icann.org/en/minutes/minutes-12feb07.htm> (where the Board discussed the “splintering” of support for the .XXX sTLD in the online adult entertainment community, a topic that “had been the subject of debate by the Board in earlier discussion in 2006;” and where a straw poll as to who had “serious concerns” about the sponsorship issue resulted in eleven Board members expressing “serious concern”).

31. ICM was not alone: the Board also permitted other applicants – “.jobs” and “.mobi” – to proceed to contract negotiations despite open questions relating to the initial RFP selection criteria. However, ICM was unique because it was the only applicant that was experiencing the fracturing of support from its purported Sponsored TLD Community. For instance, ICM cited Larry Flynt, a well-known leader of the Adult Entertainment industry, as supporting the .XXX application, but in April 2006, Mr. Flynt came out against ICM’s .XXX sTLD proposal and requested that ICANN reject the application. Numerous others in the adult entertainment community also expressed opposition to the .XXX sTLD. Unlike the negative response of many adult entertainment providers to ICM’s proposed .XXX sTLD, there was essentially no opposition from members of the proposed “.jobs” and “.mobi” communities.

32. ICM was aware of all of the Board’s discussions subsequent to June 1, 2005 expressing concerns about the proposed sTLD. ICM must have known that there was no “formal two-step process” (as described in ICM’s paper to the Panel), and that the reaction to the Board’s June 1, 2005 vote, as explained more fully below, had placed the application in jeopardy.

## **VII. ICANN'S GOVERNMENTAL ADVISORY COMMITTEE**

33. There are six advisory committees that serve the ICANN Board, four of which are specifically provided for in ICANN's Bylaws. The Governmental Advisory Committee ("GAC"), on which I served as the Chair from 1998 to 2002, is one of those advisory committees. ICANN receives input from governments and multinational governmental organizations throughout the world through the GAC. The key role of the GAC is to consider ICANN's activities and policies as they relate to the concerns of governments, particularly in matters where there may be an interaction between ICANN's policies and national laws or international agreements, and to provide advice to ICANN on public-policy issues.

34. Given the global nature of the Internet, GAC membership is drawn from all regions of the world. In its advice to ICANN, the GAC reflects the diversity among varying countries and economies – many with different laws, perspectives and policies – allowing participating countries and distinct economies to influence policies concerning the management of the DNS and related functions.

35. The GAC usually meets three or four times a year in conjunction with ICANN Board meetings. GAC meetings are regularly attended by over numerous national governments, distinct economies, and multinational governmental organizations such as the International Telecommunication Union ("ITU") and the World Intellectual Property Organization ("WIPO").

36. ICANN's Bylaws provide that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public-policy issues. The GAC may also choose 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.

37. Under the Bylaws, the ICANN Board is required to take into account the advice from the GAC on public-policy matters, both in the formulation and adoption of policies. If the Board seeks to take an action that is inconsistent with the GAC's advice, the Board is required to inform the GAC and state the reasons why the Board has decided not to follow the GAC's advice.

38. Shortly following the June 1, 2005 Board vote to proceed to contract negotiations with respect to .XXX, I received a phone call from the U.S. Assistant Secretary of Commerce for Communications and Information, Michael Gallagher, who told me that the U.S. Government had some concerns about the Board's processes regarding the .XXX sTLD and intended to send ICANN a letter on the subject. I told Mr. Gallagher that I looked forward to receiving his letter, and that he should also proceed through the GAC to address any concerns his government may have. A true and correct copy of Mr. Gallagher's letter is attached hereto as Exhibit A.

39. On July 11, 2005, the GAC met with the ICANN Board in Luxembourg to discuss many issues, including the ICM application. I reported to the GAC that no comments had been received from governments regarding the application, but I noted that the GAC could still advise ICANN on the ICM proposal, should it decide to do so.

40. On August 12, 2005, I received a letter from Mr. Mohamed Sharil Tarmizi, then-Chair of the GAC, that expressed concern about the ICM proposal. Mr. Tarmizi suggested that the Board "allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD." I suggested to Mr. Tarmizi that he continue to work through the GAC. A true and correct copy of Mr. Tarmizi's letter is attached hereto as Exhibit B.

41. Before that time, the GAC had not expressed any particular concern regarding the .XXX sTLD application. The first time that the GAC communicated any concerns to

ICANN was August 12, 2005 – only days after the first draft/proposed registry agreement had been publicly posted.

42. I believe there are two likely reasons why the GAC and individual GAC members did not comment on the .XXX sTLD earlier. First, some countries appear to have believed that, because ICM's uTLD application had been rejected in the 2000 "proof of concept" round, it would not be considered in the new sTLD round. Second, because the independent evaluation panel had recommended rejection of the .XXX sTLD application for failure to satisfy the sponsorship selection criteria, some countries likely believed that the Board would not authorize contract negotiations with respect to the application. (Although the independent evaluation panels' reports had not yet been made public, the panel's negative recommendation with respect to ICM's ability to satisfy the sponsorship criteria was implicit from the minutes of the Board's January 24, 2005 meeting. Those minutes reflect that after the presentation of ICM's application and evaluator's responses there was "extensive board discussion regarding the [.XXX] application . . . [and] the issue of whether a sponsored community criteria of the RFP was appropriately met.") As a result, I was not particularly surprised that the GAC began to express views on the .XXX application after the Board's June 1, 2005 vote.

## **VIII. THE BOARD'S SEPTEMBER 15, 2005 VOTE ON ICM'S DRAFT**

### **REGISTRY AGREEMENT**

43. Although ICM's counsel J. Beckwith Burr and the U.K. representative to the GAC, Martin Boyle, each had concerns about, among other things, the treatment of content issues such as child pornography in ICM's draft registry agreement for the .XXX sTLD, ICM requested that the then-existing draft of the proposed registry agreement be presented to the ICANN Board for a vote. ICM's counsel (Ms. Burr) requested the vote, expecting perhaps that

the proposed agreement would be rejected but that the Board might provide further clarification as to what was needed and how ICM could satisfy the application criteria. The draft registry agreement was posted on August 9, 2005.

44. On September 15, 2005, at a Special Meeting of the Board, the ICANN Board considered that draft of the proposed .XXX sTLD registry agreement. The Board did not approve the registry agreement but, instead, voted 11-0 (with three abstentions) in favor of a resolution for further negotiation:

Resolved (05.75), that the ICANN President and General Counsel are directed 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. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice.

## **IX. THE VANCOUVER MEETING AND PRESENTATION BY ICM**

45. The GAC and ICANN were to meet in Vancouver, Canada on November 29, 2005 to continue a discussion of matters arising from the Luxembourg meeting. Before the Vancouver meeting, on November 28, 2005, consistent with ICANN's interest in transparency and openness, ICANN posted on its website a Status Report on the sTLD Evaluation Process. The reports were not released earlier because of concern for the confidentiality of the evaluators while their work was ongoing, in order to insulate them from outside pressures. With respect to ICM's proposal for the .XXX sTLD, the Status Report noted that "[t]he sponsorship/community value team found that the relevant selection criteria had not been met," citing: (1) "[t]he extreme variability in definitions of what constitutes the [adult] content which defines this community," (2) uncertainty as to the interests of the proposed community, and (3) a lack of support among users and members of the community, including those outside North America.



46. On November 29, 2005, the GAC and the ICANN Board met as scheduled. The Vancouver meeting was followed by a presentation by ICM to the GAC in which ICM promised “a range of public interest benefits” in support of its .XXX sTLD application.

47. After the Vancouver meeting, the GAC requested an explanation of the process utilized in the sTLD round of applications and in particular the .XXX application. On February 11, 2006, I wrote to Mr. Tarmizi in response to the GAC’s request. In that letter, I explained the difference between the “proof of concept” round of applications in 2000 and the sTLD round of applications that was in progress at that time, clarified that “[t]he selection of the seven new gTLDs in 2000 was made without prejudice as to the future status of the remaining proposals, including .XXX,” and emphasized that the passing over of ICM and other applicants in favor of the seven gTLDs chosen in the “proof of concept” round did not constitute a rejection of those TLDs by the ICANN Board. I also underscored that, notwithstanding the decision to proceed to contract negotiations with any applicant, “it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD.”

## **X. THE WELLINGTON COMMUNIQUÉ**

48. As the time approached for the ICANN Board’s March 31, 2006 meeting in Wellington, New Zealand, a view had emerged among several GAC member countries that the public-policy issues raised by the .XXX sTLD application should remain for individual governments to address due to the host of policy issues raised by the application. Although ICM had promised “a range of public interest benefits” in its application, supporting materials, and presentation to the GAC in November 2005 to deal with those issues, the GAC was concerned that those promises, discussed below, were not addressed in the then-existing draft of the registry

agreement. Moreover, opposition to the sTLD had been raised by, among others, Sweden, Australia, Brazil, the United Kingdom, and the United States.

49. After extensive meetings and discussions among 33 members over the course of several days, the GAC issued its Wellington Communiqué on March 28, 2006, stating the “emphatic[] oppos[ition]” of several of its members to the ICM proposal from a public-policy perspective. Those concerns included: (1) “appropriate measures to restrict access to illegal and offensive content,” (2) “the development of tools and programs to protect vulnerable members of the community,” (3) the means to “[m]aintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites,” and (4) “[a]ct[ions] to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers . . . .”

50. I should note that, because the .XXX sTLD application would not have required all pornography to be located within the .XXX domain, some countries seemed to be concerned that a new .XXX TLD would simply result in the proliferation of domain names that involved pornography. Indeed, ICM had made it clear that it would not (and effectively could not) require migration of pornographic websites from .COM to .XXX, which created a concern among some that a new sTLD devoted exclusively to adult content would expand the amount of pornography available on the Internet while not imposing any restrictions on the websites that were already maintained at .COM and other uTLDs.

51. The GAC requested confirmation from the Board that any registry agreement for the proposed .XXX sTLD would include enforceable provisions covering ICM’s commitments. The GAC also requested clarification from the Board with respect to how the .XXX sTLD

application would satisfy the sponsored community and public interest criteria, and noted that ICM's proposed draft registry agreement had not, to date, addressed the "range of public interest benefits" that had been promised in its application.

52. On May 4, 2006, I wrote to Mr. Tarmizi in response to the GAC's request in the Wellington Communiqué for information about the Board's decision to proceed with several sTLD applications, notwithstanding negative reports from the independent evaluation teams. As I explained then, "the Board decision as to the .XXX application [wa]s still pending."

The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. After additional consultation with ICM, the board voted to authorize staff to enter into contractual negotiations without prejudicing 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 might be offered by the GAC. ***The final conclusion on the Board's decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application.*** In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.

[emphasis added]

I also explained that the Board had given an opportunity to those applicants such as ICM, which were deemed by the independent evaluation panel not to have satisfied the sponsorship criteria, to present additional supporting documentation directly for Board review and consideration. Although in the case of .XXX, as well as others, "the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still 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."

53. In revising its proposed registry agreement to address the concerns noted in the GAC's Wellington Communiqué – specifically with respect to the failure to address the "range

of public interest benefits” that had been promised in its application – ICM focused on “appropriate measures to restrict access to illegal and offensive content,” which was controversial among many of the ICANN Board’s members due to the impossibility of ICANN enforcing such a provision while acting consistently with its core values.

**XI. THE BOARD’S MAY 10, 2006 VOTE ON ICM’S DRAFT REGISTRY AGREEMENT**

54. The next vote on ICM’s application took place on May 10, 2006, at a Special Meeting of the Board. After a detailed discussion, the Board voted 9-5 against ICM’s then-current draft of the proposed .XXX sTLD registry agreement. As reflected in the minutes of the meeting, the Board was quite polarized on the question of whether the contract negotiations had produced the required or expected results in order to approve the sTLD.

55. I voted against the draft registry agreement. As noted above, I had always held concerns about the sponsorship criteria with respect to ICM’s proposal and, by the time of the May 10, 2006 vote, I was beginning to reach the conclusion that ICM’s registry agreement would not be able to satisfy my concerns. Although I had voted in June 2005 to allow ICM to proceed to contract negotiations in an effort to give ICM the opportunity to satisfy the sponsorship criteria during that process, the passage of time not improving ICM’s position with respect to the sponsorship issues.

56. Moreover, prominent members of the online adult entertainment industry, including Larry Flynt Publications and AVN Media Network, had voiced strong opposition to ICM’s application shortly prior to this Board vote, and the tensions between such firms and IFFOR, the organization proposed by ICM to be the Sponsor for the .XXX sTLD, was growing. Coupled with the fact that ICM’s application described the Sponsored TLD Community only in

the future tense (i.e., there was never a claim that there was a community already in existence), the existing opposition that had surfaced gave me the overwhelming impression that ICM could not satisfy the sponsorship criteria and in fact did not have (and never had) a “community” that supported the application. Unlike the other sTLD applicants, it was clear that a community simply did not yet exist separate and apart from the proposed sTLD itself. In fact, ICM asserted that the sponsoring community would “come out” once the .XXX sTLD was approved, but that was not consistent with ICANN’s requirements for sponsorship as set forth in the original application.

## **XII. THE BOARD’S MARCH 30, 2007 VOTE ON ICM’S PROPOSED sTLD**

57. As the contract negotiations continued, it became increasingly clear that ICM was not going to be able to meet the sponsorship criteria required by the RFP. Thus, on March 30, 2007, the Board approved (in a 9-5 vote) a resolution rejecting ICM’s revised agreement and denying ICM’s application for the .XXX sTLD. This vote came after a public presentation and debate by some representatives of the Adult industry/community against the application and others in favor during the ICANN Public Forum conducted on March 29, 2007. These presentations can be found at: <http://www.icann.org/en/meetings/lisbon/transcript-public-forum-29mar07.htm>.

58. Indeed, Ms. Diane Duke, the executive director for the Free Speech Coalition, a U.S. based trade association for the adult entertainment industry with membership worldwide, stated:

First of all, I would like to thank the ICANN board for allowing us this time to speak, and to speak of our concerns of the dot xxx sponsored top-level domain.

Let me be clear. As the only trade association for the adult entertainment industry, we represent the sponsorship community. It is our organization that sued the United States government on behalf of the industry and won in the U.S. Supreme Court.

It was our organization that ICM itself came to five years ago offering a portion of the proceeds from the sTLD in return for our support of their proposed domain.

ICM recognized us as the representative for the sponsorship community even then.

Today, we are here because the adult entertainment community believes that the views of the industry are being misrepresented on the issue of the dot xxx sponsored top-level domain.

Let me be clear. The adult entertainment industry, the sponsorship community, not only does not support ICM's proposal but it actively opposes the creation of a dot xxx top-level domain.

Five years ago when ICM approached the free speech coalition with a proposal that could increase our income by tenfold, we turned down that, recognizing the negative ramification that dot xxx TDL would have for the industry.

Today industry leaders as well as small webmasters have joined together not only to publicly oppose the creation of a dot xxx TLD but also to fund our trip to this conference, ensuring that their opposition is clearly communicated to the people who will be making this critical decision.

ICM will tell you that it already has met the obligation of sponsorship. Through interest received early in the process before some of the details and dangers had been made apparent and when financial wind falls were promised to many, ICM claimed to have industry support.

Support no longer exists.

59. The Board's vote came after extensive review, analysis and debate among ICANN Board members, as reflected by the considerable discussion at the Board's March 30, 2007 Meeting in Lisbon, Portugal, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm>, and attached hereto as Exhibit C.

60. It is worth noting that the Board as constituted in March 2007 was somewhat different than the Board as constituted in June 2005 (when the Board authorized ICM to proceed to contract negotiations). ICANN's Board members take office on a staggered schedule every

six months and the regular term of office for persons other than the President or a member of the Initial Board is three years. Thus, over the Board's nearly two-year consideration of ICM's application for an .XXX sTLD, the terms of some Board members expired and the terms of others commenced. As a result, several new Board members believed that it was incumbent on them to make their own evaluations of the appropriateness of ICM's application. As reflected in the Board's minutes, some of these new Board members voted against the application and expressed the same sponsorship concerns that were discussed in the June 2005 Board meeting.

61. For example, ICANN Board member Rita Rodin (a lawyer with the New York-based law firm, Skadden, Arps, Slate, Meagher, and Flom LLP), who was not a member of the Board during the earlier discussions concerning ICM's application, stated as follows:

[M]y obligation as a board member is to take a look at this application, this applicant, to look at the sponsorship criteria and the content that has been proposed, when I do that myself, I believe that I am compelled to vote no for this application.

As others have said, I don't believe that this is an appropriate sponsored community. 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, and particularly in this case where you define those that aren't in favor of this TLD that are part of the adult webmaster community as irresponsible.

62. Because I was involved in the later stages of the contract negotiations with ICM, I elected to abstain from the vote on March 30, 2007. As reflected in the minutes of the meeting, the nine members of the Board who voted against ICM's proposal each expressed their own views as to what was influencing their vote.

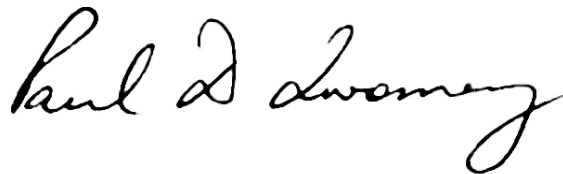
63. In short, despite the good-faith efforts of both ICANN and ICM, ICM simply could not overcome the hurdles of sponsorship with its proposed .XXX sTLD. In my judgment, the ICANN Board went above and beyond in giving ICM opportunity after opportunity to show ICANN that the .XXX sTLD could satisfy the criteria set forth in the RFP. Perhaps ICANN

should have voted in June 2005 to end the application process, but it elected to go forward in the hope that ICM could satisfy concerns that had been expressed.

64. Most importantly for purposes of these proceedings, I am absolutely confident that the Board's conduct did not violate its Bylaws or Articles of Incorporation. To the contrary, the Board's discussions concerning ICM's .XXX sTLD application were open and transparent, and virtually everything associated with the Board's discussions and ICM's sTLD application was published. ICM was given numerous opportunities to be heard, and the Board members invested an enormous amount of time on this issue.

65. There is no doubt in my mind that the Board's decisions were made in good faith. If anything, the numerous opportunities that ICM was given to respond to ICANN and the GAC's concerns reflects ICANN's considerable good faith in negotiating with ICM.

Being in full agreement with the contents of this witness statement, I hereby sign it and acknowledge its contents on this 1st day of May 2009.

A handwritten signature in black ink, reading "Paul D Twomey". The signature is written in a cursive, flowing style.

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Paul Twomey

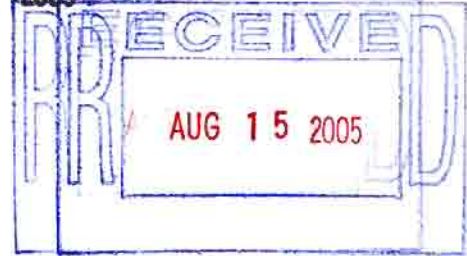


# **EXHIBIT A**



**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Assistant Secretary for Communications**  
**and Information**  
Washington, D.C. 20230

AUG 11 2005



Dr. Vinton Cerf  
Senior Vice President, Technology Strategy  
MCI  
2201 Loudon County Parkway, F2-4115  
Ashburn, VA 21047

Dear Dr. Cerf:

I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.

Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6,000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will 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.

It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition of this new top level domain. Thank you for your attention to this matter.

Sincerely,

Michael D. Gallagher

cc: Dr. Paul Twomey

# **EXHIBIT B**

**Correspondence from GAC Chairman to ICANN Board regarding .XXX TLD****12 August 2005**

From: Mohd Sharil Tarmizi  
To: ICANN Board of Directors  
Cc: Government Advisory Committee  
Subject: Concerns about contract for approval of new top level domain  
Date: Friday, August 12, 2005

Dear Colleagues,

As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content. I am omitting the specific TLD here because experience shows that some email systems filter out anything containing the three letters associated with the TLD.

You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. 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 strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new gTLDs in the Luxembourg Communique that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

In this regard, I would like to bring to the Board's attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

Based on the foregoing, I believe the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.

Thanks and best regards,

Mohamed Sharil Tarmizi  
Chairman, GAC  
ICANN

# **EXHIBIT C**

## ICANN Meetings in Lisbon Portugal

Transcript - ICANN Board of Directors Meeting  
30 March 2007

Note: Although transcript output is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the session, but should not be treated as an authoritative record.

>>VINT CERF: Good morning, ladies and gentlemen. I'd like to call the board meeting to order. Just to make sure everyone knows, Dr. Toure has been the number of a couple of flight cancellations. And I think there was a notice that went around to the ICANN community.

We hope that he arrived at the airport around 8:30, but we're not sure of that.

So if he is able to come in the day, we can take a break during our work and invite him to address us.

Otherwise, we'll regretfully have to set a meeting later in the day.

We have a considerable amount of work to do this morning. So I think we should get going.

The first item on the agenda is to approve the minutes of the last meeting.

I'm not going to read any of the minutes is. They've been posted and the board has had a chance to discuss them.

I would like to put a resolution on the table that approves the minutes of 13 March 2007. And I'd ask for a second.

I see Alex Pisanty seconds.

Is there any discussion of the minutes? If not, I'll call for a hand vote. All those in favor, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13 -- 14. We should have 15. Who's missing?

>> You.

>>VINT CERF: Vanda. Okay.

One, two -- let's do that one more time.

One, two, three, four, five -- there we are -- we're all there. It's okay. I didn't see Demi's hand.

It's unanimous, Mr. Secretary.

The next item on the agenda has to do with the decision whether to adopt a top-level domain proposed by ICM called dot XXX.

I'd like to call on Alex Pisanty to introduce a resolution on the subject, after which I expect a discussion to ensue.

Alex.

>>ALEJANDRO PISANTY: Thank you, Vint.

Vint, board members, the resolution reads as follows:

Whereas, on 15 December, 2003, ICANN solicited proposals from potential sponsors to create new sponsored top-level domain sTLD registries, seeking applications that would, quote, "address the needs and interests of a clearly defined community, the sponsored TLD community, which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate, unquote.

Whereas, on 19 March, 2004, ICM Registry, LLC, referred to as "ICM," submitted an application for the delegation of a dot XXX TLD, sTLD, the "ICM application," which was evaluated according to ICANN's designated sTLD processes.

Whereas, on 1 June, 2005, the ICANN board voted 6 to 3, with two abstentions, to authorize the president and general counsel to enter into negotiations with ICM relating to proposed commercial and technical terms for the XXX sTLD.

Whereas, on 9 August, 2005, ICANN posted a draft proposed dot XXX sTLD registry agreement on the ICANN Web site.

Whereas, on 15 September, 2005, the board voted 11-0, with three abstentions, expressing concerns regarding issues relating to compliance with the proposed dot XXX TLD registry agreement, including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership, and noting that the board had received extensive public comments, directed the ICANN president and general counsel to discuss possible additional contractual provisions or modifications for inclusion in the dot XXX registry agreement so as to ensure that there were effective provisions requiring development and implementation of policies consistent with the principles in the ICM application.

Whereas, on 18 April 2006, a revised draft proposed dot XXX sTLD registry agreement was posted by ICANN on its site, and ICANN requested and received extensive public comment on this agreement.

Whereas, on 10 May 2006, at the specific request of the applicant, the board reviewed the revised draft proposed dot XXX sTLD registry agreement, and the motion to adopt the proposed agreement failed by a vote of 9 to 5.

Whereas, on 19 May 2006, the applicant submitted a request for reconsideration -- there's a quote for a Web publication of this in the resolution. On 29 October 2006, ICM withdrew its reconsideration request and resumed negotiations in an attempt to agree to a new version of the proposed agreement for board consideration.

Whereas, on 5 January 2007, ICM negotiated a further revised draft dot XXX sTLD registry agreement, "revised agreement," which was posted by ICANN and received extensive public comment on the revised agreement.

Whereas, the board has received and analyzed unprecedented public comment, as well as advice from the GAC via communiques issued in Wellington and Lisbon, relating to ICM's application and the revised agreement.

Therefore, the board has determined that:

ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

Based on the extensive public comment and from the GAC's communiques, 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 communiques, 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 responsibility related to content and conduct.

The board agrees with the reference in the GAC communique 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, number to be determined, that the proposed agreement with ICM concerning the dot XXX sTLD is rejected and the application request for delegation of the dot XXX sTLD is hereby denied.

So moved, sir.

>>VINT CERF: I take it that's a motion.

Is there a second?

Raimundo seconds.

I'm sure that board members would like to have some discussion about this.

I can tell the general public that there has been enormous debate on this particular topic. Much input from many different sources.

And the board is not of one mind in this particular proposal.

I'd like to entertain some discussion about this particular proposal. And one way to do that, I think, would be to offer board members an opportunity to say a little bit about their view on this particular proposal. You might speak either for or against or simply make observations before we come to a vote.

Susan, let me call on you first.

>>SUSAN CRAWFORD: Mr. Chairman, I cannot vote in favor of this resolution. I'll have more to say when we vote. But in this discussion period, I wanted to note for my colleagues that I've looked back at the RFP and the proposed contract. In the request for proposals, we set forth a definition of the sponsored TLD community which said the proposed sTLD must address the needs and interests of a clearly defined community which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.

And we asked applicants to demonstrate that the community is precisely defined so it can readily be determined which persons or entities make up that community, and also to state that the community was comprised of persons that have needs and interests in common, but which are differentiated from those of the general global Internet community.

We also asked applicants to provide evidence of support for their application from their sponsoring organization.

It seems to me that the applicant here has identified a sponsored community for dot XXX as a self-identified group of adult webmasters who wish to work together to implement industry best practices in a specific and easily identifiable marketplace. They propose to provide a forum for interaction and policy development. And they assert that these are needs that are not being met elsewhere, the needs of creating and enforcing industry best practices.

They have submitted letters of support to us from members of the adult entertainment community that they assert include supporters from many countries and major providers of adult entertainment. They have also told us that since the first of June of 2006, more than 76,000 strings from at least 1,000 unique registrants have been prereserved in triple X, with instructions from ICM that only qualified applicants should request such



preregistrations.

ICM has told us that these prereservations have come from prospective registrants in triple X who are operating bona fide adult sites in other TLDs whose existing sites are providing adult entertainment or services to the adult entertainment industry, and whose existing site was registered prior to May 2006, the date the board rejected a proposed triple X contract.

I've also looked back at the GAC communique conveyed to us in Wellington, and I have compared it to the revised agreement, appendix S. And I do think the GAC's concerns have been adequately addressed.

This has been a very difficult topic for us as a board. We've had extensive discussion, reasonable board members can differ about these issues. But I wanted to make clear in this discussion period what my views are of the criteria here.

Thank you.

>>VINT CERF: Thank you very much, Susan.

Are there any other comments from other board members?

Roberto.

>>ROBERTO GAETANO: Thank you.

I would like to say two things that, in my opinion, make this debate very special.

One thing is the expectation of the community or of a large part of the community or groups and so on.

But, first of all, I would like to make clear that what I'm saying is not something that is -- has determined or will determine my vote. It's a consideration on why this issue is complex.

From what we have heard from the debate in the last months or years, there is at least one large group of people that think that the introduction of the dot XXX will multiple the amount of pornography, whatever the politically --

>>VINT CERF: Adult entertainment material.

>>ROBERTO GAETANO: -- adult entertainment material on the Net.

And, in my opinion, this is not going to happen.

Another large part of the community thinks that if we approve dot XXX, all that material that we said will magically move into dot XXX, and, therefore, children will be protected, because it will be easy to filter.

Also that, in my opinion, is not going to happen.

But, in fact, the irony of this is that besides the people who have followed more closely the debate, the ICANN community, the outside world, the press, the media, are really focusing on those two aspects. So if we approve them, if you approve the dot XXX, within a short period, the people will see that this is not going to happen. Obviously, you know, we can make a bet here. But guess who is going to be blamed.

On the other hand, if we reject the dot XXX, the same two communities will say, Ah, for instance, for the material, whatever, that the correct thing is, we still have that material, and it's not confined into dot XXX, because ICANN has rejected the creation of the TLD.

So I think that as a member of the ICANN community, as a director of this board, I think that whatever the final

resolution is going to be, one thing we need to do -- and we need to make a clear statement to the media and to the outside world -- that we'll make it clear that it was being discussed here and what is going to be approved or rejected is the introduction of a TLD that is not going to, in any case, change substantially the situation.

The second consideration that I want to make is related to the idea that we have about the sponsored community.

We have -- we thought -- when, in Tunis, I think, that we started this process of the sponsored TLD, we thought that it was going to be easy to identify a community, to identify groups that would need a TLD in order to promote their business or their activities or whatever is keeping that group together, and therefore there's going to be a drive, a push to move in time -- because, of course, who has an established business is not going to relinquish their virtual identity with domain names that they already have and that are referenced in the Web -- but that there's going to be this process by which all the people who recognize themselves in that community will eventually have a presence in that Web, and the newcomers that don't have, therefore, legacy Web sites will easily go into that community.

For certain TLDs, this -- we see this happening.

I have a problem with this one in the sense that if I were a webmaster of a Web site with adult content, I would honestly be reluctant to have my site in the dot XXX, because that can be easily labeled, it can be easily identified, and it will have all the moral consequences that you have when you are declaring things open in the community instead of hiding behind.

So when ideally -- when I think that ideally this would be a good solution in an ideal world, because you qualify yourself and you are in that particular area, I think that this is not -- obviously not going to happen for a number of reasons. So, therefore, here we have debated very much how much was the support of the community. Do we have 50%, 70%, 30%? Were the meetings attended with standing room only or were there empty seats? All this in my judgment has little influence, I have to say.

The real problem that I have is that I'm wondering whether here we are trying to discuss the color of the uniform of an army that wants to act in disguise. Thank you.

>>VINT CERF: Thank you, Roberto. Vittorio, you had a note, and also Goldstein after that. Vittorio.

>>VITTORIO BERTOLA: Thank you. Well, I want to make it clear for the record that the At-Large Advisory Committee does not have a position on this. If you were here at the public forum, you might have heard from some members of our community that are strongly in favor, and there's a good number of them. There's also people in our community that are strongly against. And if I had to say, I think I've seen more or less the same divisions that I've seen in the general discussions. So of course the At-Large tends to reflect the division of opinions in the global community. And perhaps the thing that I would note as food for thought is that I've seen an interesting division by cultures. So I've seen that almost all the supporters of the creation of this domain come from the North American culture, from the U.S., or from countries that have a similar culture, and I've seen mostly the people from outside that culture being opposed, and when this is a factor into the vote --!

I mean, and I don't know whether this will be repeated, for example, in the vote of the board, but I think it interestingly showed that these kind of proposals would have the need to, I mean, take more into account than what happens outside of the United States.

>>VINT CERF: Thank you. Steve Goldstein.

>>STEVE GOLDSTEIN: Thank you, Mr. Chairman. As my colleagues on the board will certainly know, it was by no means an easy decision for me to decide on my vote. And I was perhaps one of the -- the last people to make a final decision, but my decision turned on one point and one point only, and that was the last point in our board's resolution, the proposed resolution, that under the revised agreement, there can be credible scenarios that lead to circumstances in which we -- ICANN -- would be forced to assume ongoing management and oversight role regarding the content, and that is inconsistent with ICANN's technical mandate.

I believe that we have to guard very carefully against ICANN ever becoming a regulator in that sense, and it's for

that reason, and that reason alone, that I would cast my vote against the proposed agreement. Thank you.

>>VINT CERF: I have two other comments now. One from Demi Getschko, and one from Francisco. Demi?

>>DEMI GETSCHKO: Thank you, Steve. I have consistent problems with the definition of the sponsorship of this proposal. To separate this community from the general adult content community, the proposal uses an adjective "responsible." Then it seems that the "responsible" adult content will be defined by participating in this TLD. Then if you are a webmaster outside of this top-level domain, maybe you would be labeled as irresponsible. Then this is a very difficult way to set up as a criterion to make the right definition of the community. On the other hand, if we have to check for compliance on this kind of situation, we would be exactly in the middle of the fire of deciding about content, and it is not the mission of ICANN to be involved in content. I want to express my two views of problems identified in this proposal. Mainly because of the bad -- or the weak definition of the limits of the community and the fact that it puts us in the middle of something we don't!

want to be. Thank you.

>>VINT CERF: Thank you, Demi. Francisco, and then Raimundo.

>>FRANCISCO DA SILVA: Thank you, Vint. According to the bylaws of ICANN, I'm here as a liaison in representation of the technical liaison group and this year in the rotation ETSI is my constituency. Therefore, if I am here for an organization which has a technical mandate, which is ICANN and it is the reason why ETSI participates in the technical liaison group, I could not -- if I had to vote, I could not support it because of a thing that the decision would lead to an area that is outside the technicality and the technical issues and could become more -- could be -- enter in the regulation of content, and, therefore, I would not cope with my responsibilities towards my representation.

>>VINT CERF: Thank you very much, Francisco. Raimundo.

>>RAIMUNDO BECA: Thank you, Vint. Of course like for the rest of my colleagues, this is not a decision -- an easy decision for me. Mainly because when I see a community that is on the borders, it has been from the very beginning so split about this, then you are -- it's difficult to find a way to get a consensus, and obviously this is not a comfortable position for anybody. This is, in fact, the fourth time in this board that I am called to vote on this application.

In the three precedent occasions, opportunities, I voted against the adoption of the approval of this application, and in this fourth time, I will not modify my position.

In the three precedent opportunities, the reason why -- the rationale of my vote has always been the same. My appraisal has always been and continues to be that this application doesn't meet the support -- doesn't meet the request for proposal, mainly on the supporting community.

In particular, in September 15th, 2005, the board by 11 votes against zero voted in dissent of not adopting in that moment an agreement that was proposed, and the main reason why this -- and it's written in the resolution of that opportunity, the main reason is that the -- it should be guaranteed that there was really a commitment of the -- of the supporting community to the principles of the -- of the principle claimed by the applicant. And those principles were mainly that the -- this was a responsible adult entertainment industry that was supporting this application.

In May 10, 2006, by a vote which was more split than the one before, 9 against 5, the board didn't approve again the agreement that was proposed -- that was proposed in that opportunity. In my statement in that opportunity, I indicated that the reason why I was not voting in favor was that because the request made on September -- on September 15 was not met, which means that the -- there was no guarantee that there was a supporting organization -- supporting community that was committed in the sense of developing a responsible adult entertainment provision of services and goods.

In this fourth opportunity, my appraisal is that we are even farther than in May 10, 2006, than we were in that opportunity. Why -- this is my appraisal. Because in this opportunity, the community, the support organization, is defined as a self-identified one. And an organization which is self-identified is not committed -- is committed only

for what they will decide in the moment. So they are committed to a book of rules, but the problem is that the book of rules is not written yet, and we don't know what is that, and that, in my opinion, means that we have no guarantee that there is really a commitment with the principle of a claim to develop a responsible adult entertainment industry. Thank you.

>>VINT CERF: Thank you very much, Raimundo. Are there any other comments from board members?

I'd like to just make a couple of observations. The record will show that at one point I voted in favor of proceeding to negotiate a contract. Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms, it seemed to me, would put much more meat on the bones of the initial proposal.

I had been concerned about the definition of "responsible," as Raimundo was as well, and it seemed to me that part of that definition was behavioral and that it wasn't clear what behavior patterns one would anticipate of this community because they wouldn't be defined until the IFFOR structure was put in place and that rules would be adopted. So there's uncertainty in my mind about what behavioral patterns to expect.

There was a substantial disagreement within the adult content community to this proposal. One can argue over what does "substantial" mean, but here, setting aside a great deal of disagreement with the proposal from many parts of the community, my concern here is that over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal.

As I looked at the contract -- and we did so several times in several different versions -- the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded, for example, that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered dot xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR.

criteria. One could say, "Well, can't you just hand this off to IFFOR or to other entities constructed within the dot xxx framework?" And frankly, we've found that in other cases, our staff has still wound up having to respond to issues arising.

I would also point out that the GAC raised public policy concerns about this particular top-level domain. It's not the first time that the GAC has raised public policy concerns and I would remind everyone that this is their purpose. The Governmental Advisory Committee was created to alert the ICANN board and the community to issues of public policy character.

I recall that when we were working on dot info, there were issues associated with the registration of place names or geographical names, and the GAC provided us with guidance as to which names ought to be held in reserve and we followed that advice.

Some of you may not know that if we receive public policy advice from the GAC and we choose not to accept it and act on it, that we need to, in fact, explain to the GAC why we would not do that. This would be true, in this case, as well if we were to reject or ignore the advice of the GAC with regard to this proposal. We would be required under the bylaws to explain why that was the case.

I'd also like to remind people that in the processing of the dot travel top-level domain, we did not proceed to take action on that proposal because the -- a significant -- significant members of the general travel community objected and did not consider themselves to be part of the sponsoring community, and we did not take action until that problem was resolved and, in fact, the dissenting member ultimately joined.

So there is precedent for many of the negative actions that this particular resolution endorses.

So my vote is colored in substantial measure, not only by these matters but by the comments of my fellow board members. I'd like to also draw attention to the fact that while they do not vote on matters, that the liaisons have as much input into decision-making as the board members do with regard to discussion of various positions and

issues arising, and I think that's a very important part of our whole process.

Let me ask if there are any other comments from any other board members. Vanda.

>>VANDA SCARTEZINI: Okay. I'd like to state also that I start considering the proposal a positive alternative, but going deeply into this proposal with the consideration committee, I became to change my mind and now I finally decide against that based especially with the last item of our resolution that ICANN would be forced to assume oversight intent content, which is totally against our bylaws. Thank you.

>>VINT CERF: Thank you, Vanda. Are there any other comments? Rita?

>>RITA RODIN: Thank you, Vint. I'm not going to repeat what other board members have said. This was a very difficult decision for us. Particularly for me. I wasn't present at a lot of the earlier discussions that the board had about triple X, so I looked back on a lot of materials and I've spoken to a bunch of people in the community and when I listened to the instructions of our general counsel that my obligation as a board member is to take a look at this application, this applicant, to look at the sponsorship criteria and the content that has been proposed, when I do that myself, I believe that I am compelled to vote no for this application.

As others have said, I don't believe that this is an appropriate sponsored community. 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, and particularly in this case where you define those that aren't in favor of this TLD that are part of the adult webmaster community as irresponsible.

I do think that this, as others have said, will be enforcement headache for -- an enforcement headache for ICANN. It's going to force the board and the community to rule on the appropriateness of content and other controls that may be implemented by this TLD. As others have said, I think that's way beyond the technical oversight role of ICANN's mandate.

And I just wanted to mention that I almost feel as though if there were an exclusive TLD in silo for adult content on the Internet, I might actually vote in favor, but since it's not -- right? -- there's porn all over the Internet and since there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD -- that is, to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet -- I think that this is too early a concept and, again, I will vote against.

I just want to make one final statement that the board has had very rigorous discussion on this, as everyone has said. It's been an extremely difficult decision, and I want to assure the community that this is not the result of some secret sort of behind-the-scenes government action or any other inadvertent pressure, but, indeed, a very robust and soul-searching debate among my fellow board members. Thank you.

>>VINT CERF: Thank you, Rita. Other comments?

I gather we're ready -- oh, I'm sorry, Peter.

>>PETER DENGATE THRUSH: I think it's probably better to say something now than at the time we vote. I think it's probably easier so I'll just say just a few things now and just vote when the voting comes.

I'm going to vote against this resolution and, in fact, I sought to move a motion in favor of adopting this applicant.

I've been concerned about three aspects of this application. One, the sponsorship community and the nature of that community; the enforceability of the contract; and the nature and applicability of GAC advice.

On the first, 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 or anything about the nature of self-selection, nor as a subset of that issue, is it affected by the permanence or impermanence of that community.

People may choose to be a part of it for a period and then leave. None of that affects the ability to identify members of the community at any time that's required. Nor am I affected by the withdrawal of some of the supporters of this application in recent months.

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 that's the nature of this process and they have to be given an opportunity to create their rules and to manage the system.

I was specifically concerned about active opposition from members of the adult content provider community who might have been members of that group. That's the first time in any of these sTLD applications we've had active opposition. And we have no metrics, either in our RFP or in any other kind of precedent, to establish what level of opposition by members of the potential community might have caused us concern.

In the end, I've concluded that the level of remuneration demonstrated by the surviving community, the number of preregistrations and their provenance is sufficient. I do not think that dissent by incumbents in a market objecting to the entrance -- the entry of a new player should be given much weight.

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. No fact or real rationale are provided in the resolution, and I think given the considerable importance that the board has placed on this in correspondence with the applicant and the cost and effort that the applicant has gone to to answer the board's concerns demonstrating the existence of a sponsored community, that this 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.

I do not think that this contract would make ICANN a content regulator. I would, like others, be very concerned if I thought that was a possibility. And I come then to the GAC advice.

I think issues were raised by the GAC as to matters of public policy concern to that committee, and I just want to record mine -- and I think the rest of the board's -- great appreciation of the value of GAC advice, and the respect required to be accorded to that. Given that it's the collective expression of will of governments here to support the ICANN mission in providing their specialist public policy advice. I think these particular concerns, however, were not well -- were not at all quantified or prioritized, but nevertheless, the applicant responded, in my view, sufficiently in relation to the concerns raised, proposing suitable mechanisms to deal with the matters raised by the GAC.

I have to also record how unhappy I and other members of the board are with the sTLD process. This applicant's been put to significant expense and suffered considerable delays for reasons largely outside its control. It's also had to suffer, as we've had, lots of mistaken assertions about adult content, much of which raises issues well outside the relatively narrow scope of the RFP and the issue which the applicant had to meet.

So in that regard, I welcome the developing work in the GNSO to install a regular, repeatable, hopefully contentiousless process for the introduction of new TLDs. So for those reasons, I vote against this resolution, and would prefer to have been voting in favor of an applicant -- of the application to adopt it.

>>VINT CERF: Thank you very much, Peter. Njeri?

>>NJERI RIONGE: I will not repeat what everybody else has said, because this has been a very, very challenging

and very extensive debate at the board level. However, in addition to the reasons stated in the resolution, I vote no and for the following reasons:

That the ICM proposal does not take into account the global cultural issues and concerns that relate to the immediate introduction of this TLD onto the Internet; that the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; that the ICM proposal focuses on content management which is not in ICANN's technical mandate.

The ICM proposal conflicts with our recently consistent rebuttal with ITU during WSIS which is still a very fresh issue in our minds and in the minds of the community and we need to be consistent with the core mandate of ICANN.

>>VINT CERF: Thank you, Njeri. Are there any other comments?

I think it's time for us to proceed to a vote. I'm going to make this a roll call vote. Board members who wish to make any further statements in the course of casting their vote are free to do so. But you're not compelled to do so. So I'm going to start at this end of the table and work my way all the way around, calling on myself first.

Let me also remind you that if you vote yes on this proposal, you are rejecting the dot xxx proposal. If you vote no, you're voting against rejecting the dot xxx proposal. And I struggled very hard last night trying to figure out: Whom how am I going to say this without getting my shoe LACES tied together, so again, if you vote yes, you are voting to reject the dot xxx proposal. If you vote no, you are voting not to reject it. It does not mean that you accept it; it just means you didn't reject it. Okay.

So Vint Cerf votes yes, I am rejecting the dot xxx proposal. And I call on Roberto to cast his vote.

>>ROBERTO GAETANO: I vote in favor of the motion, which I understand is rejecting the dot xxx proposal.

>>VINT CERF: Thank you, Roberto. Goldstein.

>>STEVE GOLDSTEIN: I vote yes.

>>VINT CERF: Susan.

>>SUSAN CRAWFORD: I must dissent from this resolution, which is not only weak but unprincipled. I'm troubled by the path the board has followed on this issue since I joined the board in December of 2005. I'd like to make two points.

First, ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. Second, ICANN should take itself seriously, as a private governed institution with a limited mandate and should resist efforts by governments to veto what it does.

I'd like to talk about the role of the board.

This decision whether to admit a particular non-confusing legal string into the root is put before the ICANN board because, first, we purport to speak on behalf of the global Internet community. And second, the U.S. Department of Commerce defers to the judgments of that community when deciding what to tell its contractor to add to the authoritative root zone file.

As a board, we cannot speak as elected representatives of the global Internet community because we have not allowed elections for board members. This application does not present any difficult technical questions, and even if it did, we do not, as a group, claim to have special technical expertise.

So this is not a technical stability and security question.

It seems to me that the only plausible basis on which the board can answer the question in the negative -- so



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.

Let me explain.

The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted.

This understanding, this value, has led directly to the striking success of the Internet around the world.

ICANN's role in gTLD policy development is to seek to assess and articulate the broadly-shared values of the Internet community. We have very limited authority. And we can only speak on behalf of that community. I am personally not aware 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. It is very clear that we do not have a global shared set of values about content on-line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned.

I'd like to speak about the process of this application.

More than three years ago, before I joined the board, ICANN began a process for new sponsored top-level domains. As I've said on many occasions, I think the idea of sponsorship is an empty one. All generic TLDs should be considered sponsored, in that they should be able to create policies for themselves that are not dictated by ICANN. The only exceptions to this freedom for every TLD should be, of course, the very few global consensus policies that are created through the ICANN forum. This freedom is shared by the country code TLDs.

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.

Since then, real and AstroTurf comments -- that's an Americanism meaning filed comments claiming to be grass-roots opposition that have actually been generated by organized campaigns -- have come into ICANN that reflect opposition to this application.

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.

No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition. We have no idea how significant it is. We should not be in the business of judging the level of market or community support for a new TLD before the fact. We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root.

It seems to me that what is meant by sponsorship -- a notion that I hope we abandon in the next round -- is to show that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are members of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants.



To the extent some of my colleagues on the board believe that ICANN should be in the business of deciding whether a particular TLD makes a valuable contribution to the namespace, I differ with them. I do not think ICANN is capable of making such a determination. Indeed, this argument is very much like those made by the pre-divestiture AT&T in America, when it claimed that no foreign attachments to its network -- like answering machines -- should be allowed. In part, because AT&T asserted at the time that there was no public demand for them.

The rise of the Internet was arguably made possible by allowing many foreign attachments to the Internet called modems. We established a process for sTLDs some time ago. We have taken this applicant through this process. We now appear to be changing the process. We should not act in this fashion.

I would like to spend a couple of moments talking about the politics of this situation. Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort with this application may have been sparked anew by first the letter from individual GAC members Janis Karklins and Sharil Tarmizi, to which Ambassador Karklins has told us the GAC exceeded as a whole by its silence, and, second, the letter from the Australian government.

But the entire point of ICANN'S creation was to avoid the operation of chokepoint content control over the domain name system by individual or collective governments. The idea was that the U.S. would serve as a good steward for other governmental concerns by staying in the background and overseeing ICANN's activities, but not engaging in content-related control.

Australia's letter and concerns expressed in the past by Brazil and other countries about triple X are explicitly content based and, thus, inappropriate in my view.

If after creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content. Also, if certain governments want to ensure that all adult content providers with a physical presence in their country register exclusively within triple X, that is their prerogative as well.

I note as a side point that such a requirement in the U.S. would violate the first amendment to our Constitution.

But this content-related censorship should not be ICANN's concern and ICANN should not allow itself to be used as a private lever for government chokepoint content control.

>>VINT CERF: Susan --

>>SUSAN CRAWFORD: I am almost done.

>>VINT CERF: No, no, no. I was asking you to slow down. The scribes are not able to keep up with you. I think you want this to be on the record.

>>SUSAN CRAWFORD: I do, and I will give it to them also in typed form.

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.

Registration in or visitation of domains in this TLD is purely voluntary. If ICANN were to base its decisions on the views of the Australian or U.S. or Brazilian government, ICANN would have compromised away its very reason for existence as a private non-governmental governance institution.

So in conclusion, I continue to be dissatisfied with elements of the proposed triple X contract, including but not limited to the rapid take-down provision of Appendix S, which is manifestly designed to placate trademark owners and ignores the many of the due process concerns that have been expressed about the existing UDRP.

I am confident that if I had a staff or enough time, I could find many things to carp about in this draft contract. I'm equally certain if I complained about these terms, my concerns would be used to justify derailing this application for political reasons.

I plan, therefore, as my colleague Peter Dengate Thrush has said, to turn my attention to the new gTLD process that was promised for January 2007, a promise that has not been kept, in hopes that we will some day have a standard contract and objective process that can help ICANN avoid engaging in unjustifiable ad hoc actions.

We should be examining generic TLD applicants on the basis of their technical and financial strength. We should avoid dealing with content concerns to the maximum extent possible. We should be opening up new TLDs. I hope we will find a way to achieve such a sound process in short order. Thank you.

[ applause ]

>>VINT CERF: Since we are in a voting phase, Susan, you also need to cast your vote.

>>SUSAN CRAWFORD: I began my statement, Mr. Chairman, by casting my vote.

>>VINT CERF: Which was no? Okay, thank you.

Njeri Rionge how, do you vote?

>>NJERI RIONGE: I vote yes.

>>VINT CERF: Raimundo?

>>RAIMUNDO BECA: As an elected member of the board, under no pressure of no government of the world, under no pressure of any association, but knowing my responsibilities as a member of the board, I vote -- I vote in favor of this resolution. And I will make no comment -- additional comment from what I made before.

>>VINT CERF: Thank you, Raimundo.

Peter?

>>PETER DENGATE THRUSH: No.

>>VINT CERF: Rita?

>>RITA RODIN: I vote yes.

>>VINT CERF: Vanda?

>>VANDA SCARTEZINI: I vote yes, but I would like to state there is no pressure. I'm not under pressure of my government or any government.

>>VINT CERF: Dave Wodelet?

>>DAVE WODELET: Yes. I would like to say first, Vint, that we've already had a lot of discussion on this subject and I certainly see no need to repeat some of my colleagues, so I will limit my comments and be brief to just a couple of things.

This decision certainly has been a difficult one resulting in protracted discussions both within and outside of the board. This decision is a decision that has deserved a lot of thought and deliberation, learning input from a lot of disparate or different groups.

This decision has clearly been emotionally charged and has certainly a lot of emotional baggage. And as a result, I believe some objectivity has suffered during the process.

While I believe that the content of TLDs sponsored or not is not in the scope of ICANN, I also believe that we have to and must evaluate this application on its technical merits alone.

In doing so, I believe the conditions and objections the board had with the previous application have now been met and resolved. So as such, I must vote no and I cannot support this resolution.

>>VINT CERF: Thank you, David. Joichi?

>>JOICHI ITO: I vote no against the resolution, and I would like to comment briefly. I think Peter, Susan and David have articulated most of the points. I would also like to point out that the discussions and arguments about how we would end up by default becoming entangled in the content aspect of this is not sufficient reason for me to vote in favor of this resolution. It is a reason to look at again, as Susan says, the whole process of gTLDs but maybe even at a higher level the *raison d'être* and the existence of ICANN and how it should progress.

I don't think this particular vote, particularly in the context of a process that has been followed, and, to me, the fact they have met the technical requirements of the RFP is not the appropriate place to determine whether ICANN should or shouldn't be involved in content. It shouldn't. But that's not where I would be placing this issue.

I think that this -- what this should alert us to is that we have a much higher, bigger problem that we need to be discussing, and I hope that conversation doesn't end here.

And so I think different board members have taken different approaches to how to deal with this issue that's been thrown in our laps. But for me in particular, I think that consistency of the process and to me, as David says, the technical merits of the RFP are very important. And it is also very important for me personally to be very clear that the arguments that are being made about the content and the political issues have no bearing on my -- on the vote that I am casting.

>>VINT CERF: Demi Getschko?

>>DEMI GETSCHKO: I vote in favor of the resolution, and I would like to say that I am a Brazilian citizen. I am an elected board member from the CC community. I don't make any considerations about the reasons the people on the board voted yes or no. I have to declare very strongly that I am voting on my own decision without any kind of pressure, and it seems to me it would be outrageous to try to say that maybe we have voting in some elections because of some kind of pressures. Thank you.

>>VINT CERF: Thank you, Demi.

Ramaraj?

>>RAJASEKHAR RAMARAJ: I don't want to repeat what the others have said, so all I would like to say is with all that I have seen, heard and reviewed, I feel that it is appropriate that the board should actually approve the agreement with the ICM Registry and, hence, I vote no.

>>VINT CERF: Alex?

>>ALEJANDRO PISANTY: Thank you, Vint. I will vote in favor of the resolution that says no. I vote yes to no.

I have to distance myself energetically, and I see that other board members have already done so from the characterization made by Ms. Susan Crawford. Rhetoric aside, the picture she paints is plainly wrong. I do not consider that the board has been swayed by political pressure of any kind. It has acted to the best of its knowledge and capacity within a very vigorous discussion within the board and within the community.

Within the strict limits set by ICANN's mandate and for these TLD, within the procedural and substantial rules set

by the board's resolution and the RFP itself. ICANN has acted carefully and strictly within the rules.

Further, I have never seen a discussion colored by such implications as discomfort with adult content in this board or any issues related thereto.

The ICANN board has taken into account what one of the things that Ms. Crawford mentions, that there is no universal set of values regarding adult content other than those related to child pornography and the resolution voted is based precisely on that view, not on any view of the content itself. And I repeat, it's based on the view that there is no universal set of values agreed explicitly regarding this.

The fiduciary duty of care that we're obliged to as board members has taken those who vote in favor of the resolution to find that the proposed contract cannot scalably or credibly fulfill the measures required by the RFP. A global TLD needs to scale to a global application, to a global community, to a global response of foreseeable, predictable response from the global community and not work only in one country, as I find Ms. Crawford's statement to be much more concentrated into the realities of one jurisdiction.

The resolution is not based on the judgment of the community support for the application other than noting that this community support has been divided and not consistent a long time.

It is not based on considerations that would interfere with freedom of speech or any other human rights and values adopted generally and specifically by ICANN.

The proposed contract fails to extricate ICANN from contents and conduct-related issues. In fact, it does the opposite. To the best of our understanding, this cannot be remedied, and that in our global, international multistakeholder environment, is what counts.

>>VINT CERF: Thank you, Alex. Paul Twomey, how do you vote?

>>PAUL TWOMEY: Chairman, I abstain.

>>VINT CERF: Thank you, Paul. My count says that there are eight votes yes, which means that the proposal is rejected. There are five votes no, and one abstention.

It's nine. I'm sorry, there are nine yeses. Nine, five and one abstention. So the proposal is effectively rejected, and it is my understanding that as a consequence of this vote, we will not accept any further proposals on this particular TLD in this particular cycle of sponsored TLD consideration.

Well, thank you very much for all of the comments that have been made. I'm glad that we can put the matter to rest for a while, anyway.

I agree with Susan, that we desperately need to have a new TLD process and we've had some very fruitful discussions during the course of this week which I hope will lead us closer to agreeing on that.

I would like to move on now to the next item of discussion, specifically having to do with registrar accreditation. Many of you will know that we recently have been through a period of complex difficulty because a registrar, RegisterFly.com has, in fact, failed in many respects to fulfill its duties under the agreement with ICANN and has, in fact, been disaccredited. Paul, I would like to ask you to introduce this discussion.

I'm sorry, did I miss something?

>>STEVE CROCKER: Slower.

>>VINT CERF: Slower. Thank you, Steve. I call on Paul Twomey.

>>PAUL TWOMEY: Thank you, Steve. Chairman, throughout the last -- well, months and weeks, the issue of performance and compliance by registrars and one registrar in particular with registrar accreditation agreement

and the appropriate protection of registrants has been a major item both of work and of comment.

Related to that is the -- two issues, I think. One has been raised which is issues around ICANN's compliance program and also the actual specifics of this agreement of this particular registrar.

And I'm going to ask Kurt Pritz to take us through a presentation briefly on that particular set.

Chairman, there is a process going forward of that discussion and consensus building amongst the community about what are the new -- what are the new things that should be done in response, not just in the case of RegisterFly but more broadly about both the registrar accreditation agreement, other actions outside that agreement which could also improve performance of the protection of registrants and related to that a clear -- as Steve Crocker himself has made the case several times this week, a clear understanding of what is the parameters of which we are trying to solve and what is the appropriate model that we need to have and what is the appropriate boundaries or actions that should take place to support registrants and clearly understand which parts may not be within ICANN's scope or even the registrar's scope.

So I will ask -- if you would like a second discussion that's already started this week in the workshop, the board may have views about what they would like to see out of that discussion going forward.

But before we hear those, I would ask Kurt to just take us through where we are on compliance on the registrar accreditation agreement, both in a historical sense but also where are we in the case of the registry RegisterFly.

>>VINT CERF: Thank you.

Kurt, if you will take the lectern.

>>KURT PRITZ: Thank you, Mr. Chairman.

>>VINT CERF: Microphone, please?

>>KURT PRITZ: Is that okay? Thank you. Sorry. I think a discussion of this sort starts with ICANN's existing compliance program and the existing registrar accreditation agreement, registry agreements and other agreements with which -- for which ICANN has compliance responsibility. There is significant action and work that can be taken in the current environment while we seek to improve the tools we have and improve the contractual conditions that will further protect registrants.

Very briefly the existing compliance program, you can see it at [icann.org/compliance](http://icann.org/compliance), includes basically handling consumer complaints and then having procedures in place for escalating those complaints when they become serious, numerous or potential breaches of the registrar accreditation agreement, registry agreement or other agreement.

And then a sense or practice of perseverance on these issues to see them through to completion, that's where the registrant will -- will see relief or be protected. And then there is a proactive part to the compliance program, too, rather than receiving complaints and reacting to them. And that is a proactive audit schedule and that schedule is also published, so the activity would be the execution of that.

So the first -- the first part of that is responding to consumer complaints, and this is not necessarily always within ICANN's mission and the customer service levels provided by registrars.

We receive complaints through several ICANN mailboxes and a lot of phone calls, the primary source of these inquiries is the registrar info mailbox where we receive with about 650 or 700 complaints a month. Each complaint is sorted and then sent to the responsible registrar or registry as indicated in the mailbox in the case of -- sorry about that -- in the case of the registrar mailbox, it is the registrar.

Statistics described in the complaints are on the Web site. This is kind of an eye chart. I apologize for that in advance, but you can see that there's several, several issues that are the subject of these complaints. The biggest by far has to do with transfers and then the next has to do with WHOIS-type complaints, whether WHOIS

data has been changed or is inaccurate and cannot be changed. That's a sort on the complaints in the year 2006 that ICANN received. Like I said, it's posted.

The other activities are more pointed to ICANN's mission and that is to follow up on compliance concerns and issues. Obviously we have an internal escalation process so that we can determine those issues that should be prosecuted, particularly by the ICANN staff. Maybe when there's a number -- complaints are numerous or they're serious.

So for an example in the last 20 working days, ICANN has followed up on 40 cases that have been escalated personally with registrars and interceded on registrants behalf to some sort of resolution. So that 90 active compliance actions in one month of working days is fairly typical. It has been fairly constant. I think last month it was higher than that.

The 90 complaints just for information were about 42 different registrars and there were four significant reasons for complaints that could be RAA related. One is failure to transfer according to the transfer process. That's the largest. The others are problems with WHOIS information, customer service and particularly problems with a reseller of an ICANN accredited registrar.

The last part of the compliance program is the audit process. There is audit schedules posted for both registries and registrars. Recently, we completed a registry WHOIS audit within the past fiscal year. Also, there is audits of registrars as they go through the RAA renewal process to bring them into compliance, and presently there is a registrar WHOIS Web site program going on.

So with a backdrop of that existing compliance program, here came RegisterFly and its behavior.

RegisterFly, this is just some background. It has always been a reseller, and then having not gained an accreditation through the ICANN process obtained one through purchase. There were continued complaints about RegisterFly, mostly about customer service levels. A lot of complaints, questionable whether they were violations of the agreement.

Nonetheless, ICANN undertook an audit and requested a lot of information and got involved with RegisterFly in mid 2006 and the number of complaints dropped. But then they rose again and included chargebacks that occur when customers don't get what they pay for, unauthorized WHOIS changes, underfunded registry accounts and transfer policy violations.

Now we're going through -- as everyone knows, a deaccreditation process that's clearly defined in the RAA. Through the process, we have been doing a few things with the big ICANN community, registrars, registries are facilitating transfers. There is a lot of ICANN involvement on a personal basis on hundreds and hundreds -- to facilitate hundreds and hundreds of transfers. And registrars are providing advice and technical support to RegisterFly to help them make transfers and help registrants.

There has also been a coordinated effort among registries to prevent deletions of names during this time so that the rights of registrants can be preserved until the situation sorts itself out, and we're also working to escrow timely data, including proxy data, that data that underlies the privacy registrations.

And finally, we are working with registrars and registries to develop a coherent predictable method so that registrants can transfer their name away from RegisterFly in the event of termination.

So one of these issues was escrow of data. A case study always teaches you more and this is a very fact-specific situation, but I think every registrar and potential registrar failure will be a very fact-specific situation.

We've learned that escrow data is very important, and we have a program in place to complete that program and implement it, but there's other issues that are very important, too. And, that is, the whole issue of proxy data. So if we have escrow data, the people who have registered privacy registrations really don't have their data escrowed anywhere and they are not protected in the event of failure. Should proxy data be escrowed or should registrants be using a proxy service to take on a higher level of risk?

And then there is -- once you have the data, what do you do with it? And how can you use it? At one point in a termination process or a breach process can ICANN use the data and act in a way to protect registrants? All the parties have rights. The registrants, the registrars and so under what circumstances can the data be used or transferred?

I just want to talk a bit about the data escrow program. This is a program to implement data escrow pursuant to the ICANN registrar accreditation agreement. So there's -- the implementation plan really has five steps and that is to write a technical specification and a draft of that is done. It is going to be submitted to registrars and others in the community for technical review. And then to secure the services of an escrow provider. Or in the case of registrars that want to secure their own data escrow, a process for approving third-party providers. And then the last two parts of the implementation will be a development of the audit procedures and a test. So those are pretty straightforward. That program plan is going to be prosecuted within with the community.

At this meeting, in a meeting with registrars, the registrars -- the gTLD registrars appointed a team or task force -- I don't know what you call it, but a bunch of good people to work with ICANN to accelerate the implementation of a data escrow program. We're also redefining the project to include these issues that have been raised -- that have been raised due to this set of circumstances. And we've also agreed to accelerate the plan significantly, and we're going to publish the final schedule next month.

So Mr. Chairman, I'm just going to take a couple more minutes, if it's permissible, to review the discussion we've had with registrars here at this meeting and show progress and then I'll be done. But these are the issues that Paul Twomey raised in his posting to the community regarding improvements that can be made in the relationship between registrars and their -- and the community, their registrants, and potential changes for the RAA.

The discussion with registrars first went to, you know, some of these things can be done right away and we can discuss them right away, and some of them require a change to the agreement. So I've italicized the items here that require some change to the RAA, and so that change would be on the critical path to actually getting some of this stuff done.

I've also -- I've already talked about data escrow and I think there's a -- there's a clear plan and I'm going to refer to my notes here, to make sure I've captured the gist of what was said in the meeting, but I think I've clearly stated what we're -- the path forward on data escrow.

The problems associated with proxy registrations were discussed again, and, you know, we discussed a proxy registering service that can be certified. One that could take the privacy data and actually store it at a third party and release it, then, under certain circumstances. So that idea is being pursued.

There's extensive discussion about the rating of registrars. It's something that can be done, but something that's done that's accurate, meaningful, and available to registrants might be problematic. It's an area where resources could be expended without real benefit, so there's enthusiasm for discussion of it, and moving forward with it in a way that would be beneficial.

ICANN's looking at the system of affiliated registrars and group ownerships. Affiliated registrars have common ownership or control over -- you know, among many registrars, and currently ICANN requires a separation of affiliated registrars when they apply for accreditation in a way that might inhibit this. So ICANN has an action to take up with its general counsel's office to determine how this can be best pursued.

Stronger or additional compliance enforcement tools were discussed in detail. There are some that could be invoked or implemented without a change to the RAA, such as publication of breaches or publications of bad behavior. Others, such as escalated sanctions, one might be suspension of ability to register names for a period of time would require a change to the agreement. There are brief discussions -- and I'll tell you why -- about changes to the transfer policy, and that is that that effort's already ongoing. ICANN staff had furnished a report to the GNSO Council on experiences with the --

>>VINT CERF: Kurt, I'm sorry. Can you slow down a little bit, please?

>>KURT PRITZ: I'm going to try. So -- it's not my nature. I'm sorry.

[Laughter]

>>KURT PRITZ: So ICANN has turned a report to the GNSO Council suggesting reporting experiences and suggesting changes to the transfer policy, and as -- since that report, furnished clarifications and a list of policy issues. That's a draft document, and so we want to energize those discussions and when I say "energize," I mean provide staff support for those discussions to continue on discussion about the transfer policy.

We discussed the idea of registrar certification of staff. This seems to be a straightforward thing to do but again, to do it in a meaningful way that's just not an administrative burden to registrars is important, so that discussion will continue.

There is an opinion that accreditation by purchase is difficult to prevent at first examination, given the M&A process and the M&A environment, and -- but we did discuss several measures to prevent problems due to transfer of ownership. Such as higher levels of scrutiny by ICANN in the case of a change in contact information or a change in entity. So that -- that part of the discussion is ongoing, and then how the accreditation by purchase might be prevented is a deeper legal discussion.

And then we discussed reseller liability under the RAA, and each registrar went around the table and took complete ownership of the behavior of resellers, and so that was -- that was -- that was essentially the extent of that discussion. Registrars committed that issues regarding resellers and reseller compliance would receive sufficient resources and attention to assure better accountability by resellers to registrars. To registrants, rather.

And then there was quite a bit of discussion about the process for amending the RAA and we'll have to -- there's more of an investigation that has to occur there. It has to be according to the agreement in some consensus based process, so I think that provides quite a bit of opportunity for moving forward on a rapid basis.

So Mr. Chairman, that was quite a bit of material, and I'm sorry for taking up so much time and talking fast but I wanted to provide some background for the discussion here and then after we leave here, too.

>>VINT CERF: Thank you very much, Kurt. I would suggest when you have a lot of material, that it should not cause you to speak at 900 words per minute. In deference to the hard work of our scribes.

I'd like to make an observation about what Kurt has just reported. The first one is that the ICANN staff have actually been very much involved in compliance in various ways over the course of some years, so the RegisterFly matter, although it is by far one of the most visible of the problems arising is not, by any means, the only one. And for many people who might not have known, staff has been actually quite engaged in dealing with problems of this sort, trying to respond to registrant protection through the compliance mechanisms. I'd like to suggest to you, though, that the board has an obligation to discuss -- if not here, then at another time -- the extent of the obligations that we have to registrants. I mean, my belief is that in general, our whole role is to assure that the registrants are able to register in their chosen domain names and that the system will continue to serve them. To the extent that we can assure that through contractual means, through complia!

nce and the like, I think that's very important, but we should have a fundamental discussion about how far we can go.

For example, if a registry fails, are we responsible for turning into receivers to operate it? If a registrar fails, how far do we go to reconstitute the operation?

The data that is needed may not be sufficient to reconstitute operation precisely in the same way that a particular registrar has been functioning. I'm thinking that the -- the databases and the user interfaces and the like for each registrar may be quite different.

So we need to find some guidelines for the degree to which we are able to offer various protections for -- for registrants.

So I think we should have that fundamental discussion. I don't know how to make the metric, but clearly it has to be feasible, it has to be affordable, it has to be scalable, as more and more registrars and more registries are



created.

So I put that on the table as a potential discussion, if not now, then later during the course of 2007, as we try to lay out what our responsibilities are.

I would suggest that we will have similar kinds of discussions with regard to new TLDs, again, trying to identify the limits of our responsibilities in order to permit additional TLDs to be created.

Are there any questions and comments? Peter?

>>PETER DENGATE THRUSH: Thank you, Vint. First of all, I'd just like to thank Kurt for the presentation, and I and I think other members of the board are probably very grateful to know that that work is going on in compliance. Mostly invisible to me, I'm sure to many other members of the community. So thank you for exposing all of that good work that's going on. Secondly, I'd like to support Vint's call that we do need to have a fundamental policy discussion about the extent of all of those issues. We're talking about a delicate balancing in a fairly contested commercial climate of the rights of registries with registrars and registrants, and that is something that we may find from time to time that we change the balance as conditions move. So we need to keep up with that.

The other thing that we do need to do is complete the obligations in the contracts for preparing an escrow compliance -- an escrow program, but at the same time we recognize the message that came to us from the registrar community that even full escrow would not necessarily solve the RegisterFly situation. Obviously, it's an important step to have in our compliance and backup program.

So I think really Kurt and Paul, it's a call for an appropriate timetable for completing that escrow obligation in the contracts and get that done in a timely but complete sort of way.

And then run, Vint, your requirement for a full policy discussion about all the other things that we need to have to complete that picture.

So I don't know how we -- those seem to be the two things that we need to set up. One is reasonably rapid to be honest with you effective completion of the escrow issue and a full policy debate on all the other issues that are required.

>>VINT CERF: Any other comments? Yes, Vittorio.

>>VITTORIO BERTOLA: Yes. Well, the first thing that I want to say is that this is a really important matter for the at-large and for registrants in general. I think much more important than dot xxx or any other issues that -- on which we have been spending a lot of time. The At-Large Advisory Committee has released a statement. It was presented briefly yesterday at the public forum. But basically, we agreed that it is important to enforce the current contracts, and escrow specifically, but I think that -- I mean, I agree with you that we need a discussion on where ICANN needs to stay into this environment, and especially what kind of provisions it has to add to the contracts to protect the registrants. And there's a number of situations where this is actually necessary. Maybe not many of them, so I'm not thinking that this should become a heavily regulated market, but for the market to be a market, there needs to be a basic level of competition. And so as a minimum!

, registrants must be actually free to move from one registrar to the other.

So, for example, we have suggested that there are some provisions in the contracts that require registrars to supply an easy way for transferring domains away. Compatibly with security, of course.

So in general, I think we need to have that discussion. Maybe other things could be obtained by nonbinding measures, so I think -- I really think that most of it could be a discussion between the registrars and the registrants, the at-large, and anyone else about practices. Perhaps there's the need to write down some things. I mean, one of the most usual complaints I see is people registering a domain name and then discovering that it's -- I mean, in the WHOIS system, the registrant is actually the reseller, not them, so they cannot get back their domain if they want to change their Web hosting company, for example. And this is clearly outside of the purview

of ICANN directly, but at the same time, I don't think that there's any documents stating anywhere that in the DNS it should be you that gets the ownership of the domain and not the reseller. So maybe just by agreeing on some best practices like this, we can provide some registrants a way to show that they have a r!

ight when they have to discuss with their suppliers. So I basically look forward to this discussion. I don't know how to do it. Maybe it's just as in -- the registrants just have to arrange it separately, but I think it's something that we really need to have.

>>VINT CERF: Just a reminder, Vittorio, that was very rapid-fire delivery. A reminder to board members, please slow down.

Steve Crocker.

>>STEVE CROCKER: Thank you, Vint. I just want to add from the perspective of the Security and Stability Advisory Committee, equal emphasis and shared purpose in exactly the focus of protecting registrants. This is a general topic that we have spent time on before. I think we have shared purpose across different segments of the community here. We stand ready to work cooperatively with at-large or with any other portion of the community, and in particular, our view of security and stability necessarily includes the entire system that is involved, not just narrow operating components of a particular service, for example.

So I would like very much to see and applaud the efforts that Kurt has described and the staff's attention to using the mechanisms that exist and exercising them to full measure. And at the same time, a broader discussion about what our objectives are, what our values are in this area at the board level, and at the community level, and then eventually translating those thoughts and decisions into perhaps new mechanisms or additional mechanisms that make the whole system work quite effectively. I think we all subscribe to the general notion of a free and open market. That is a nice embracing concept. There is no market that operates completely unfettered by some sort of constraints. Those that do rapidly -- often, anyway, rapidly run into -- off the deep end somewhere where they're totally captured or they have some other flaw in them. So I don't see it inconsistent with our general mandate to have a vibrant, free, open marketplace with equally a set of carefully selec!

ted and well-crafted protections built into the marketplace in order to make that marketplace continue to function vibrantly. Thank you.

>>VINT CERF: Thank you, Steve. I'd just like to make one other observation about all of this.

We have perhaps -- or could have an overly simple model of this market. The connection between a registrant and these things we call registrars and registries can sometimes be quite distant. If you wanted to get a Web site, you might go to a hosting company which will undertake to register a domain name for you, to provide you with host services and so on. That party might go to a reseller in order to perform the registration. There are a variety of linkages that connect or potentially connect a registrant to the system with which we actually have contracts.

The result is that trying to protect a registrant is going to be, if not a distant goal, at least a complex one, and I think under all circumstances, we will be unable to provide the protections that Vittorio, the at-large community, might expect simply because of the variety of ways in which registration can occur.

I don't say this as a way of trying to inhibit ICANN from trying to do the right thing, but I would say we should be conscious of the fact that our only tool for compliance today is contract, and that we don't actually have contracts with every component of this complex marketplace. So we should not be surprised if there are some cases that don't work. The comment that in the case of RegisterFly, perfect data might still not have solved the problem, because we couldn't get our hands on it or the party wasn't cooperative or there was a dispute within the company as to who was in charge of it and who could make agreements, those are all the kinds of real-world physics that get in the way of the virtual models that I wish that we could actually work with.

As a mathematician and a computer scientist, "virtual" is very cool, but as a pragmatist, I understand that sometimes it doesn't apply.

Are there other comments on this particular topic? I got one from Janis. I'm sorry. Did I see Susan? No. Janis, and

anyone else? No. Janis?

>>JANIS KARKLINS: Thank you. And I think the issue you raised concerning consumer protection or registrant protection from Government Advisory Committee perspective is a very valid one. That is a public policy concern, and I would like to agree that implementation of that principle may be difficult, but the absence of the provision in the contract which obliges registrars ensure that customers do not suffer as a result of some kind of collisions. That is not acceptable. The provisions should be there, and I think that this is the minimum ICANN can do in order to follow this the principle of consumer protection.

>>VINT CERF: So this term "customer" introduces a potential hazard here. Because the customer of a registrar might be a reseller. The customer of a registrar might be a hosting service. We would have to, in our further deliberations about where our responsibilities lie, we might, for example, have to insist that the ultimate registrant has to be exhibited in the data tables. I don't know what the ramifications of that are, and I don't suggest that we have the debate now, but I'm fond of observing that Einstein once said that "things should be as simple as possible but no simpler," and that is to say, let's be careful that we don't try to design and build a system of compliance around a model which is, in fact, inadequate to reflect the real world.

If there are no other -- there are two. One from Susan and then one from Peter.

>>PETER DENGATE THRUSH: Thank you but I've just been drafting an easy resolution, but if Susan has another comment, I can defer.

>>SUSAN CRAWFORD: Oh, just very briefly. We have a lot of soft power here that we can use, informational -- getting news out to registrants and other actors about what it means to register a domain name and what their rights and obligations and who to call. We can do a better job at that, I think. Also, I think it might be helpful to rapidly convene a group that amends this contract to include these lesser-included things that we need to protect registrants. You know, ultimately this is a matter of customer service, in a sense. Our service to the Internet community and the registrars' service to their registrants. And if we can help with building in escalation procedures short of de-accreditation, I think we have an opportunity now to seize this moment and amend the contract and get registrars working together with all of us to make this a better situation for registrants. But I wouldn't discount the communication/education function that ICANN can serve in this regard!

rd.

>>VINT CERF: Thank you, Susan. I see Peter's hand and then Paul's. Peter, if you're about to introduce a resolution, normally my practice is not to do resolutions on the fly, but I think we should hear what you have in mind to do, so please go ahead.

>>PETER DENGATE THRUSH: Thanks, Vint. I'm just trying to be helpful, going forward. I suggest that we direct the president to report to the board in San Juan on progress with developing a program for escrow as provided in the RAA, and on stimulating a policy debate to create policies for the appropriate protection of registries, registrars, and registrants. Reporting in San Juan on those two issues. One, escrow; and two, a policy debate. Which hopefully would lead to Susan's and JANIS' issue about amending the contracts.

>>VINT CERF: A procedural suggestion might be to record a sense of the board with these two things are designed, as opposed to a formal resolution. I'm not trying to rule out that at all. I would like to get some comment from Paul on this, since he had his hand up anyway, and Alex after that, and we'll come back, Peter, to the proposal.

>>PAUL TWOMEY: Yeah. Thank you, Vint. I'd like to support what Susan said a hundred percent. I think she's right on the money. And I think to come to what Peter suggested, I think there's -- there's potentially four options, four avenues we have here. One is, we should report back on the existing obligations on, for instance, the escrow policy. So that's the first item.

The second one is: There are -- I think Susan is absolutely right. There are a series of actions that we could encourage registrars to do and which ICANN itself could creatively do which do not require a change to the RAA and which could improve some of these -- some of these aspects. So I think we should report back on that.

Thirdly, on -- when it comes to the accreditation agreement itself, very importantly, the wording of the agreement for its amendment, it calls for consensus, not for consensus policy. And as we know, that issue is fairly significant, because we could well, for the speed of time, convene the sort of working groups, the cross-constituency working groups and feels if the board that is a consensus approach by Sao Paulo -- San Juan, should I say, for amendment to the contract. If there are specific things that then need or require consensus policy -- in other words, they have to go through a PDP through the GNSO -- then they could be identified as well. So it's not to exclude out things that would go through the -- the GNSO PDP, but it may not necessarily -- it may not be -- for the sort of amendments I'm hearing the registrars now just talking about, we may be able to implement those amendments without necessarily having to have the PDP.

>>VINT CERF: I was signaling you to slow down, Paul. Did you -- have you finished?

>>PAUL TWOMEY: That's it.

>>VINT CERF: All right. Let me get Alex and then we'll come back to Peter's proposal.

>>ALEJANDRO PISANTY: Vint, I share with many the concern that registrants, individual small business owners or nonprofit organizations are left hanging by things like the RegisterFly and many other potentially occurring failures now or in the future. I would urge this board and the community not to get carried away before studying also what the consumer protection role is.

Consumer protection is something that varies widely among countries. There are countries which have very strong organizations which are mostly grass-roots citizens organizations which have been well-organized and funded and can put up a lot of pressure on providers who fail consumers. There are countries where this is a government function. There are countries where this is basically a wild west or a jungle. And one could try to -- one should be very careful and get information and advice from the GAC as to how to better implement a consumer protection function that scales globally, that scales cross -- across jurisdictions, judiciary traditions and so forth, and that doesn't put ICANN again in a nontechnical coordination role. I am baffled and surprised and I would like to look in more detail to make sure it's not exactly the same people who make claims against ICANN overstepping its technical coordination role, that as soon as they see a flap occurring in the market,!

some outreach -- some outrage, sorry, to make my pronunciation specific for the scribes -- that immediately are turning ICANN into something that also exceeds the technical coordination mandate which would be sort of the consumer protection agency of cyberspace.

This is a dangerous path, and I would insist in first studying the implications. I think that the call by JANIS and several other of the people present here, board members and liaisons, are valuable. Careful study is required. And I insist we should not get carried away and suddenly saddle ICANN with an unmeetable function.

>>VINT CERF: Okay. Thank you, Alex. Let me suggest, Kurt, that it's okay for you to stand down now. I'm sorry that I left you standing up there. And thank you, again, for that report.

There are several people who have asked to speak. Rita had her hand up. Let me ask you, Rita: Do you want to speak to something which would have an influence on Peter's proposal or can I proceed with that first? What's your -- what is the topic that you'd like to cover.

>>RITA RODIN: Vint, I'm sorry, I don't remember Peter's proposal. It's just a quick comment on something that Alex said.

[Laughter]

>>VINT CERF: Go ahead.

>>RITA RODIN: All right. I just wanted to echo something that Alex said. I think it is important, as everyone has discussed, to deal with the protection of registrants in a situation of registrar failure, because it is important to keep the Web running. But I do want to echo what Alex said, that there shouldn't be this notion that anyone -- you know, as a U.S. lawyer, I know that it's impossible to draft a perfect contract to protect someone, and I do want us

to just be temperate in terms of looking at contracts and dealing with too many burdens on registrars and trying to think that there will never be any issues that will come up in the space.

>>VINT CERF: Peter is trying very hard to get something done. Alex, I hope a brief comment?

>>ALEJANDRO PISANTY: It will be a footnote to Rita's comment saying it's not only the Web. There's 65 535 ports out there. Not just port 80. This is the Internet, not the Web, the Corporation for Assigned Names and Numbers.

>>VINT CERF: Thank you, Alex. Peter, let's come back -- Rita, the proposal that Peter made was to ask the board -- I'm sorry, ask the staff for a report on where we stand with regard to compliance and to engage in substantive discussions about the compliance questions and our role in it. Peter, would you like to repeat the proposal?

>>PETER DENGATE THRUSH: Thank you, Vint.

Directing the president to report to the board in San Juan on progress with developing a program for escrow, as provided in the RAA, and on stimulating a policy debate on policies for appropriate protection for registries, registrars, and registrants. If I can just speak to that, I put that on a slightly wider context at the end than simply registrants' rights in the case of registrar failure, which is the particular event which has stimulated this. It seems to me that we are at a nexus, and we can't tweak -- we can't pull one part of this without having regard to what that does to the rest of the balance, and that the debate really needs to take that all into account. The trouble with that, I recognize, is that it opens it up to a much wider scope, so depending on the urgency, we may -- we may choose to limit it, and deal with it in chunks.

>>VINT CERF: I think those issues, though, don't necessarily influence the basic request that you're making. Paul?

>>PAUL TWOMEY: Thank you, chairman. I think this is a good thrust. May I suggest, just for good housekeeping, that we just take the wording on notice and perhaps we could move to the next item and come back to the wording, just to allow Peter to consult with the normal people we do consult in resolutions, the general counsel and others, just to make certain the wording is fine. It might just be an opportune thing to do.

>>VINT CERF: Peter, is that an acceptable path?

>>PETER DENGATE THRUSH: Yes.

>>VINT CERF: All right. So we will ask counsel to work on the actual wording of this proposal and move on to the next topic, as Paul suggests. And this has to do with spending money, and our chairman of finance is Raimundo Beca who is our chairman, who is going to introduce this resolution.

>>RAIMUNDO BECA: Well, certainly I don't like to spend so much money on lawyers, but I know --

>> What?

>>RAIMUNDO BECA: -- I know as the chairman of the Finance Committee, I have to move this resolution. The resolution reads as this: Whereas, ICANN has had significant needs for legal services during the months of October, November, December 2006 and January and --

>>VINT CERF: Slowly, slowly, slowly.

>>RAIMUNDO BECA: This is the first time.

-- and January and February 2007. Whereas, Jones Day has provided extensive legal services to meet these needs and ICANN has received invoices from Jones Day in connection with these services totaling \$108,135.45 for October 2006, and \$79,902.98 for November 2006, \$26,642.87 for December 2006, \$27,427.22 for January

2007, and \$46,506.57 for February 2007.

Whereas the general counsel and the acting CFO have reviewed the invoices and determined that they are for proper and should be paid.

Resolved, the president is authorized to make payments to Jones Day in the amount of \$288,615.09 for legal services provided for ICANN during October, November and December 2006, and January and February 2007.

>>VINT CERF: So I take that as a motion. Is there a second? I see a second from Goldstein.

Paul, I'd like to ask you to not spend a lot of time on this, but just to emphasize that these funds are payment for a very broad range of legal advice. Not all litigation, for example. We do many things that require outside legal talent beyond that. Could you just, in some brief way, characterize the range of expenses or the nature of the expenses?

>>PAUL TWOMEY: Thank you, Vint. There are ranges of things here. There are work on compliance issues, so assistance on work on compliance issues. There is assistance here for further evolution of work -- for the institution's evolution, so background work on the various committees or work on the RALOs being presented, just sort of background consideration on that sort of stuff.

There is also support for analysis of decisions the board has to make, so there has just been a range -- really a range of things.

>>VINT CERF: That's fine. Thank you very much, Paul.

Are there any other comments or questions on this resolution? If not, I will ask for a vote with a show of hands. All those in favor, please raise your hand.

(Raising hands)

5-0. Thank you very much. The motion passes.

The next topic has to do with the President's Strategy Committee report, which was received this week. And I would like to ask Peter Dengate Thrush to introduce a motion on this subject.

Peter is disappearing in the direction of the lectern.

>>PETER DENGATE THRUSH: Thank you.

>>VINT CERF: Your microphone doesn't appear to be on. Try again.

>>PETER DENGATE THRUSH: Thank you. How's that? Thanks, Vint. I thought it would be easier to come here to talk about this because I need to see Dan over your shoulder because Dan is going to put up some sections on the screen of the report.

Let me begin by saying what an honor it has been to be a co-chair of the President's Strategy Committee since its formation in Vancouver at the end of 2005. And while we're thinking historically, it is now ten years since the late-night conversations that some of us were having with Ira Magaziner, the development of ICANN, the development of bylaws, green papers and white papers. What this committee has been doing is looking at the next phase of the development of ICANN, from the corporation from the Newco, proposed in the white paper, and then developed and then reformed and then maintained and sustained by the board and then all of you in the room.

What I would like to do is to ask Dan to put up some sections of the report. While he is doing that, let me just remind you, because many of you were in the room when the committee reported in the public forum, that there are three sets of recommendations.

The two that I'm not going to talk about, the contribution to capacity development, part of that is going to be covered in a later resolution as the board adopts resolutions, developing relations and developing capacity.

And, third, the other one I am not going to talk about is the role of participation of stakeholders and some of that is dealt with in a coming resolution from the Board Governance Committee on review of the internal structure of ICANN and stakeholders.

What I am going to talk about is the first one, with which is really the legal status of ICANN. Now, I can't see -- I can see Dan, but now I can't see the screen.

What I would like to have you look at is part of this report. One of the key recommendations on this aspect is this encouragement by the committee to the board to explore with the U.S. government, other governments and the ICANN community whether there are advantages and appropriate mechanisms for moving ICANN's legal identity to that of a private international organization based in the U.S.

This is a major step forward from Newco, taking it from a U.S. corporation to a private international organization developed -- registered or based in the United States.

If we can move to the second part of that, because I think this is important as well. Committee considered such developments could contribute to the further improvement of stability and encourages the board to explore the private international organization model as part of its review and then to operationalize whatever outcomes result.

Not up on the screen but part of the report was a very clear statement by the committee that we were not suggesting a treaty organization or an intergovernmental organization. And the part that is up on the screen I hope now says this commitment to really the fundamental essence of ICANN, what makes ICANN so historically different, so exciting and hopefully so successful in the end, is this private sector-based multistakeholder model with, of course, bottom-up processes, transparency of process, consultation with those affected by our outcomes, et cetera. There is absolutely no intention of departing from there and every intention of incorporating all of the essence of ICANN as it currently stands as we have built it over the last ten years into the new organization in this new format.

And then there's a further recommendation that the board should consider this, and this portion ensuring that the accountability and review mechanisms are established and including international arbitration panels.

The last one I want to go to, then, is the long quote that deals with suggested mechanisms for changing the current arrangement of U.S. Department of Commerce oversight. And there are two suggestions. It is accepted that there may be others, but these are the two that the committee thought had some merit: An order contracted by the U.S. Department of Commerce to undertake the checking function or changes to the root and contracting of a third-party order to be taken over by ICANN, if ICANN proves sustainable.

It was always the original intention that this kind of authority would transition to ICANN once it met the conditions originally of the MOU and now we have the joint partnership arrangement.

So those are the key recommendations. Quite a challenge, I think, for the community and the board.

>>VINT CERF: Sorry, Peter. I am not able to time share when I've got 17 different people -- I'm sorry. What was it you asked?

>>PETER DENGATE THRUSH: I was just coming now to the discussion that I want -- the committee would like the board to have and I think the board was asking for to review this part of the report, the concept of moving ICANN to a private international organization.

>>VINT CERF: And I saw Alex's hand go up. Alex?

>>ALEJANDRO PISANTY: Sorry, Vint. This is just somewhat presumptuous from a non-native English speaker, but "complementary" is probably too falsely self-conceding and it could be very actually replaced by "complimentary" and maybe it would even make a lot more sense.



>>VINT CERF: I noted the same thing at the same time and sent a note to the general counsel that that was a misspelling. It is very funny that the non-english speaker caught it. Are there any other substantive comments.

Susan?

>>SUSAN CRAWFORD: Moving beyond spelling for the moment, this is potentially an extraordinarily important transformative time for ICANN to be considering this question. And I hope that we will have very serious deliberation of this question at the board level.

This report sets up a bunch of issues for us to talk about in a very concise and helpful fashion. It doesn't give us very much detail about implementation.

And as I said at the public forum on this subject, as we float away potentially from oversight by either the forces of litigation or the U.S. government to the extent it has provided oversight in this context, it becomes increasingly important to focus on accountability, to whom is ICANN accountable not just inwardly but is there a way to reverse decisions of the board? To check what the GNSO is doing? Can we look outside ourselves for mechanisms of accountability?

And the report helpfully suggests that the board should ensure that appropriate full accountability and review mechanisms are established.

I hope that as a board we can charge this committee with continuing to work to help us with those mechanisms, to gather expert advice about the kinds of accountability we could put in place outside ICANN. I think that this is going to be very interesting from a sort of biological petri dish of governance point of view.

I think ICANN -- if we go down this path -- will be a really unique forum of private international organization. So we will need to be creative about these mechanisms, and I hope we will have the advice of this very well-constituted committee to work on these questions before the board has to move forward with any concrete steps. Thanks.

>>VINT CERF: It strikes me that the resolution text does get to some of what you're asking for because the resolution would engage in analyzing much of the proposals to try to understand more deeply what their implications are.

I can't resist using your biological petri dish simile or metaphor to hope that ICANN won't become an incurable disease.

I saw a hand go up over there. It was Vanda.

>>VANDA SCARTEZINI: Just a few considerations, that I believe this movement to an international institution is not only the desire of the community but I believe have been discussing this with IGF, and WSIS and other forums. It is the desire of the whole world. I believe that is one step forward that this committee should really reach, and I hope to have this for comments in the board as soon as possible. Thank you.

>>VINT CERF: Thank you, Vanda.

Other comments? Steve Goldstein?

>>STEVE GOLDSTEIN: Thank you, Mr. Chairman. There is, indeed, some importance to looking at the institutional structure and looking at change. But I think of equal or even at this particular point, greater importance is that we look inward in ourselves and our procedures and how we deal with things and straighten those out.

And I think once we straighten out our own house, relocating the house to another city or putting new covering on the roof or outside the house or new windows will come a lot easier and be a lot more meaningful. Thank you.

>>VINT CERF: So, Steve, you're actually alluding to something that is going on, as I'm sure you know. There are



a whole series of evaluations of different parts of ICANN's internal operation which the Board Governance Committee is overseeing.

>>PETER DENGATE THRUSH: The other point I would respond to that, Mr. Chairman, in agreeing with the need for that is just to say that kind of self-improvement is a continuing one. It is a journey, really, rather than an arrival. And I don't think there will ever be a time we could say we have our house in order, it is time to move it.

I'm not sure you are suggesting, Steve, that we wait until we give ourselves ticks in every box, but certainly we have to be on that journey continuously.

>>STEVE GOLDSTEIN: What I am saying is I don't want to see us involve ourselves in a lot -- expending a lot of work and energy just to change the organizational structure without changing the organization and the way it works inside as well.

>>PETER DENGATE THRUSH: Vint, if there aren't any other contributions, the way I would like to move this forward is just reply to a couple of things. First of all, in relation to the detail of implementation. The committee deliberately did not go down an implementation tract until we had time to review the very high level concept level. There seems to be support for concept level so the memorandum that I am going to move in a moment is going to be suggesting that we proceed.

The other issue really is that we have to go and get legal advice, so Raimundo will be passing another resolution paying lawyers against his better judgment in future because the issues of constitutional and international law in this area, as Susan has identified, this is going to be an unique organization and there isn't an easy off-the-shelf precedent for us to use.

So, perhaps, I could then move to the resolution. It doesn't actually include anything about petri dishes or Penicillin.

It is that "whereas" ICANN's mission is to coordinate at the overall level the global Internet's systems of operation and to identify and in particular to ensure the stable and secure operation of the Internet's unique identifier systems;

Whereas, that the ICANN board noted in 2005 that the ICANN community could benefit from the advice of a group responsible for making observations and recommendations concerning strategy issues facing ICANN and resolved in 2005 to direct the president to appoint the President's Strategy Committee;

Whereas, the President's Strategy Committee conducted its work and consulted with the community on input to its proposed recommendations;

Whereas, the President's Strategy Committee recommendations addressing ICANN's status and continued improved responsiveness to an evolving global environment, contributing to capacity development and participation and a role of stakeholders have been presented to the ICANN board and community.

Resolved, to recognize the President's Strategy Committee recommendations and request that the committee provide further detail on aspects arising from the recommendations and conduct in consultation with the community an evaluation and analysis of their implementation and related implications.

That's the resolution.

>>VINT CERF: So moved. Thank you, Peter. Is there a second? Vanda seconds.

Is there any further discussion of this resolution?

>>PETER DENGATE THRUSH: Vint, can I just say something about the "whereas" about the consultation with the community. We said this in the presentation, but I'd just like to personally repeat the thanks for the input at considerable expense in terms of time and contribution from the ICANN community where we received substantive input from thought leaders in the ICANN community and very valuable contributions from outside

ICANN.

>>VINT CERF: Thank you, Peter.

It's been moved and seconded. If no further comments, I will call for a vote. All those in favor of the resolution please raise your hand. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15. Thank you. Mr. Secretary, the motion passes.

Thank you, Peter.

The next item on the agenda -- by the way, I intend to press on. So if there are people here who have other pressing matters to attend to, you should take care of them personally and privately.

I would like to ask Ramaraj to introduce -- director Ramaraj to introduce the motion on cooperative agreements with international and regional organizations. Before you do that, let me just mention we had a significant ceremony yesterday that was photographed heavily. The photographs are available in the foyer. Much activity has taken place to cement international relationships.

Rag, please go ahead.

>>RAJASEKHAR RAMARAJ: Whereas, ICANN has developed a collaborative program with private and intergovernmental parties to conduct outreach to governments and local Internet communities;

Whereas, ICANN staff has engaged with respective organizations both globally and regionally;

Whereas, organizations have expressed an interest to enter into non-binding cooperative agreement MOUs with ICANN to highlight cooperation and partnerships;

Whereas, these cooperative agreement MOUs seek to enable cooperation and partnership on areas consistent with ICANN's bylaws and strategy and operating plan.

Moved that it be resolved that these cooperative agreement MOUs are a positive step in enhancing cooperation and working in partnership with respective organizations and the president is authorized to enter into agreements such as the cooperative agreement MOUs with the African Telecommunications Union, ATU, Pacific Islands Telecommunications Association, PITA and the U.N. economic and social commission for western Asia, UN-ESCWA.

>>VINT CERF: Thank you very much, Raj.

Is there a second for this motion? I see Paul Twomey raising his hands.

Before we vote, I would like to make the observation that this is the kind of activity that ICANN needs to engage in, in order to reach out to communities that have not necessarily been able to participate in the ICANN process. So I'm really pleased to see these kinds of actions on the table.

Paul, did you have a comment?

>>PAUL TWOMEY: Yes, Vint. I would like to echo what you say and, perhaps, even spell the word "complimentary" correctly this time. That this is the sort of activity which ensures that we're not being duplicative, which I know has been a major concern of the community. And that where we are involved in outreach and engagement throughout the global Internet community, we try to do that as efficiently as possible and working with these sorts of organizations gives us an opportunity to remain truly ICANN but at the same time be efficient in the way we use our resources.

>>VINT CERF: Thank you, are there any other comments on this resolution?

If not, I will call for a vote. If you vote in favor, we will be authorizing and accepting these agreements. All those in favor please raise your hand. One, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15.

Thank you, Peter.

>>SUSAN CRAWFORD: I did not raise my hand.

>>VINT CERF: I beg your pardon. I miscounted. I beg your pardon. So that's 14 in favor. Are there any opposed? Are there any abstentions?

Do you care to say why?

>>SUSAN CRAWFORD: No. I would prefer not to say why. I have had a very busy week. I wanted to study the text of these agreements carefully, and I just haven't had time.

>>VINT CERF: Okay, thank you, Susan. I apologize for counting too fast.

Next item on the agenda has to do with the Regional At-Large Organization which has shown a substantial dynamic in the last 12 months, rapid growth of ALSs and RALOs. One of our board members has been long associated with the at-large community and I would like to ask Roberto to introduce this motion.

>>ROBERTO GAETANO: Thank you, Mr. Chairman. In fact, it is true that I have been associated with the at-large community, and I would like to make a comment before I read the motion, if I'm allowed.

I think some of you remember the statement of Pedro related to the football, that the GAC football team has waited for him not to play once to win the tournament.

And I feel ALAC community has done this to me as well. They have waited until I moved out, and then -- you know, and then they went ahead.

But since I still feel part of this at-large community, although I don't have mandate from the at-large community, I am really very happy to see this happening and I'm glad that I've been given the honor of presenting this motion.

So I will go on and read the motion. With whereas -- I suppose I can speed up a little bit because you have the text, right?

Whereas, the ICANN bylaws, article XI, section 2, part 4 provide a process that allows individual Internet users to participate meaningfully in the work of ICANN, as the community known as "at-large," and; Whereas, groups representing individual Internet users throughout the world have made outstanding progress in their work together, resulting in three regions concluding their negotiations on creating memoranda of understanding with ICANN to create their Regional At-Large Organizations, RALOs, and;

Whereas, the three regions are the Asia/Australia/Pacific, the African and the European regions, an achievement which represents a considerable milestone in the development of the multistakeholder process which is so fundamental to the work of ICANN, and;

Whereas, the ICANN board wishes to recognize and applaud the at-large community worldwide and especially in the African, Asia/Australia/Pacific and European regions for the achievement of this milestone in their development, and;

Whereas the board is pleased to highlight the fact that with the creation of these three RALOs, the At-Large Advisory Committee is now composed of eight elected members and five Nominating Committee members with only two remaining board-appointed members, and;

Whereas, the general counsel's office have reviewed the draft MOUs and determined they meet the requirements in the ICANN bylaws establish for the formation of a RALO and advised that a 21-day public comment period

should be observed, and;

Whereas, the African and European user groups have met as a part of the ICANN Lisbon meeting and elected their representatives to the At-Large Advisory Committee as a part of their work, allowing for the diverse communities engaged in ICANN to be present to recognize this achievement, and;

Whereas, the Asia/Australia/Pacific region are in the process of formally providing written confirmation of their consent to be bound by the terms of their MOU with ICANN and shall formally sign the MOU in a public ceremony at the October 2007 ICANN international meeting to be held in the Asia/Australia/Pacific region, and;

Whereas, the parties to the African and European MOUs composed of ICANN and representatives of the at-large structures in the African and European regions, signed it at a public ceremony on Thursday 29th March, 2007 at the Lisbon ICANN meeting, the execution of the agreement on ICANN's part contingent upon final approval by the ICANN board following completion of the public comment period, and;

Whereas, the public comment periods for the African and Asia/Australia/Pacific concluded on the 28th March, 2007 and the public comment period on the Latin America and the Caribbean region concluded that on 4th January, 2007. Resolved, the board ratifies the memorandum of understanding with the European at-large structures on the same basis under which it was signed, and;

Resolved, the board gives its final approval to the memorandum of understanding between the at-large Latin America and Caribbean region and ICANN and, resolved the board gives its final approval to the memorandum of understanding between the at-large African region and ICANN, and;

Resolved, the board gives its final approval to the memorandum of understanding between the at-large Asia/Australia/Pacific region and ICANN.

>>VINT CERF: Thank you very much, Roberto. Is there a second for this motion? I see a second from Vanda. I'm sure that if Vittorio were a voting board member, he would be eager to second this as well.

Is there any further discussion of the motion? I'll ask for a vote -- oh, I'm sorry. Njeri.

>>NJERI RIONGE: I just want to, you know, sort of congratulate all those people who are involved in this process, because we now have an African RALO which is actually going to help to bring people together and I expect to and look forward to seeing more business constituency participation within the African community.

>>VINT CERF: Alex, I saw your hand up and Peter also.

>>ALEJANDRO PISANTY: Thank you. Vint, I think that if one looks at the organizations which were actually participating in the signing or in the announcements yesterday -- or in the announcements, because Asia-Pacific will still be signed in a few months, it's remarkable and has to go down on the record the diversity of types of organizations that are coming together. The principles and the social functions of these organizations are very different, yet they are coming together because they find it important to represent the general user of the Internet in matters that are general to ICANN. Mostly concerned of course we know related to domain names but the stability of the Internet, first of all, and also IP addresses and all other aspects of ICANN's work are attracting this interest.

I would further underline that many of the organizations coming together in the at-large structures are chapters of the Internet Society. This underlines, first, that there's an ongoing, growing level of cooperation and shared interest with the society and the field which ICANN covers. The goodwill that's coming together here is extremely important at all levels, from the individuals to the chapters to the general working of our groups, and it's continuing to validate so now we will also be able to test the concept on which we have built the at-large representation which is this Web of trust.

There's an enormous number of similarities between the way the at-large chapters are recognized and come together and, for example, the ways in which ISOC chapters are created and recognized. It's very much based on someone knowing someone having concrete positive or negative provable references of the good work being

done by some of these organizations and people, and this Web of trust concept is the one that gives me, as it has proven -- it gives me much encouragement to assist in continuing this specific form of the at-large effort. It has taken time. We can all complain that it has taken much time to finally get these organizations built up and signing the MOUs, but that's also coming from the concept itself and the ones it has got up some speed, as it is now, it's sure that we can responsibly make sure that we address the concerns of these communities that we -- as ICANN, as a board, and from staff go ask not only for them to express themselves but go ask and consult!

t explicitly on specific things, craft a specific program of work that's geared to our better and better planning which includes now the planning with the GAC, and which validates further -- and apologies for the reiteration here -- the work that we've been doing in the joint working group, the work that's being done in the ALAC and so forth. It's really this WSIS [non-English word] ALAC character of ICANN that is also extremely important and that should be underlined. The resolutions that we've taken today, which are some of the most momentous ones in the -- in the history of ICANN are very well-grounded in this multistakeholder approach. Every part of the community has expressed itself repeatedly in a structured way, in it a way that has made sure that their voice gets incorporated into the final resolutions, and the growth of this ALAC part is very well connected to that aspect.

>>VINT CERF: Thank you very much, Alex. Any other comments? I see Peter and then Francisco. Peter?

>>PETER DENGATE THRUSH: I just wanted to add my congratulations to all of those who have worked so hard over the last few years to bring that to fruition, and it was a pleasure to be on stage with a glass of champagne yesterday at the time of the signing. I think a most appropriate ceremony. Well done.

>>VINT CERF: Francisco.

>>FRANCISCO DA SILVA: So thank you very much. I see that from Sao Paulo to Lisbon, good progress was achieved in this area, and I am very content and glad with it. The only thing that I'd note, that we have three speaking -- Portuguese speaking in this board and we have no organization in this from any Portuguese speaking country in any region, so I -- this is only to stimulate those of the Internet community that are Portuguese speaking to adhere to this movement that is in the beginning and I have already yesterday spoken with someone from Africa, from Tanzania, that they are taking -- paying attention to this, and if we can help, I think I can speak on behalf -- I have not spoken with my fellow Portuguese speaking, Vanda and Demi, but I think we are open to helping and supporting what is needed. Thank you. And anyhow, congratulations and I hope this is only a first step to a more rich -- a richer environment concerning the at-large.

>>VINT CERF: Thank you very much, Francisco. I see one more comment from Vittorio. Yes.

>>VITTORIO BERTOLA: Very briefly, I just wanted to thank all the board members for the support. Yes, it was a long and painful process. It started over four years ago. It took a lot of time and effort by not so many but not so few people, actually, and so I'm really glad we are at this point. There's still a lot of open issues and things to be done and -- but perhaps the thing I'd like to point out is that when we started this, it was -- well, two years before the WSIS, I'd say, and we looked a bit insane of this idea with continuing to involve final users in so-called civil society, if you want, in ICANN, but time has proven that perhaps the need that we were feeling at that point in time was actually true, and in the end, I think it's been a great value for ICANN to have this part of its structure in place during the last years. So I think we -- we wanted to be one of the more forward-looking constituencies of ICANN and I think we can continue to provide that value !

as well.

>>VINT CERF: Thank you very much. Are there any other comments before we go to a vote? If you vote in favor of the resolution, we will be approving or ratifying a collection of MOUs that are integrating the at-large structures into our organization.

So let me call for a vote. All those in favor, please raise your hand. I count one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve -- I see Susan -- thirteen, fourteen, fifteen. Thank you very much. Fifteen to zero, Mr. Secretary.

The next item on the agenda is to receive and acknowledge reports from the root zone advisory committee and the Security and Stability Advisory Committee and I'd like to ask Dave wood let to introduce this motion.

>>DAVE WODELET: Thanks, Vint. As many of you know, IPv6 has been a very important part of the discussions this week, as well as in the Internet as a whole. Rightly so with the looming exhaustion of IPv4, so as an appointed member of the ASO, and the IP number registries organized through the NRO, I'm very pleased to be able to introduce this resolution. So let me read the resolution.

Whereas, on 23rd of March 2007, ICANN's Root-Server System Advisory Committee, the RSSAC, and the Security and Stability Advisory Committee, SSAC, jointly published a report on accommodating IP Version 6 address resource records for the root of the Domain Name System.

Whereas, the report includes a roadmap the community -- sorry, let me try again. Whereas, the report includes a roadmap the community can follow to assure that the inclusion of Quad A records in the root hints file and DNS priming responses from the root name servers has minimum impact and maximum benefit.

Resolved, the board hereby accepts the report and thanks the members of the SSAC and the RSSAC, and all their contributors for their efforts in the creation of this report.

Resolved, the board forwards the report to the IANA staff to consider and implement the report's recommendations as appropriate.

>>VINT CERF: Thank you, David. Is there a second? I see one from Demi. Are there comments on this particular resolution. Susan? Suzanne.

>>SUZANNE WOOLF: Thank you, Mr. Chairman. I'd just like to mention briefly, I think this undertaking shows how careful we have to be when we change the Internet infrastructure. It's a significant undertaking to change the fundamental functioning of how the DNS and the Internet functions. Yet it's critically important that we do it and we do it well. I'm especially happy to see this report delivered to the board, in light of recent discussion about the future of address space management for both IPv4 and IPv6 now occurring in the RIRs and elsewhere. I think this is a small, but important step towards the future of a reliable and scalable Internet and I'm very pleased to see it finished and presented to the board.

>>VINT CERF: Thank you, Suzanne. I see Peter's hand up and then Steve Crocker. Paul -- I'm sorry. It's Paul's hand up and then Steve Crocker.

>>PAUL TWOMEY: You don't know how dangerous it is to confuse an Australian with a New Zealander.

[Laughter]

>>VINT CERF: Should I excuse myself now...

[Laughter]

>>PAUL TWOMEY: The -- I would just like to say how pleased I am with this resolution and fully support it. I'd also just like to remind the board of the dialogue we had yesterday with Ray Plzak when he reported, I think just as -- both to the ASO executive council and as chair of the -- I'm sorry, chairman, I'll have to come back to you.

>>VINT CERF: Let's go back to Steve Crocker, then, and we'll return to Paul in a moment. Steve?

>>STEVE CROCKER: Alex? Alex?

>>VINT CERF: Alex, could you --

>>STEVE CROCKER: We did it. We did it. Thank you, Mr. Chairman. I just want to echo Suzanne's comments and add that two positive things in addition is that this is one of the -- unfortunately -- somewhat rare instances in which we've actually been able to get ahead of the game and lay the foundation for something prior to it becoming an urgent or -- matter or a crisis. This is one important -- small, but important -- piece of laying the foundation for an IPv6 network in advance of the time that pure IPv6 operation is actually in existence.

The other very positive thing that I am personally quite pleased about and want to convey is that this was genuinely a joint effort between the Root-Server System Advisory Committee and the committee I chair, the Security and Stability Advisory Committee, and I think -- I hope it becomes a precedent for other cooperative efforts, not only involving either of our committees but, in general, across the ICANN community. Thank you.

>>VINT CERF: Thank you, Steve. In Paul's absence, since this is -- this action item is primarily to accept the report and convey, I think that we can press ahead anyway.

We'll just be one short on the vote. Are there any other comments? In that case, in Paul's absence, I will call for this vote. All those in favor of the resolution, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteenth, fourteen.

>>ROBERTO GAETANO: Paul is away. He's not voting.

>>VINT CERF: Yes. So we only have fourteen votes. Thank you. Put your hand now, Joichi, unless you wanted to say something. No. So Mr. Secretary, that vote passed by 14 to zero.

The next item on the agenda -- well, actually, Steve I wonder if you're prepared to speak to the DNSsec matter.

>>STEVE CROCKER: I am. Thank you, Mr. Chairman. We also had an opportunity this week to hear from representatives from the Swedish registry and a number of their colleagues, and from the Bulgarian registry on their progress in signing the root -- signing their zones, the SE and BG zones. This is the deployment -- implementation of the DNS security protocol, what we call DNSsec, and it's a major step forward. Already, we have been able to see instances in which others have taken note and begun learning from it, so I -- and I'm especially appreciative that the representatives from those two communities took the time to come here and make presentations for the benefit of the community.

I'd like to suggest a very brief moment of recognition or -- that the board take recognition and let me suggest the following wording:

The board recognizes the importance of the steps the Swedish registry -- SE -- and the Bulgarian registry -- BG -- have taken to sign their zones and thereby lead the way in adding security to the domain name system. The board expresses its appreciation to the representatives of those registries and their colleagues for taking the time to come to Lisbon and share their experiences with the community. Thank you.

[Applause]

>>VINT CERF: Steve, did you intend that to be a resolution of the board or simply something that's read into the proceedings?

>>STEVE CROCKER: If it's possible for it to be a resolution or a sense of the board, I think that would be appropriate and helpful.

>>VINT CERF: It seems to me that that's clear enough wording that unless counsel tells us otherwise, we could take that as a motion. Counsel? Counsel says that this is not a problem. So I take that as a motion and ask for a motion.

>> Second.

>>VINT CERF: I see several of them.

>>ALEJANDRO PISANTY: And it passes by acclamation.

>>VINT CERF: I'm sorry. Alex, second, and then I see a hand up.

>>ALEJANDRO PISANTY: Passes by acclamation. I would agree with that. All those in favor, please clap.

[Applause]

>>VINT CERF: So we've -- to make an obscure reference, it's nice that we can go to resolution by acclamation as opposed to resolution by quacking and there are a lot of people who probably don't remember where that came from.

All right. Let's move ahead. Thank you, Steve. Let's move ahead now to a rather interesting development in the dot museum top-level domain. This is a resolution which authorizes some modification to the way in which dot museum deals with registrations and with wildcard treatment, and so I'd like to ask Goldstein to introduce this particular resolution. Steve?

>>STEVE GOLDSTEIN: Thank you, chair. It occurs to me that those of you who are sitting out there patiently, really patiently and hearing all these resolutions, you hear all the preambles, all the declarations up front, and you don't know when the resolutions are coming. So the resolution here is: We really haven't had enough time to work out the details, okay? That's going to be the punch line. So here's the resolution:

Whereas, ICANN has been engaged in negotiations with the sponsored TLD registry sponsor MuseDoma regarding renewal terms for their registry contract.

And whereas, these negotiations are intended to result in a revised new registry agreement for this sponsored TLD, including revised terms to come into line with other recently approved sponsored TLD registry agreements.

And whereas, it may be beneficial for all parties involved to allow for an extension of the deadline of the existing agreement so that ICANN and the registry sponsor will have adequate time to address public comments raised by the proposed renewal agreement and the subsequent discussion in the 27 March 2007 registrar constituency meeting that led to the proposed path of extension of the current agreement.

Resolved, the president and the general counsel are authorized to continue negotiations with MuseDoma in accordance with existing contractual terms, and are authorized to extend the relevant renewal process deadline as necessary and appropriate for up to six full months, while discussions continue.

>>VINT CERF: Thank you, Steve. Is there a second for this motion? I see one from Susan. The intention here is to allow time for considerable discussion about the specifics of handling second-level registrations in this top-level domain and particularly to help parties who have not yet registered to be visible in this -- in this system.

So let me ask if there are any other comments on the resolution? It's simply to extend the time to allow this discussion to reach fruition.

I see none, so I'll call for a vote. All those in favor, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. Thank you. Mr. Secretary, the resolution passes.

The next item on the agenda is a board governance committee recommendation on independent reviews and I'll call on Roberto, the chair of the board governance committee to introduce this resolution.

>>ROBERTO GAETANO: Yes. Since there was intense debate and there was a public forum on this in the last days, I think that there's no need to explain what happened and I will go ahead in reading the resolution.

>>VINT CERF: You might even, if you wish, get away with -- since it's on the screen there, you could say insert all the "whereas" preambles by -- request that it be inserted into the record, and then you didn't have to read all of them and you could go straight to the specific resolution. Would you like to do that?

>>ROBERTO GAETANO: I'm -- what is the exact formula for --



>>VINT CERF: Well, you could say that you would request that all the "whereas" clauses be incorporated into the record by reference and that you read aloud only the resolutions that are the action of this proposal.

>>ROBERTO GAETANO: Thank you. I will make good use of this also in other times. For this time it has taken longer to give me the explanation, so...

[Laughter]

>>ROBERTO GAETANO: May I ask to have the "whereas" clauses incorporated, and -- as they appear on the screen, and I will pass to read the resolution.

Resolved, the ICANN board directs staff to post the proposed terms of reference for the At-Large Advisory Committee review for public comment and further consideration.

Resolved, the ICANN board approves the board governance committee's proposal to create a BGC GNSO review working group and a BGC NomCom review working group, and appoints the following individuals, while noting that additional individuals may be appointed:

For the BGC GNSO review working group, Roberto Gaetano, Rita Rodin, Vanda Scartezini, Tricia Drakes, Raimundo Beca, Susan Crawford, and Vittorio Bertola; and.

For the BGC NomCom review working group, Alejandro Pisanty, Peter Dengate Thrush, Njeri Rionge, Mouhamet Diop, Jonathan Cohen and Steve Goldstein. Resolved, the ICANN board approves the recommended charters for these two working groups that include the objectives, tasks and processes to be undertaken by these groups and directs staff to support the creation and work of these groups.

>>VINT CERF: Thank you very much. Is there a second? I see one from Njeri. Are there any comments on this resolution? One from Steve Goldstein.

>>STEVE GOLDSTEIN: Yes. What this designates or -- is that one of the committees of the board is recognizing that there is so much work before the board that it can't do everything all by itself and is now beginning the process of streamlining some of our activities so that we can call on working groups to help get some of the work done and advise back, and I highly commend this action.

>>VINT CERF: Thank you, Steve. I would note that the additional members of the working groups are drawn from former board members, and that's a resource which we probably could make increasing use of, to the degree that those former members are willing to contribute. Are there any other comments on the resolution? Peter?

>>PETER DENGATE THRUSH: Thanks, Vint, I wanted to thank those former board members for agreeing to serve in what are going to be onerous positions, and also just to comment in a kind of self-serving way, I suppose, that we are catching up with the -- with this very important part of the obligations under the bylaws. And I think it's just a further confirmation of the importance that the board places on this essential review of all of these -- of the - of the organs of ICANN. So we're back on track.

>>VINT CERF: Another biological metaphor. I'm keeping track, Peter.

>>PETER DENGATE THRUSH: I thought that was a musical one.

>>SUSAN CRAWFORD: Promotive, perhaps.

>>VINT CERF: Well, fair enough.

All right. Are there any other comments on this resolution? If not, I'll call for a vote. All those in favor, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. Thank you.

Fifteen to zero. Mr. Secretary, the motion passes.

I understand that we have text now for the resolution that Peter asked for earlier, which requests the staff to prepare reports to us in Puerto Rico, so Peter, I'll turn it over to you to introduce the motion.

>>PETER DENGATE THRUSH: Thank you, Chairman. I'm going to require, then, for the words to come up on the screen, and all ours are -- ah. They were all totally blank.

The board --

>> [inaudible]

>>PETER DENGATE THRUSH: Right. Thank you. So we've been drafting this in the board checkroom, and I think we've got reasonable agreement amongst the board and general counsel that this will meet the objectives. The board requests that the president provide a report on the status of escrow compliance relating to ICANN's current agreements at or before ICANN's meeting in San Juan. The report should also propose a process for a public discussion on creation of a policy for appropriate protections for generic registries, registrars, and registrants.

>>VINT CERF: I take it that's a motion. Is there a second? I see several of them. Raimundo should be on the record to second. Is there any further discussion of this motion? I'll call for the vote. All those in favor, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. Thank you very much. The motion passes. We move on now to another very important responsibility of the board, and particularly the Audit Committee, and that is to appoint auditors to review our financial status and I'll turn to the chair of the Audit Committee, Vanda Scartezini, to introduce this resolution. And Vanda, once again, I would advise that with the lengthy preamble clauses, you could ask to incorporate them by reference and go straight to the resolution. Vanda?

>>VANDA SCARTEZINI: Okay. Thank you. I guess it's a good idea. We have a lot of things to read, and since you have all those statements in the screen, I pass straight to the resolution.

Resolved, the president and chief operating officer are authorized and directed to enter into the engagement letter and professional services agreement of 9 March 2007 with Moss Adams LLP to provide the outside audit for fiscal year 2006-2007.

For the record, I would like to thank specially to Doug Brent, John Jeffrey, and Amy Stathos for the very productive joint work they -- this committee has had with the staff.

>>VINT CERF: Thank you very much, Vanda. Is there a second for this motion? I see one from Goldstein.

Let me -- before we vote, let me just say that the proposals have been on the table before the board, the text and so on have been available for us to review, so we're not putting them up here on the screen for now. Any other comments? In that case, all those in favor, please raise your hand.

One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen -- I'm sorry, I've lost track. Rita, are you voting on this? Okay. Fifteen. Thank you.

All right. So now, the last items on the agenda are easy ones. They have to do with saying thank you. And so I would like to ask Sharil Tarmizi to come and join us on the stage, if he's here. Sharil. There he is hiding in the back, hoping to be invisible, but it didn't work. Let me embarrass you by asking you to stand in the center of the stage.

>>SHARIL TARMIZI: I feel like I am on detention.

>>VINT CERF: This is a formal motion which I will put on the table for vote by acclamation. Mohamed Sharil Tarmizi joined the GAC in Yokohama, Japan in July 2000 as the representative for Malaysia, led GAC's internal IDN working group as early as June 2001, became one of the three inaugural vice chairs of the GAC in September 2001 in Uruguay to the end of 2002 in Shanghai.

He was appointed to ICANN's first IDN committee led by Masanobu Kato in September 2001 at Montevideo.

He was unanimously elected as the second chairman of the GAC succeeding Dr. Paul Twomey in January 2003 and chaired his first GAC meeting in Rio de Janeiro in March 2003.

He became the first GAC liaison to the ICANN board when the position was first established.

He chaired the organizing committee of the ICANN meeting in Kuala Lumpur in June 2004.

He returned unopposed for a second and final term in Mar del Plata in March 2005. And, finally, stepped down in Lisbon, Portugal in March 2007. I was going to say "finally escaped in Lisbon" but I think perhaps that would be inappropriate.

Whereas, Sharil Tarmizi has served the GAC, board, ICANN and Internet community with energy, distinction, panache and an unique and self-deprecating sense of humor. Whereas he has contributed in countless ways to the successes of ICANN with his unique, blend of technical and diplomatic and collaborative skills. Now, therefore, it is resolved that the ICANN board offers its sincere and heartfelt gratitude for his long and diligent service and conveys its best wishes for success in his new investment advisory business, more time with his family, and opportunity for global contact with the world through his ham radio hobby.

I ask that you pass this resolution by acclamation.

[ applause ]

>>VINT CERF: This is a small token of our esteem. I have to confess a certain envy here to his successful escape. Sharil, you might wish to address the assembled crowd?

>>SHARIL TARMIZI: Thank you, Vint. It is not ticking, so I guess it is safe.

Colleagues, ladies and gentlemen, friends in ICANN, it is almost -- well, it is about seven years from when I started and joined the fray in ICANN. And I must admit, during those first day in Yokohama, Japan, I could not understand what the heck was happening. All I thought was I was looking at a completely disorganized organization that was trying to find its way somewhere along the way.

The more I got involved in it, the more I realized that what kept the organization together was the wonderful people that kept coming to the organization despite not agreeing what it was doing at that time, kept coming because they believed in the cause.

Now, I'm deeply humbled and enriched by the experience I've had in the last seven years with the ICANN process. We have now gone from a fairly young organization to an organization which has matured considerably.

The challenges that face ICANN going forward, I think, will become more complex and, indeed, could even be trying.

But I'm confident with the people that I see on the board, the people that I see in the community, I'm confident that the organization will see it through. So with that, I thank you very much for all your support. If there are any mistakes I made in the past, I would seek your forgiveness. Any action as which I may have done which may have not suited you, I apologize.

And last but not least, Vint, I wish you all, all the best. Thank you very much.

[ applause ]

And if any of you are ever coming to Malaysia, look me up.

>>VINT CERF: You may get what you ask for, be careful. Actually, we have one other presentation to make to you, Sharil. This is on behalf of the GAC. So I would like to ask the succeeding GAC chair, Janis Karklins, to make one other presentation. Jan Janis, let me offer this to you.

>>JANIS KARKLINS: Thank you, Vint.

The GAC already, in its session, thanked Sharil withstanding ovations for his loyal, tireless service to the GAC for so long. And I -- maybe I will not repeat what I said to Sharil, not to prolong the ceremony. But one thing I can say here in the presence of the chairman of NomCom, I just admitted when Vint read out the resolution that Sharil now qualifies to be presented as a candidate for the board, because he has --

[ Laughter ]

-- changed the camp. Now, the question is whether he wants to serve on the board or become a candidate. Just consider that.

>>ROBERTO GAETANO: I second.

>>JANIS KARKLINS: Sharil, thank you very much, indeed, on behalf of the GAC and on behalf of all of us, for your service.

[ applause ]

>>SHARIL TARMIZI: No need to say anything to what he said.

>>VINT CERF: Please watch out for the wires.

>>ROBERTO GAETANO: We will all come to Malaysia, don't worry.

[ Laughter ]

>>VINT CERF: The next item on the agenda is to thank our very generous and tireless sponsors, staff, scribes and event teams. And so I would like to ask Raimundo to introduce this resolution which I will ask you to pass, again, by acclamation.

Raimundo?

>>RAIMUNDO BECA: Thank you very much. This is the other side of the coin of the resolution to pay the lawyers.

[ Laughter ]

This is the good side of the coin.

>>VINT CERF: Ahh.

>>RAIMUNDO BECA: The resolution reads like this: The board extends its thanks to all sponsors of the meeting including Arsys, Portugal Telecom, VeriSign, AfiliAs, PIR, Microsoft, DENIC, Amen World, Anacom, dotMobi, puntCat, InterNetX, EURid, LogicBoxes, Skenzo, and ICANNWiki. The board would also like to thank Camara Municipal de Lisboa, Turismo de Lisboa and Anubis Networks for their support.

The board expresses its appreciation to the scribes, Laura Brewer, Teri Darrenougue, Jennifer Schuck and Charles Motter, to ICANN staff present here in Lisbon, and to the rest of the ICANN staff for their efforts in facilitating the smooth operation of this meeting.

The board also wishes to express its appreciation to all the FCCN staff for the overall event management including IPv4 and IPv6 networking, iWayTrade for technical support of all the remaining technical infrastructure, Abreu for all touristic and event management services, Hospital da Cruz Vermelha and Bombeiros Lisbonenses for medical services and Empatia for the stage and booth design. Additional thanks are given to Hotel Corinthia for this fine facility and to their event facilities and support.

>>VINT CERF: Thank you. I ask that you pass this by acclamation.

[ applause ]

>>VINT CERF: Thank you. Finally, we would like to thank our local hosts who have been extraordinary in their generosity and care for all of us in this wonderful city. And I would like to ask Vanda to put this resolution on the table.

>>VANDA SCARTEZINI: Thank you, Mr. Chair. A special consideration with our host, I will read this thank first in Portuguese.

(Speaking in Portuguese).

Thanks to the local hosts. The board wishes to extend its thanks to Fundacao para a Computacao Cientifica Nacional-FCCN and the following members of the local organizing committee: Pedro Veiga, Marta Moreira Dias, Luisa Gueifao and all the volunteering for hosting the ICANN meeting. The board would also like to thank Jose Mariano Gago, minister of science technology and higher education for supporting the March 2007 Lisboa meeting.

>>VINT CERF: Thank you very much, Vanda. I ask that we pass this resolution by acclamation.

[ applause ]

>>VINT CERF: Pedro, would you kindly join me on the stage. Wait a minute, you are not supposed to bring your own present, that doesn't make sense.

[ Laughter ]

>>VINT CERF: I don't know how to say this, Pedro. Considering --

>>PEDRO VEIGA: (inaudible).

>>VINT CERF: Well, your team has just done a stunning job here. We have done so much constructive work this week and it is largely thanks to your planning and energy and all of the work that you and your team have put into making us feel hospitably received and also well served.

I understand in the midst of all of this you have your own complexities in your own business to deal with, so that makes it doubly impressive. We would like to leave you with a small memento of our invasion of Lisbon.

>>PEDRO VEIGA: Thank you, Vint. This is not a resolution but I have written a few words. I need my glasses. I am aging and one of the components of that is the degradation of my eyes.

Good morning, the organization of this event was a joint cooperative effort between FCCN and ICANN. I want to thank the chairman of ICANN, the C.E.O. of ICANN and all the staff for the wonderful cooperation.

Now that the event finally is coming to an end, I am very happy with the way how everything ran very smoothly.

I also want to thank to the staff of FCCN, some of them are there, others are hiding. This includes all those present here in Hotel Corinthia but also those that stayed in the background doing part of the work or with some overload because of the presence of the ones staying here.

I also want to thank my friends from Brazil, the organizers of the Rio and Sao Paulo meetings. They gave us very helpful hints about all of the relevant organizations, the challenges that we were going to face so we could prepare ourselves for last-minute problems.

Especially, I would like to thank two of the Brazilian friends not present here, Caroline. She stayed here during the months of January telling us about all of the details. And we are missing Glaser, he had an accident a few days ago. He was very sorry because it's the first ICANN meeting that he is missing and it's in Portugal. And I personally also miss his presence.

I would like to mention a few names. It is always very difficult to isolate a few names but doing that, I also am naming the people of the teams they are coordinating. So from ICANN, I would like to thank Diane and Michael Evans for all the good cooperation in a lot occasions. From FCCN, Marta, Luis, and Jerome. They are there and have been greeted; from Abreu, El Sa, Isabelle and (saying name).

I also want to thank obvious sponsors, they have been named in the resolution. And now I am going to offer two bottles of port wine, one to Vint Cerf and another one to Paul Twomey. As a symbol of our appreciation of the excellent cooperation that happened between FCCN and ICANN.

>>VINT CERF: Wow. Oh my gosh. Look at this! Look at the vintage. 1998! Perfect.

>>PEDRO VEIGA: Okay. So with this symbolic gesture, I want to remember when you have a friendship, you want to commemorate that, drink port wine. So good-bye, in Portuguese we say Adio. Good-bye. I hope to see you soon. Have a nice travel back home and visit Portugal in the future. So thank you, Vint. Thank you, board.

[ applause ]

>>PAUL TWOMEY: Pedro, can I just say on behalf of the staff, thank you to you and your colleagues. It has been a wonderfully smooth operating meeting, since the very first time we arrived. It is one of those classic examples if it all works, you don't notice. And it all worked marvelously well and we really do appreciate it.

I can tell you that the small ICANN staff party that will take place later today will have a -- enjoy the wine. Thank you.

[ applause ]

>>VINT CERF: Ladies and gentlemen, we are nearly done. But Paul Twomey apparently has one or two other additional items. So, Paul, I will turn this over to you.

>>PAUL TWOMEY: Thank you, Vint. I would first like to give two comments. First of all, unfortunately I have to report to the community that air traffic between Switzerland and Portugal has been particularly poor last night and this morning. And the next flight that was likely to arrive here from Geneva is at 4:00 p.m. So unfortunately for reasons beyond our control Hamadoun Toure is not attending. He rang me last night from Geneva airport where he had been sitting for some time with a boarding pass in his hand. His plane had been delayed twice and then it was canceled. He then tried again for this morning.

So I'm afraid that hasn't proceeded. My apologies to the community. It is just an unfortunate circumstance, I think. We look forward an opportunity to talk further with him at various times.

Secondly, we have received communications this week as of the 30th of March from Edouard Dayan, the deputy - the director general, sorry, of the Universal Postal Union. And he has in this communication indicated to me that he was pleased in the interest to move the negotiations to conclusion of the dot post TLD. He goes on to say how important the postal sector sees the dot post TLD in their capabilities in what they are trying to move forward, and also extends an invitation to myself to speak at their high-level conference coming up in at Berne in late June.

This will be posted to our Web site. But I just wanted the board and the community to understand the significance of the communication.

>>VINT CERF: Thank you very much, Paul. Steve, did you have your hand up?

>>STEVE GOLDSTEIN: Thank you, Vint. I have been scanning the audience to see if I could find -- see the face of our immediate past director Hualin Qian. I know he's here because I saw him yesterday. In Sao Paulo we had a chance to thank him as an outgoing director. But it was by a telephone contact. We never had a chance to give him a, you know, round of applause in person. But I don't know if he's here now. If he is, I hope he could at least stand up so we could say hello. If he isn't here in the audience and you see him, could you please extend our felicitations to him.

>>VINT CERF: We can acknowledge that with a round of applause, Steve.

[ applause ]

>>VINT CERF: Yes, Raimundo. I'm sorry. Alex?

>>ALEJANDRO PISANTY: We had the same situation with Veni Markovski. Do I remember well? He was by phone taking care of a 1-year-old baby or so?

>>VENI MARKOVSKI: 1-day-old.

>> That's right.

>>VINT CERF: If that's the case, do you care to have a round of applause for Veni?

[ applause ]

>>VINT CERF: Raimundo, you had your hand up, too.

>>RAIMUNDO BECA: This is not so good news for getting applause, but I cannot -- not speak about that. I was particularly upset by the comments made by Susan Crawford when she spoke justifying her vote.

I didn't answer at the moment because it was not in the scope of what we were discussing. We were discussing on the vote the reason why I vote in favor or against but not to judge how, why, other people voted in a different way.

I speak for myself. I am sure what I am saying also, also concerns all the board members that voted in favor of the resolution and also the behavior of all the board members in this vote and in many other votes before.

I just got from Susan her statement, so I don't know if I am quoting exactly the words she put, but the first comment I would like to make is she says that ICANN acts against itself when it acts in ad hoc, responding to political pressure.

I don't know if she was meaning that in this particular case, ICANN was acting under pressure. She didn't say that. But if -- I think if it says that ICANN has acted in some occasion under pressure, she should indicate in which cases ICANN has acted under pressure.

Number two, she said, we cannot speak as representatives of the global community. She says we cannot speak. She is speaking.

The fact is that this is a board of a multistakeholder organization. We have defended that with very great success at the WSIS and we are continuing the work defending the same concept.

And I think we are lacking to the representatives of this board and this organization if we don't recognize that this board is representative of a community and has members who are about one half of them elected and another half selected which is another form of election.

So I think that I have to say that we, all of this board, including herself were acting as a representative of a truly multistakeholder.

Well, one can doubt that perhaps there will be a different structure, less selected. That's a different term. But what the organization decided is to choose its vote in this way.

Third, she spoke about something called the Astroturf. I don't know exactly what that means, but personally I am not being sensible to any Astroturf. I have been studying all the pages. There was about 1,000-pages. We have been about two years in this, a lot of time consumed and, I think, completely insulted when I say that some colleagues have been sensitive to the Astroturf.

Finally, she says she has no staff and she had not had the time to follow all the details of this agreement. Well, I don't have staff. And I have gone through all the details of this agreement, and I think that if I wouldn't have had the time, I wouldn't have voted.

>>VINT CERF: Thank you, Raimundo. If there are no -- I'm sorry. Roberto, you have a comment?

>>ROBERTO GAETANO: Yes, I have a comment because I hate to end a very successful meeting in which a lot was achieved on a note -- or on a -- or in a dispute between or among board members.

I think the lessons that we can draw from this and the evidence that we are giving to the Internet community is that really this board is made of a lot of different individuals who have different points of view and it is very difficult to bring this point of view to a common decision and that those board members are also human beings that have feelings and that maybe sometimes put their wording in a way that it might sound offensive or may be beyond what the diplomacy of other places where decisions have been taken is used.

But I think that personally I considered this an added value. I don't consider this a problem. I think that it may happen that in presenting a subject, in presenting your own ideas -- because we're all involved emotionally in this. It might happen that maybe one word too much is being expressed or maybe something -- maybe a sentence that we may regret half an hour later. But I think my personal experience in this board as a liaison where I was not allowed to vote and so I was looking at things in a more detached way is that every director of this board is -- brings an added value and is honestly dealing with the matter on the table.

And I think that this is something that if I go back to the criticism that was given to this board many years ago, I'm thinking about the early days, '98, '99 where the board was accused to have prechewed solutions and only coming here on stage to formally -- to make like a theater for things that have been already arranged in advance, I think there is -- that can be considered an incident.

What happens today is, in fact, the manifestation of the richness of this organization and this manifestation that the board has of the (inaudible) debate, also involving deeply not only our rational part but also our emotional part. And I think that the only thing that we can do is acknowledge this and try to overcome this and be, I would say, better in the future. But in no case, I think that we can disassociate our rational thinking from our emotions because that's part of the game and that's part of the richness of this board. Thank you.

[ applause ]

>>VINT CERF: Well, let me close by making an observation that in this board it's all right for Susan to make statements and it's all right for Raimundo to make statements and it is all right for Roberto to make statements. This board talks to each other. We do so sometimes with some emotion but, in fact, there is a discussion and I want this record to show that this is not a non-unusual discussion, that the board dives deeply into every issue that it is confronted with. And it does so in the spirit of real dialogue.

So let me thank the board members, the participating audience, all of our support staff and the local hosts for



another very successful meeting of ICANN. We look forward to seeing all of you in Puerto Rico. I will call this meeting to a close. Thank you.

[ applause ]

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

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and  
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00224 08

**WITNESS STATEMENT OF ALEJANDRO PISANTY**

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Counsel for Respondent ICANN

## **I. BACKGROUND**

1. My name is Alejandro Pisanty. I am currently a full-time professor at UNAM, the National Autonomous University of Mexico, on sabbatical leave, and have previously served in the position of Director of Computing Academic Services at the same university, in Mexico City, Mexico. I received a bachelors degree in Chemistry, and Master of Science and Ph.D degrees in Physical Chemistry from UNAM. I was a postdoctoral fellow at the Max-Planck-Institut für Festkörperforschung in Stuttgart, Germany from 1984-1986.

2. I was elected for the Board of the Internet Corporation for Assigned Names and Numbers (“ICANN”) by the Supporting Organization that was responsible for policy making for generic Top Level Domains and was seated at the 1999 annual meeting. I was ultimately elected for subsequent terms, which ended in June 2007.

3. While an ICANN Board member, I was a member of the Committee on ICANN Evolution and Reform, which analyzed possible reforms associated with ICANN’s bylaws, including the Independent Review Process that ICM has invoked in these proceedings. From approximately November 2000 to the end of my term in 2007, I served as Vice-Chairman of ICANN’s Board of Directors.

4. I have also served as Chairman of the Board of CUDI, Corporación Universitaria para el Desarrollo de Internet, the Mexican Internet 2 Consortium, as well as Chairman of the Board of ISOC Mexico. In addition, I served UNAM as Coordinator of the Distance Education Project (1995–1997), Technical Secretary of the Computing Advisory Council (1991-1997) and Head of the Graduate School in Chemistry (1993–1995), as well as Professor in the School of Chemistry. From UNAM, I also lead the National Network for Videoconference in Education from its inception to February 2009, as it operated from the unit I directed.

## **II. THE INDEPENDENT REVIEW PROCESS**

5. As noted above, I was a member of Committee on ICANN Evolution and Reform (the “Committee”). The Committee was originally created on November 15, 2001 in view of the considerable discussion at that time within the ICANN community of possible changes to the structure of ICANN, including possible new Supporting Organizations and new or revised

mechanisms for nominating or selecting ICANN Directors. The Committee was responsible for: (i) monitoring and providing reports to the Board on possible changes to the structure of ICANN; (ii) evaluating and making recommendations to the Board concerning any specific proposals or applications to the Board that would or could affect the structure of ICANN or the composition of the Board; (iii) considering input from the community on reform of ICANN's structure and consulting with specific stakeholders for clarifications or further input; and (iv) preparing recommendations to the Board regarding, first and foremost, a statement of ICANN's essential functions and its mission, as well as the appropriate structure of ICANN and the processes by which it should function.

6. On February 24, 2002, then ICANN President Stuart Lynn released his "President's Report: The Case for Reform," which set forth the need for constructive change in ICANN's structure and processes if ICANN was to fulfill its mission and responsibilities. That report initiated a wide-ranging discussion throughout the ICANN community. As a result of that discussion, and consistent with its mandate, the Committee undertook to propose a new set of bylaws for ICANN.

7. The proposed new bylaws provided many mechanisms to ensure that ICANN operated transparently, with participation by all with interest in its actions, and that the ICANN structure and operations would be accountable to the broad Internet community. Among the means for these mechanisms to occur were via the selection of Directors, the operation of ICANN's policy development bodies, and in the various advisory committees that provided input from specific sectors of the ICANN community. In addition to the basic structure of ICANN, the proposed new bylaws contained several additional provisions for transparency, accountability, and fairness in carrying out ICANN's mission, including the introduction of a refined 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.

8. In particular, the proposed new bylaws provided that requests for independent review would result in the appointment of an Independent Review Panel that would be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and

with declaring whether the Board acted consistently with the provisions of those Articles of Incorporation and Bylaws.

9. In creating the process that would result in the appointment of an Independent Review Panel, we did not consider that an Independent Review Panel should have the ability to overrule, nullify or stay the decisions reached by the ICANN Board. Granting such power would only serve to add another layer of governance to a system for which a significant goal of reform was to reduce overreaching process and to increase effectiveness. Moreover, the composition of the ICANN Board envisioned by the proposed new bylaws was broadly representative of the entire range of ICANN stakeholders, and was (and is) thus the most appropriate body to make final decisions on ICANN policies. Thus, the Committee specifically rejected the notion that an Independent Review Panel would function like a “Supreme Court” with ultimate authority to decide what actions the Board should take. To the contrary, the ICANN Board was meant to retain ultimate authority over ICANN’s affairs.

10. In short, it was always the Committee’s intention that any declaration of an Independent Review Panel be submitted to the ICANN Board for review and consideration. Under no circumstances would such a declaration be “binding” on the Board. To the contrary, the ultimate authority to act on the conclusions of an Independent Review Panel was left to the sound discretion of the ICANN Board, which of course would take the Panel’s conclusions seriously but would retain the ability to do what the Board itself found to be proper and appropriate. This was consistent with the notion that the Board – and not a panel of three judges – was tasked with ultimate decision-making authority with respect to the matters that the Board was supposed to address. The existence of the Independent Review Process, and the fact that an Independent Review Panel would make declarations that the Board would be required to consider, was viewed as a part of the “check-and-balance” system of ICANN, in this instance meant to insure that interested parties would be able to challenge whether the Board had violated its Articles of Incorporation and Bylaws; the result of any such challenge, if adverse to the Board decision, would require the Board to review the issue again.

### **III. THE ICM APPLICATION IN 2003 AND THE JUNE 1, 2005 VOTE**

11. During my tenure as a member of ICANN's Board, I became familiar with ICM's unsponsored TLD application in the 2000 "proof of concept" round (which the Board did not adopt), as well as ICM's sponsored or sTLD application in 2003. ICM's application in 2003 was in conjunction with the Board's decision that it would accept additional sponsored TLD applications, and thus the issue of sponsorship was extremely important to the application. Thus, this particular round of TLD applications was only for sponsored TLDs, not unsponsored TLDs, and ICANN was only considering ICM's application made in 2003.

12. The Board's review of ICM's application only related to its sTLD application in 2003, not its prior application in 2000. The Board addressed ICM's sTLD application on June 1, 2005, during a Special Meeting that the Board held via teleconference. After considerable debate, the Board voted 6-3 (with two abstentions and four Board members who were not able to participate in the call) to adopt two Resolutions allowing ICM to proceed to contract negotiations:

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 terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.

13. I voted against the Resolutions. There were many unanswered questions at this time regarding ICM's ability to satisfy the requisite sponsorship criteria. For instance, ICM's proposed community definition was limited to those members of the online adult entertainment industry who supported the creation of the .XXX sTLD, and thus did not include all online adult entertainment industry members (namely those opposed to .XXX). Limiting the community in this manner required almost exclusive self-identification of the members, and thus was not capable of precise or clear definition, as the Request for Proposal required. In other words, such self-selection, extreme variability and subjectivity in what defined the .XXX community made it nearly impossible to determine objectively which persons or services would be in or out of the

community. Contrasted with the clearly defined communities of other sTLD applicants, it was evident that ICM had not proposed a clear and precisely defined community sufficient to satisfy the sponsorship selection criteria of the Request for Proposal. To the contrary, ICM's proposed community appeared to be "whoever subscribes to a name in this particular TLD." To me, this was not at all consistent with the notion of sponsorship.

14. Moreover, the definition of "adult entertainment" varies considerably from region to region and culture to culture, such that there was not a global definition that could be applied to the .XXX sTLD community. Thus, to the extent one was trying to determine whether certain content would be permitted or prohibited in the proposed .XXX sTLD, ICM did not appear to have an answer that could be applied equally throughout the world.

15. Despite these open questions, some Board members expressed views that the best way to test whether ICM could satisfy the sponsorship selection criteria was to determine whether the concerns regarding sponsorship could be addressed in the registry agreement with ICM. I did not think that, because of the nature of these concerns, ICM would be able to resolve any of them through contract negotiations, which is why I voted against the Resolutions. However, other Board members expressed that ICM might be able to satisfy their concerns, and so ICM's application was allowed to continue following the 6-3 vote.

16. As the adopted Resolutions made clear, the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by this vote to award the .XXX sTLD to ICM because the resolution that the Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal. There were simply too many open questions concerning sponsorship in June 2005 for the Board to find that ICM had fulfilled the sponsorship selection criteria. Instead, the sponsorship question remained unresolved and in fact continued to be the subject of serious discussion at numerous additional ICANN Board meetings. And at several of the subsequent meetings, I continued to raise my concerns with respect to the sponsorship issue.

17. For example, the sponsorship criteria were discussed extensively at the September 15, 2005 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-15sep05.htm> ("after a lengthy discussion involving

nearly all of the directors regarding the sponsorship criteria”); at the May 10, 2006 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (ICANN Board and staff “entered a detailed discussion on the following points: agreement terms against the application statements and promises made by ICM in support of their proposal; concerns regarding ICANN’s ability to enforce the promises made by ICM through a contractual framework and the potential harm if such enforcement could not be maintained; the sponsorship criteria in the RFP and materials submitted in support by ICM and others; community input including letters and emails from industry and consumers regarding the proposed sTLD; GAC advice contained in the GAC Communiqué from the Wellington Meeting and whether the terms of the proposed agreement achieved the terms of that advice; and ICM’s submission and supporting letters and documentation.”); and again at the February 12, 2007 Special Meeting of the Board, *available at* <http://www.icann.org/en/minutes/minutes-12feb07.htm> (where the Board discussed the “splintering” of support for the .XXX sTLD in the online adult entertainment community, a topic that “had been the subject of debate by the Board in earlier discussion in 2006;” and where a straw poll as to who had “serious concerns” about the sponsorship issue resulted in eleven Board members expressing “serious concern”). In short, during each of these Board meetings referenced in the previous paragraph, several Board members – including me – expressed significant concern about the issue of sponsorship.

#### **IV. THE MAY 10, 2006 VOTE**

18. ICM and ICANN began negotiating the registry agreement shortly after the June 1, 2005 vote. The first formal vote the ICANN Board had on whether to approve ICM’s proposed registry contract was on May 10, 2006. After detailed discussion, the Board voted 9-5 against ICM’s then-current draft of the proposed .XXX sTLD registry agreement.

19. I voted against the proposed registry agreement at the May 10, 2006 meeting. I did not think that the draft agreement guaranteed (or could guarantee) that the representations made by ICM could be fulfilled. First, ICM still had not set forth a precisely defined community. Second, the language in the draft registry agreement would have been nearly impossible for ICM to implement. ICM was proposing to monitor illegal and offensive content according to all law globally. That is, ICM was suggesting that IFFOR, ICM’s proposed sponsoring organization, be responsible for identifying responsible adult online content providers



– across all nations – who would be permitted to register a .XXX domain name. In its application, however, ICM did not include the structural guarantees that it or IFFOR could effectively monitor or enforce the activities of their applicants. Nor did ICM provide how it would resolve any disputes that might arise over ICM’s identification of responsible adult online content providers. Moreover, to the extent interested parties were dissatisfied with ICM’s resolution of these issues, complaints would inevitably come to ICANN. This would put ICANN in the untenable position of making content-based decisions, which is outside its mandate. I did not think that these problems were any particular fault of ICM itself, but were due to the complexities inherent in the international, multilingual, and multicultural environment in which ICM proposed to operate this particular TLD.

20. The May 10, 2006 vote was a rejection of ICM’s then current draft of the proposed .XXX sTLD registry agreement. The Board did not deny ICM’s application in its entirety at this time, but instead permitted ICM another opportunity to negotiate and attempt to revise the contract to conform to the RFP specifications.

21. ICANN Staff and ICM thereafter worked to negotiate additional revisions to the draft .XXX sTLD registry agreement that addressed the concerns regarding the sponsorship requirements, among others. On January 5, 2007, a revised agreement was posted for public comment, which was open until February 5, 2007. Subsequent to the posting of the agreement, ICANN staff and ICM negotiated additional clarifying language to Appendix S of the revised agreement. Appendix S was critical to the sponsorship analysis. It consisted of eight parts, including the proposed .XXX Charter, which identified the purpose for which .XXX would be delegated and the community to be served by its delegation, a description of the sTLD community, and relevant information regarding how the .XXX Registry would be operated. Appendix S was thereafter posted for public comment.

22. The Board’s next meeting was on February 12, 2007. At that time, the Board reviewed the recently posted public comments on the revised agreement, including Appendix S. The vast majority of comments were opposed to the introduction of the .XXX sTLD, prompting many Board members to reiterate the concern that ICM’s proposed .XXX sTLD lacked the broad-based support of the community ICM intended to represent. Despite such stark evidence

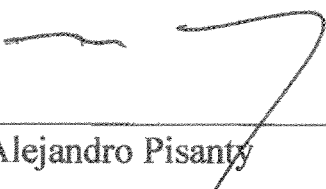
of a splintering of community support, the Board again did not outright deny ICM's application in February 2007. Instead, the Board unanimously approved a resolution directing ICANN Staff to further consult with ICM in an effort to inform the Board's upcoming decision of whether the sponsorship criteria could be met for the creation of a new .XXX sTLD.

V. THE MARCH 30, 2007 VOTE

23. Ultimately, ICM could not satisfy the sponsorship selection criteria set forth in the Request for Proposal. Thus, on March 30, 2007, the ICANN Board approved a resolution rejecting ICM's revised agreement and denying ICM's application for the .XXX sTLD. I voted to reject the agreement and to deny ICM's application for the same reasons I had voted against ICM in June 2005 and May 2006 – ICM simply could not satisfy the sponsorship criteria and still had not built the requisite structural guarantees into the registry agreement to ensure that the operations of the TLD would be consistent with ICM's proposal.

24. Another Board member suggested at the March 30, 2007 Board Meeting that the Board was somehow swayed by political pressure in coming to this decision. I thought this was an inaccurate depiction of the process, and political pressure had no influence whatsoever on my vote. Further, my observation of the votes of the Board members was that those votes came after extensive review, careful consideration, and thoughtful analysis of difficult and controversial issues. Indeed, the Board (and ICANN Staff) spent an enormous amount of time and energy evaluating ICM's proposal to determine it is should proceed. There is no doubt in my mind that the Board acted in good faith and allowed ICM every chance to conform its application to meet the Request for Proposal. In the end, ICM simply was not able to satisfy the sponsorship selection criteria and the proposed registry agreement did not match up to the promises of ICM's application.

Being in full agreement with the contents of this witness statement, I hereby sign it and acknowledge its contents on this 4<sup>th</sup> day of May 2009.

  
\_\_\_\_\_  
Alejandro Pisanty

IN THE MATTER OF THE INDEPENDENT REVIEW PROCESS  
FOR CERTAIN ICANN DECISIONS  
BEFORE THE INDEPENDENT REVIEW PANEL  
ESTABLISHED UNDER THE RULES OF  
THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
AS PROVIDED FOR IN ARTICLE IV(3) OF THE ICANN BYLAWS  
AND AS REQUESTED BY  
ICM REGISTRY, LLC, THE AFFECTED PARTY

ICDR Case No. 50 117 T 00224 08

Expert Opinion  
Of  
David D. Caron

May 5, 2009

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## **I. Introduction**

1. This document is the expert opinion of David D. Caron prepared at the request of the Internet Corporation for Assigned Names and Numbers (“ICANN”) in the Matter of the Independent Review Panel (“IRP”) review of Certain Decisions by ICANN before a Panel established under the Rules of the International Centre for Dispute Resolution (“ICDR”), as provided for in Article IV(3) of the ICANN Bylaws and as requested by ICM Registry, LLC (“ICM”), the affected party.

## **II. Qualifications of the Author of this Opinion**

2. I have been a member of the Faculty of Law at the University of California at Berkeley since 1987 and have held the C. William Maxeiner Distinguished Professor of Law Chair at that University since 1996.

3. As regards my expertise in international law, my scholarship covers various aspects of international law and organization, with the corpus of work focusing on public and private international dispute resolution, international courts and tribunals, the United Nations, the law of the sea, international environmental law, climate change and general theory of international law. In 1991, I received the Deák Prize of the American Society of International Law for outstanding scholarship by a younger scholar and, in 2000, received the Stefan A. Riesenfeld Award of the University of California for outstanding achievement and contribution to the field of international law. In 2006, I served as a member of the Faculty in the Public International Law Session of the Hague Academy of International Law, as well as Director of Studies in 1987 and Director of Research in 1995. I have served as a member of the U.S. Department of State Advisory Committee on Public International Law since 1993, as Co-Director of the Law of the Sea Institute since 2002, as a member of the Global Agenda Council of the World Economic Forum since 2008, and as a member of the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW from 1990 to 2005, and from 2008 to the present. I presently serve as President-Elect of the American Society of International Law, and am a past Chair of the International Law Section of the Association of American Law Schools.

4. As regards my expertise in international arbitration, I have served as arbitrator, lead counsel and expert in international arbitral proceedings. I am included as a leading international arbitrator from the United States in CHAMBERS USA (since the inaugural edition in 2005) and in WHO'S WHO LEGAL, CALIFORNIA (since 2007). I have served as Chair of the Advisory Board for the Institute of Transnational Arbitration of the Center for American and International Law since 2005, am a founding fellow of the College of Commercial Arbitrators and am a Co-Editor of the WORLD ARBITRATION AND MEDIATION REVIEW. I am a member of the roster of arbitrators for International Centre for Dispute Resolution ("ICDR"), China International Economic and Trade Arbitration Commission ("CIETAC"), and the Peruvian Chamber of Commerce, and have served as an arbitrator in International Chamber of Commerce ("ICC"), ICDR, International Center for Settlement of Investment Disputes ("ICSID") and United Nations Commission on International Trade Law ("UNICTRAL") Rules *ad hoc* arbitrations. I presently serve as a member of the NAFTA Chapter 11 Arbitration Panels in the matters of *Glamis Gold, Ltd. v. United States of America* and *Cargill, Inc. v. United Mexican States*. From 1996 to 2003, I served as a Commissioner with the Precedent Panel (E2) of the United Nations Compensation Commission in Geneva resolving claims arising out of the 1990 Gulf War. Over a series of nine installments, the E(2) Panel addressed several thousand corporate claims in the construction, insurance, banking, transportation, export, tourist and aviation sectors. I also served as the U.S.-appointed Member of the Property Claims Commission established under the German Forced Labor Settlement in 2000-2001. In 2004-2005, I served as lead counsel for the Government of Ethiopia in a set of matters before the Eritrea - Ethiopia Claims Commission. From 2002 to 2006, I served as President of the ICSID Tribunal in the matter of *Aguas del Tunai v. The Republic of Bolivia*. I also served as Counsel to the Defender of the Fund for the Marshall Islands Nuclear Claims Tribunal in the mid 1990s, and have provided legal counsel to various Governments.

5. As regards my competence with the law of the State of California, I have been a member of the Bar of California since 1984. I have periodically provided advice on the law of the State of California and practiced briefly in the State of California with the law firm of Pillsbury Madison & Sutro, as it was then known, from 1986 to 1987.

6. As regards my exposure to non-profit corporations, I am a member of the Board of the Trustees of the California Ocean Science Trust, a public California non-profit corporation, as well as a member of the Board of Trustees for the Center for American and International Law, a Texas non-profit corporation.

### **III. The Opinion Requested**

7. I was retained by Counsel for ICANN on February 19, 2009, to prepare an opinion generally as to the place of international law in these proceedings and specifically as to the meaning of Article 4 of the Articles of Incorporation of ICANN, that article providing:

4. 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

Counsel for ICANN indicated that, in preparing the opinion, particular focus should be given to the meaning and effect of the phrase in Article 4 which reads: “in conformity with relevant principles of international law and applicable international conventions and local law . . . .” and the role of this clause and international law generally in these proceedings.

8. Counsel for ICANN placed no constraints on the scope of the opinion requested. The necessary scope of the opinion is a matter within the expert’s discretion.

9. I note that Professor Goldsmith devotes a portion of his Expert Report to the application of his opinion as to the meaning of Article 4 to the facts present in this IRP process. I indicated to Counsel for ICANN that I did not foresee providing such an application. I stated that it is my view generally that an expert opinion should not undertake the application of the law upon which an opinion is given to the particular facts of the case because: (1) the application of the law to the facts is quintessentially a matter left to the panel, and (2) the facts available to the expert are necessarily limited. Counsel for ICANN indicated that this was their view as well.

#### **IV. Documents Reviewed**

10. In preparing this Opinion, I have had access to the documents at [www.icann.org/en/documents/](http://www.icann.org/en/documents/) and in particular relied upon (1) “Claimant’s Memorial on the Merits” dated 22 January 2009 and (2) the “Expert Report of Jack Goldsmith” dated 22 January 2009 (also attached to Claimant’s Memorial).

#### **V. Summary of Opinion**

11. This Opinion proceeds in the following manner.

- First, I define the scope of this Opinion and my understanding of the question before this Panel (Part VI).
- Second, I provide my opinion as to the law to be applied by the IRP to the question before it (Part VII).
- Third, I interpret Article 4 of the Articles of Incorporation (Part VIII).
- Fourth and last, I examine the content of the particular principles raised by ICM (Part IX).

12. The conclusions of this Opinion as are follows:

- First, in my opinion, the task of the Panel is clearly set forth in Article IV(3) of the ICANN Bylaws and is threefold. First, the IRP is to “compar[e] contested actions of the Board to the Articles of Incorporation and Bylaws.” Second, the IRP is to identify the prevailing party and “declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” Third, the IRP, if appropriate, 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 opinion of the IRP.” This Opinion is concerned with the first two of these tasks in the context of an assertion that certain actions of the ICANN Board of Directors are inconsistent with the Articles of Incorporation of ICANN, in particular Article 4. In this sense, this Opinion seeks to assist the Panel in understanding the



requirements of Article 4 so that it might “compare[e] the contested actions of the Board” so as to ascertain whether such actions were “inconsistent” with the requirements of Article 4.

- Second, applying the mandate of Article 28(1) of the ICDR Rules, the “appropriate” law applicable to the IRP’s effort to evaluate whether an action of ICANN is inconsistent with Article 4 of the Articles of Incorporation in my opinion is the law of the State of California. The IRP thus should ascertain the meaning of the various articles of Bylaws and Articles in accordance with the law of State of California, including its law regarding interpretation.

- Third, in my opinion the first sentence of Article 4 of the Articles of Incorporation means:

- The Corporation shall operate for the benefit of the Internet community as a whole in the sense that;

- it is “carrying out its activities,” meaning activities that follow from operating “for the benefit of the Internet community as a whole” and are contemplated by Article 3;

- in a manner “in conformity with,” meaning in a manner that corresponds in form, agrees in character or is in harmony, but need not be identical to or the same, with;

- “principles of international law,” meaning the principles (not the rules) of general international law to be found primarily in customary international law although some may also be found in universal multilateral treaties as well as in general principles of law recognized by civilized nations;

- to the extent that such principles are “relevant,” meaning those principles that are applicable to a private non-profit corporation and bearing on an activity contemplated by Article 3 and in dispute;

[with, as a secondary alternate meaning, that such principles are “relevant,” meaning those principles of international institutional law normally applicable to international organizations and bearing on an activity contemplated by Article 3 and in dispute]

- as well as being “in conformity with” both “applicable international conventions” and “local law.”
- Fourth, the principles raised by ICM in my opinion as a general matter are inappropriately characterized with the definiteness of rules rather than the generality of principles. Principles are abstract statements of legal truth within which specific rules may be articulated. In my opinion, there is a principle of good faith in international customary law and international institutional law. The good faith principle requires that an act be such that it may be reasonably said to fall within the outer limits of the principle. Given that it is difficult to ascertain whether an act falls within such outer limits, it not uncommon for tribunals to inquire as to the reverse. Namely, does the act manifestly violate the principle of good faith? The alleged principles of protection of legitimate expectations and of transparency -- as articulated by ICM -- in my opinion are not principles of international law. ICM in articulating its version of these principles in both instances draws on sources not speaking to a principle of general international law but rather to a specific conventional obligation.

## **VI. My Understanding of the Question before the IRP**

13. In this Part, I outline my understanding of the task before the Panel so as to define the scope of this Opinion. As Eric Kahler observed, the meaning of anything can be found only in its relationship to something else.<sup>1</sup> The question upon which I am to opine gains meaning only to the extent it addresses the question and task before the IRP. As this is the first invocation of the IRP process, a review of the rules empowering and guiding the process must be undertaken so as to understand the task before the IRP.

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<sup>1</sup> ERICH KAHLER, *THE MEANING OF HISTORY* (1964).

**A. The Procedure Giving Rise to this Proceeding**

14. The procedure requested by ICM is provided for in Article IV section 3 of the ICANN Bylaws. Article IV(3) empowers the independent review and defines its procedures; it is thus here that any inquiry into the task before, and powers of, this Panel must begin. The full text of Article IV(3) is attached to this Opinion. The following subsections are of particular relevance to the present proceeding. Article IV(3)(1) provides that:

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.

Article IV(3)(2) indicates who may request the “independent third party review” called for in subsection (1). In particular, subsection (2) provides:

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.

Article IV(3)(3) sets forth the charge given to the third party reviewers:

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.

The charge given to the IRP in terms of the authority it has and the content and form of the relief it may specify is set forth in greater detail in Article IV(3)(8) and IV(3)(12):

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.

....

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.

15. Other subsections of Article IV(3) provide that ICANN should appoint an international arbitration provider. The International Centre for Dispute Resolution was so appointed by an ICANN resolution. Finally, Article IV(3)(15) is possibly of relevance as well to the powers of the panel in its requirement that: "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

### **B. This Opinion's Understanding of the Question before the Panel**

16. In my opinion, the task presented to the Panel is clearly specified in the subsections of Article IV(3) quoted above. The task of the Panel in accordance with Article IV(3) of the ICANN Bylaws in my opinion is threefold.

- First, the IRP is to "compar[e] contested actions of the Board to the Articles of Incorporation and Bylaws."
- Second, the IRP is to identify the prevailing party and "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws."
- Third, the IRP, if appropriate, 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 opinion of the IRP."

17. This Opinion is concerned with the first two of these tasks in the context of an assertion that certain actions of the ICANN Board of Directors are inconsistent with the Articles of Incorporation of ICANN, in particular Article 4. In this sense, this Opinion seeks to assist the Panel in understanding the requirements of Article 4 so that it might "compare[e] the contested actions of the Board" so as to ascertain whether such actions were "inconsistent" with the requirements of Article 4.<sup>2</sup>

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<sup>2</sup> I note that ICM and its expert appear to be in rough accord with this understanding of the task before the IRP. There are a number of differences, however. At this point I note that both ICM and its expert in most instances phrase the task of the IRP as one of ascertaining whether the action was "consistent with" rather than

## VII. The Law Applicable to the IRP Review of ICANN Decisions

18. This Part provides my opinion as to the law applicable in this procedure. This is an important aspect of the Opinion because ICM and its expert are incorrect in my view in suggesting that the IRP process is governed by international law. In my Opinion, the IRP process clearly is governed by the law of the State of California. In their alternate view of what law applies, ICM and its expert agree that California law governs, adding in their view that choice does not lead to a different substantive result. Putting aside for the moment their assertion that the result is the same in either case, it is critical to observe in my opinion that their assertion that this process is governed by international law is based on numerous theoretical propositions that I do not dispute but that – most importantly – are not applied to this particular situation. The issue is not whether this proceeding could *in theory* be governed by international law, but whether it is. The choice of law argument utilized by ICM and its expert is not only not correct, it is also unfortunately confusing to their analysis (and potentially these proceedings) and is infused subsequently throughout their argument.

19. The IRP process is governed by the ICDR Rules, as modified by the Supplementary Procedures for ICANN cases. Article 28(1) of the ICDR Rules addresses applicable law and provides:

### Article 28

1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

Article 28(1) thus instructs the IRP (1) to apply the law designated by the parties, or if no such law is designated, (2) to apply the law it determines to be appropriate.

### A. The Disputants Have Not Designated an Applicable Law

20. The ICDR Rules first require the IRP to apply the law designated by the disputants; however, no law has been specified by the disputing parties. There is no law specified in Article IV(3) of the Bylaws which establishes the IRP, the April 19, 2004 Special

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whether it was “inconsistent with” the Articles of Incorporation and the Bylaws. Putting aside that it is inaccurate, I disagree with this phrasing to the extent that the use of phrase “consistent with” suggests that one starts with the assumption that the allegation of inconsistency is correct that and therefore the quality of “consistency” must be established, rather than the reverse.

Resolution of the ICANN Board, or in the ICDR Supplementary Procedures for ICANN Cases. In my Opinion, therefore, the IRP should proceed to the second step in Article 28(1) and determine the appropriate law to be applied.

21. ICM and its expert disagree with this view, arguing that ICM and ICANN have designated an applicable law. Professor Goldsmith, for example, states that the “Parties to this dispute have designated the laws contained in Article 4 as applicable to this dispute.”<sup>3</sup> He proceeds to argue that many corporate charters contain an arbitration agreement between shareholders and there is no reason--analogizing to bilateral investment treaties--that such an arbitration could not be extended to third parties.<sup>4</sup> Professor Goldsmith uses the possibility of arbitration agreements in corporate charters between shareholders to say that a choice of law clause would be similarly possible.<sup>5</sup> As to the theoretical possibility of such a clause, there is no dispute. Professor Goldsmith and ICM jump, however, from the theoretical possibility to the supposition that “Article IV acts as a choice-of-law provision.”<sup>6</sup> Neither ICM nor Professor Goldsmith, however, offers an analysis of *why* Article 4 in particular is such a choice of law clause.<sup>7</sup> In my opinion, it is not.

22. First, I observe that Article 4 is not by its language a choice of law clause and thus its characterization as such must be implied. Second, it is important to observe that Article 4 is not a part of the Bylaws in the sections where the IRP process was established.<sup>8</sup> Article 4 was adopted at an earlier point in time, yet it is not referenced in the Bylaws. The Bylaws in Article IV(3), with its offer of the IRP, could have made an explicit choice of the law for the IRP, but did not. Third, it is critical to observe that the references in Article 4 do not apply directly to other Articles of the Articles of Incorporation or to the Bylaws and thus could not serve as a choice of law clause generally for all IRP reviews.<sup>9</sup> Fourth, it is unlikely,

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<sup>3</sup> Expert Report of Jack Goldsmith, ¶ 15.

<sup>4</sup> I note that although ICM and ICANN dispute precisely what the nature of the IRP process is, they do not dispute that some process was extended by ICANN in its Bylaws to affected third parties.

<sup>5</sup> Expert Report of Jack Goldsmith, ¶ 18.

<sup>6</sup> ICM Memorial, ¶ 333.

<sup>7</sup> The reasoning of ICM is set forth in the ICM Memorial at ¶ 334 where it states that the analysis is straightforward. The reasoning that then follows (tracking Professor Goldsmith’s reasoning quite closely) also does not address the question of whether Article 4 contains a choice of law clause in the sense of Article 28(1).

<sup>8</sup> See ICANN Bylaws, Article IV, Section 3.

<sup>9</sup> Expert Report of Jack Goldsmith, ¶ 19.

and at a minimum unusual, that a choice of law clause would designate three sources of law joined by the conjunction “and,” that is, three laws at the same level of hierarchy.

23. This point of disagreement with ICM and Professor Goldsmith is important because their approach misapprehends the question before the IRP and the underlying confusion concerning Article 4 as a choice of law clause resurfaces in ICM and Professor Goldsmith’s analysis of the meaning of Article 4.

24. ICM’s reasoning as to why Article 4 is a choice of law clause is set forth in paragraph 334 of its Memorial. The above-mentioned confusion infuses ICM’s argument. Therefore, in the left-hand column below, I quote ICM’s conclusions with respect to why it believes Article 4 is a choice of law clause. In the right-hand column, I restate their argument more closely following the language of Article 4. In part this is a restatement of my view as to the question before the IRP, but it also makes clear that ICM’s argument does not address why Article 4 should be viewed as a choice of law clause.

<u>The text of ICM Memorial Paragraph 334</u>	<u>Comment</u>
Just as a corporate charter or corporate bylaws can contain an offer to arbitrate, so too can they contain a governing law clause. The analysis is straightforward:	
(1) ICANN's Bylaws offer <b>to arbitrate the issue</b> of whether the ICANN Board acted <b>consistently</b> with ICANN's Articles and Bylaws;	(1) ICANN's Bylaws offer <b>to affected parties an IRP process to decide</b> whether the ICANN Board acted <b>inconsistently</b> with ICANN's Articles and Bylaws;
(2) ICANN's Articles state that ICANN will carry out its activities in conformity with international and local law;	2) ICANN's Articles state that ICANN will <b>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;</b>
3) therefore, ICANN has offered <b>to arbitrate the issue of whether the Board carried out its activities in conformity with international and</b>	(3) therefore, ICANN has offered <b>an IRP process to decide whether an act of the Board was inconsistent with it operating for the benefit of</b>

local law.	the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law;
(4) ICM has accepted that offer in submitting its Request for Independent Review Process.	(4) ICM has accepted that offer in submitting its Request for Independent Review Process.
(5) Thus, “ICM and ICANN have <b>agreed to arbitrate</b> whether ICANN's denial of ICM's application for a .XXX sTLD (as well as the process leading to that denial) <b>complied</b> with ‘relevant principles of international law and applicable international conventions and local law.’”	(5) Thus, ICM and ICANN have <b>agreed to an IRP process to decide</b> whether an ICANN act (namely, the denial of ICM's application for a .XXX sTLD as well as the process leading to that denial) <b>was inconsistent with ICANN operating for the benefit of the Internet community as a whole, carrying out its activities in conformity with</b> “relevant principles of international law and applicable international conventions and local law.”

**B. The Appropriate Law to be Applied is the Law of the State of California**

25. In absence of a choice by the parties, Article 28(1) of the ICDR Rules directs the IRP to apply the law it determines to be “appropriate.”

26. In this IRP process, it does not appear to be disputed that the corporate identity of ICANN, its Articles of Incorporation and its Bylaws, are governed by the law of the State of California.<sup>10</sup> I do not have any doubt that California courts and the California Attorney General would apply the law of the State of California to such questions. Professor Goldsmith likewise agrees, writing as an alternate position that “even if the parties have not effectively designated the governing rules of law,” the appropriate law “is almost certainly California law.”<sup>11</sup>

<sup>10</sup> ICM Memorial, ¶ 336, citing with apparent approval the Expert Report of Jack Goldsmith at ¶ 20.

<sup>11</sup> Expert Report of Jack Goldsmith, ¶ 20, ICM Memorial, ¶ 336. Although Professor Goldsmith argues this alternate position, the misapprehended question of applicable law confuses the later interpretation of Article 4 by engendering a hierarchy discussion. *See, e.g.*, Expert Report of Jack Goldsmith, ¶ 20, where in addressing the question of hierarchy in Article 4 he states: “When international law is included in a treaty or *governing law clause*



27. California law would be applicable particularly to the question of interpretation of the Articles of Incorporation and the Bylaws. When presented with an issue of interpreting articles of incorporation, California state courts would utilize the common rules of statutory interpretation. “It is generally accepted that corporate bylaws are to be construed according to the general rules governing the construction of statutes and contracts.” *Sanchez v. Grain Growers Ass'n*, 126 Cal. App. 3d 665, 672 (Cal. Ct. App. 1981) quoting *American Center for Education, Inc. v. Cavnar*, 26 Cal.App.3d 26, 32 (Cal. App. 2d Dist. 1972); See also *Estate of Anderson*, 179 Cal. App. 2d 535, 537 (Cal. App. 4th Dist. 1960) where the Court of Appeal of California analyzed the plain meaning of Articles of Incorporation. They must be “given a reasonable construction and, when reasonably susceptible thereof, they should be given a construction which will sustain their validity . . . .” (*Id.* quoting *Oliny v. Merle Norman Cosmetics, Inc.*, 200 Cal.App.2d 260, 272 (Cal. App. 2d Dist. 1962)). Under the well-established rules of statutory interpretation that are thus applicable, the court first looks to the text of the statute. (“...we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context” in *Mejia v. Reed*, 31 Cal. 4th 657, 663 (Cal. 2003) quoting *Esberg v. Union Oil Co.*, 28 Cal.4th 262, 268 (Cal. 2002)). When the plain meaning is not enough, courts turn to canons of statutory interpretation. (“When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules of maxims of construction...” in *Id.*) Courts can also resort to the legislative history. (“Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.” in *Id.* quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1387 (Cal. 1987)). Courts may also consider public policy issues. (“Finally, the court may consider the impact of an interpretation on public policy” in *Id.*).

28. In my opinion, therefore, the law applicable to the IRP’s effort to evaluate whether an action of ICANN is inconsistent with Article 4 of the Articles of Incorporation is the law of the State of California. Thus the IRP should ascertain the meaning of the various articles of the Bylaws and Articles in accordance with the law of State of California, including its law regarding interpretation.

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as a source of law alongside national or local law, arbitrators sometimes conclude that international law, including general principles, should trump when in conflict with national law.”

## **VIII. The Meaning of Article 4 of the Articles of Incorporation**

29. In this Part, I consider the meaning of Article 4 and, in particular, focus on meaning and significance of the phrase: “relevant principles of international law.” In Part IX, I examine the particular “principles of international law” alleged by ICM and its expert to be applicable in this case.

### **A. General Observations Regarding the Structure and Meaning of Article 4**

30. To undertake a review of whether a particular action is inconsistent with Article 4 of the Articles of Incorporation, the Panel must first interpret what Article 4 specifically requires.

#### **1. The Place of Article 4 within the Articles of Incorporation in General**

31. The Articles of Incorporation for ICANN are attached to this Opinion as Attachment 1. The Articles of Incorporation are brief, only nine articles in length. Two comments about the place of Article 4 in the Articles of Incorporation are appropriate.

32. First, Article 3 states that ICANN is “organized under the California Public Benefit Corporation Law” as a nonprofit public benefit corporation, that it is “organized, and will be operated, exclusively for charitable, educational, and scientific purposes,” and that “[i]n furtherance of the forgoing purposes . . . shall, except as limited by article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global interest in the operational stability of the Internet by [there then follows a list of five categories of activities.]”

33. Article 4, in stating that the “Corporation shall operate for the benefit of the Internet community as a whole,” builds on the purposes set forth in Article 3. What the “Corporation” is and what it means for it to “operate” is to be understood in terms of Article 3. Thus Article 4 adds to Article 3 by stating that in operating in accordance with Article 3, the Corporation shall do so “for benefit of the Internet community as whole.” Article 4 goes on to discuss what it means to operate for the benefit of the Internet community as whole.

34. Second, although it does not appear to be an issue in these proceedings, I note that both Articles 5 and 8 open with the phrase “[n]otwithstanding any other provision” and thus, if applicable, are potential limitations on any interpretation of Article 4.

## **2. The Two Sentences of Article 4**

35. The text of Article 4 of the ICANN Articles of Incorporation is set forth above at paragraph 7. It contains two sentences.

36. The purpose of the first sentence is encompassed in the opening clause of that sentence: “The Corporation shall operate for the benefit of the Internet community as a whole . . .” The second sentence adds that, to meet the objective of the first sentence (“To this effect”), the Corporation shall cooperate as appropriate with relevant international organizations. The second sentence need not be addressed further in this proceeding.<sup>12</sup>

## **3. The Relationship between the Closing Phrases and the Opening Clause of the First Sentence of Article 4**

37. As to the first sentence of Article 4, I note that the opening clause of that sentence -- “The Corporation shall operate for the benefit of the Internet community as a whole” -- is a broad statement that does not itself provide a particularly detailed basis for a review of any decision of ICANN. It is difficult to see how any decision that had some rational basis arguably would be inconsistent with this very general statement.<sup>13</sup> ICM and Professor Goldsmith appear to agree with this interpretation of the initial clause, at least in the sense that they place the weight of their argument concerning inconsistency on the closing phrase of the first sentence: “carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”

38. It is the closing phrases that provide some guidance on how the Corporation is to undertake to “operate on behalf of the Internet community as a whole.” Namely, it shall do so: (1) by “carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law” and (2) “to the extent

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<sup>12</sup> It does not appear that ICM alleges that an act of the Board was inconsistent with the second sentence of Article 4 and that sentence is thus not considered further in this Opinion.

<sup>13</sup> Similarly, it would require a very unusual action or decision for it to be inconsistent with the second sentence of Article 4’s minimalist call for “cooperation when appropriate” with relevant international organizations.

appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.” In the context of this claim, ICM’s argument focuses primarily on the first of these two closing phrases.<sup>14</sup> As to the first closing phrase of the first sentence, it also is important to note that ICM does not claim that the actions of the Board of Directors were inconsistent with “applicable international conventions.” To the extent that ICM claims in the alternative that the actions of the Board were inconsistent with “local law,” this Opinion does not address consistency with local law in any detail given that the scope of this Opinion is limited to international law. Therefore, much of the analysis which follows focuses on the object of least specificity and the primary one in dispute: “relevant principles of international law.”

39. I stress, however, that the whole of the first sentence remains relevant and, in this sense, three comments are offered concerning “applicable international conventions and local law.” First, it does not appear to be disputed that “applicable international conventions” refers to treaties.<sup>15</sup> Second, it does not appear to be disputed that “local law” is a reference to the law of the State of California in the circumstances of this proceeding.<sup>16</sup> Third, the three sources listed in the first of closing phrases of the first sentence (“relevant principles of international law and applicable international conventions and local law”) are connected by the word “and.” In this sense, the three sources should be viewed as additive. ICANN is to operate for the benefit of the Internet community as a whole by carrying out its activities in conformity with each of these sources.<sup>17</sup>

#### **B. The Meaning and Significance of the Phrase – “carrying out its activities”**

40. The meaning of the phrase “carrying out its activities” is not addressed by ICM or Professor Goldsmith and does not appear to be disputed. It is worth emphasizing,

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<sup>14</sup> ICM turns to the second of the two closing phrases only briefly as support for its assertion that ICANN violated its Articles of Incorporation by failing to act open and transparently. ICM Memorial, ¶ 353.

<sup>15</sup> Expert Report of Jack Goldsmith, ¶ 22 (“Applicable international conventions refers to treaties”). Moreover, it is likely that “applicable” treaties would be those relevant both in terms of the nations involved and in terms of the subject matter of the action taken.

<sup>16</sup> Expert Report of Jack Goldsmith, ¶ 22 (“Local law” means California law”).

<sup>17</sup> This area is an example of where the argument of ICM and Professor Goldsmith that Article 4 is a choice of law clause engenders confusion. It is the view of Article 4 as a choice of law clause that leads both ICM and Professor Goldsmith to ask what the hierarchy should be between relevant principles of international law, applicable international conventions and local law. *See, e.g.* ICM Memorial, ¶ 339.

however, that the “activities” referenced are those activities contemplated by the purposes of Article 3.

### **C. The Meaning and Significance of the Phrase – “in conformity with”**

41. When first reading Article 4, I was struck by its preambular-like breadth and generality. Precisely how exacting was Article 4 intended to be? Looking to the drafting history of Article 4, one finds that the phrase “due regard” in the penultimate draft of Article 4 was replaced in the final draft with “in conformity with.” Professor Goldsmith argues that this change in language is more exacting.<sup>18</sup> I agree. But to say it is more exacting than “with due regard” does not mean that it requires perfect compliance. Neither ICM nor Professor Goldsmith interprets the phrase “in conformity with.” An examination of its meaning under the law of the State of California indicates that “in conformity with” is not a precise standard and certainly a less exacting standard than, for example, “in strict conformity with.”

42. In approaching the second clause of the first sentence, the applicable California law on interpretation directs us to the ordinary meaning of “in conformity with.” The Oxford English Dictionary defines “conformity” as “[c]orrespondence in form or manner; agreement in character; likeness, resemblance; congruity, harmony, accordance; exact correspondence to or with a pattern in some respect or matter.”<sup>19</sup> It is noteworthy in my view that the majority of terms in this definition do not imply an “exact correspondence.” Similarly, the Oxford English Dictionary defines “in conformity with” as “in agreement, accordance, or harmony with; in compliance with.”<sup>20</sup> In some samples of usage in the Oxford English Dictionary, a more exacting sense of “in conformity with” is achieved by the phrase “in strict conformity with” thereby implying that mere conformity is not strict.<sup>21</sup>

43. Though I do not claim particular expertise in California law, I note that the phrase “in conformity with” has been examined by the California Supreme Court:

The word “conform” is not the equivalent of “identical,” or of “the same.” Webster defines “conformity” thus: “Correspondence in character or manner; resemblance; agreement; congruity with something else.” This word is usually

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<sup>18</sup> Expert Report of Jack Goldsmith, ¶ 24 (“ratcheted up ICANN’s standard of compliance”).

<sup>19</sup> Oxford English Dictionary Online (04/22/09) at <http://dictionary.oed.com/cgi/entry/50047105>

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

followed by “to,” or “with,” and is frequently qualified by the word “perfect,” without which qualification identity is not indicated.<sup>22</sup>

The California Supreme Court thus found that a writ was “in conformity with” a complaint in that the amount designated on the former, though not identical, was “in correspondence in character and in harmony or congruity with” the latter.<sup>23</sup>

44. Thus both the ordinary meaning of “in conformity with” and the ordinary meaning as understood by the California Supreme Court likely require more than due regard but do not require perfect compliance. Therefore in my opinion “in conformity with” denotes correspondence in form, agreement in character, harmony, but not identical or the same, unless qualified by the word “perfect.”

#### **D. The Meaning and Significance of the Phrase – “relevant principles of international law”**

45. Given the claims of inconsistency by ICM, the key inquiry is into the meaning of the phrase: “relevant principles of international law.” To reiterate, the reference to relevant principles of international law in my opinion does not mean that the Articles of Incorporation are governed by international law. Rather, it means that meaning and requirements of a particular section of the Articles of Incorporation is to be understood in accordance with the law of the State of California by reference in part to a particular body of law known as “relevant principles of international law.”

46. The interpretation of “relevant principles of international law” presents at least three questions: (1) what meaning is to be given to the phrase “international law,” (2) what meaning and significance is to be given to the word “relevant,” (3) what meaning and significance is to be given the word “principles.” I answer each of these questions in turn and close this analysis with section tying the analysis of the three questions together.

#### **1. The Meaning of the Words “international law”**

47. The meaning of the phrase “international law” in Article 4 is not disputed. ICANN, ICM and Professor Goldsmith all appear to agree that this phrase is a reference to

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<sup>22</sup> *Chijulia de Leonis v. Etchepare*, 120 Cal. 407, 415 (Cal. 1898). I note that the Court views “in perfect conformity with” in the same manner as the Oxford English Dictionary is cited as viewing “in strict conformity with” in ¶42.

<sup>23</sup> *Id.*

“public international law.”<sup>24</sup> In a “strictly technical sense of a formal test of validity to be applied by courts,” the sources of public international law are set out in Article 38 of the Statute of the International Court of Justice (“ICJ”), as Professor Goldsmith states.<sup>25</sup> I agree. The sources set out in Article 38 are (1) treaties, (2) custom and (3) general principles of law.<sup>26</sup> Despite this seemingly broad agreement, the analysis of ICM and Professor Goldsmith’s Opinion do not follow this agreement and are unnecessarily confusing. I have three points.

48. First, it is astounding to me that in asking for an opinion on the meaning of Article 4 that ICM in Professor Goldsmith’s words “has not asked me to address issues of customary international law in this Report.”<sup>27</sup> I find this limitation incomprehensible and disabling of any opinion. It is as if the phrase read “in conformity with US law,” but then one is instructed to only consider such remnants of federal common law that may be found to exist, and to not consider either federal statutes or State law.

49. Second, Professor Goldsmith does not adequately explain in my opinion the basis for his opinion despite the exclusion of customary law.<sup>28</sup> Professor Goldsmith acknowledges the widely held view that “[t]he notion of “general principles” as originally articulated in the Permanent Court of International Justice referred to widely accepted principles recognized in national law, and was designed primarily as a gap-filler to avoid *non*

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<sup>24</sup> ICM Memorial, ¶ 345.

<sup>25</sup> Expert Report of Jack Goldsmith, ¶ 23.

<sup>26</sup> Article 38(a) of the Statute of the International Court of Justice describes the three sources as:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; ...

Judge Jennings observes: “[T]here is a sense in which the only adequate definition of international law is that it is the whole body of principles, rules and practices which satisfy the sources tests; but whilst true, this is also circular, because the sources are themselves determined by the law itself.” R. Jennings, *International Law*, in II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1165 (R. Bernhart, ed.,1995).

<sup>27</sup> Expert Report of Jack Goldsmith, footnote 28. ICM writes: “Customary international law, for present purposes, it is submitted, requires neither an analysis, nor results in an outcome that is any different.” ICM Memorial, ¶ 347.

I do not understand the motivation behind ICM’s instruction to its expert. It is clear that the content of custom is greater, specific and directed at States. This clear interstate character makes more apparent the problems present with assuming that the intention of ICANN was to transform international law obligations directed at States into obligations applicable to a private non-profit corporation. But, the motivation of ICM is not clear from the extant record.

<sup>28</sup> Professor Goldsmith notes that: “It is conceivable that the reference to ‘principles of international law’ . . . was meant to pick out ‘general principles’ but exclude customary international law. I doubt this is the correct interpretation.” Expert Report of Jack Goldsmith, footnote 30.

*liquet* when treaties and custom did not address an issue.”<sup>29</sup> Thus, if there is a custom, then one looks to it and not to general principles generally held by civilized nations. In other words, if there was both a custom and a general principle generally held by civilized nations that addressed a given situation, it is the custom that is applicable. For example, it may be a general principle of law recognized by civilized nations that an individual, even when accompanied by compensation, does not have the right to take the property of another individual. But it is clear under customary international law that a State may in certain circumstances with compensation take the property of an individual.<sup>30</sup> Customary international law is both more finite and more definite than the more general principles of international law that fill the interstices of international law proceedings before the International Court of Justice. This is the limited role given to “general principles of law recognized by civilized nations.”<sup>31</sup>

50. But despite his acknowledgment of the subsidiary status of general principles of law recognized by civilized nations, Professor Goldsmith proceeds to discuss those principles as though custom should not be the primary area of inquiry and is not relevant.<sup>32</sup> Professor Goldsmith devotes considerable argument to the point that “general principles of international law” includes “general principles of law recognized by civilized nations.” This point is not disputed to the best of my knowledge. That point, however, does not change the subsidiary nature of “general principles of law recognized by civilized nations.”

51. Third, in stating that the phrase “international law” means public international law, one simultaneously indicates what it does not include. As Hermann Mosler writes: “The term ‘general principles of law’ is used in various meanings which need to be distinguished to

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<sup>29</sup> Expert Report of Jack Goldsmith, ¶29. See generally GENNADY M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 181-85 (1993)(Principles are not part of the “formal category of [international law] sources [but] must nevertheless be taken into consideration as ‘supplementary’ sources,” from which “recourse may be had ... in order to fill certain gaps in general international law.”);

<sup>30</sup> Mosler writes “many general principles form part of customary law; however, the two concepts are not identical.” Hermann Mosler, *General Principles of Law*, in II THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 513 (1995).

<sup>31</sup> It is true that in certain areas of international law such as human rights where it is difficult to assemble the practice of States necessary to form a rule or principle of customary international law, that internal law and practice of States has been cited. But this practice is not without controversy and is done to provide evidence of custom, not as a source in and of itself.

<sup>32</sup> Professor Goldsmith writes that: “It is conceivable that the reference to ‘principles of international law’ . . . was meant to pick out ‘general principles’ but exclude customary international law. I doubt this is the correct interpretation. . . . But in any event the important point is that Article 4 is best read to include a requirement to act in conformity with general principles of law.” Expert Report of Jack Goldsmith, footnote 30.



avoid confusion.”<sup>33</sup> Although ICM and its expert look to “general principles of law recognized by civilized nations,” it should be noted that the authorities cited by both ICM and its expert range beyond those viewed as a part of public international law under Article 38(1)(c) of the Statute of the International Court of Justice. In this sense, ICM and Professor Goldsmith in my opinion take an unwarranted expansive view of the scope of “general principles of law recognized by civilized nations.” After Judge Mosler makes his careful comment that one needs to distinguish the various meanings of general principles of law “to avoid confusion,” Mosler goes on to list these various meanings that should be distinguished. Curiously, Professor Goldsmith takes the list as meaning that all of these various meanings have come together. Citing to this list, Professor Goldsmith writes that, although “general principles of law recognized by civilized nations” may have originally been intended to serve as a gap filler, “the concept of ‘general principles’ *has expanded to include* general principles that merge across different types of international legal relations and those that inhere in all forms of legal reasoning, domestic and international.”<sup>34</sup> (My emphasis.) This misapprehends the scope of this source of international law. All general principles of private law binding on individuals do not become “general principles of law recognized by civilized nations” binding upon States. For example, the Algiers Accords which established the Iran – United States Claims Tribunal provides that the tribunal shall apply, among other things, “general principles of commercial and international law,” thereby recognizing that at least two distinct sets of general principles exist.<sup>35</sup> ICM points out it is possible for parties to “choose ‘international law; or a blend of national law and international law or even an assemblage of rules known as international trade law, transnational law, the ‘modern law merchant’ (the so-called *lex mercatoria*) or by some other convenient title.’”<sup>36</sup> As a matter of party choice of law this may be possible, but it is beside the point. Article 4 in this instance refers to “international law” which it is agreed means public international law. The fact that public international law includes “general principles of law recognized by civilized nations” does not mean that all of the possibly general principles present in “national law . . . ,

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<sup>33</sup> Hermann Mosler, *General Principles of Law*, in II THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 511 (1995).

<sup>34</sup> Expert Report of Jack Goldsmith, ¶ 29.

<sup>35</sup> Claims Settlement Declaration, Article V. Cited in the Expert Report of Jack Goldsmith, ¶ 25, for the proposition, with which I agree, that general principles of international law include both principles of customary international law and general principles of law recognized by civilized nations.

<sup>36</sup> ICM Memorial, ¶335.

transnational law, [or] the ‘modern law merchant’ (the so-called *lex mercatoria*)” are a part of public international law.<sup>37</sup> At base, my point is that ICM and its expert move too easily among possible sources of general principles and, in seeking to articulate the contours of a particular principle of international law, on occasion refer to sources that are not necessarily on point and thus must be approached with care.

52. Although (1) custom should not have been excluded from the charge to its expert, (2) the use by ICM and its expert of “general principles of law recognized by civilized nations” at times is misplaced and (3) certain sources referenced are not part of a public international law, these points should not be taken to mean that phrase “international law” in Article 4 is without content. Instead, it is to suggest that the focus on the content of principles of general international law are to be found in customary international law, on occasion in universal multilateral treaties as well as general principles of law recognized by civilized nations. Thus there is some overlap between principles to be found in customary international law and general principles of law recognized by civilized nations. I agree with some of the principles identified by ICM and Professor Goldsmith and disagree as to some as well. More importantly, as discussed within, I disagree with the specificity both ICM and Professor Goldsmith give to such principles.

53. Finally, I note that although there is apparent agreement that “international law” refers to public international law, there are two important limitations to this reference in Article 4. First, the reference is to “relevant” international law. Second, the reference is to “principles,” rather than rules, of international law. It is to these significant limitations I now turn.

## **2. The Meaning and Significance of the Word “relevant”**

54. The word “relevant” is a critical and significant limitation on the meaning to be given “international law” in Article 4. Given that international law generally is not by its own terms applicable to the manner in which a California non-profit corporation is “carrying out

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<sup>37</sup> General principles of law recognized by civilized nations likewise do not necessarily include principles in private international law. There is a decisive difference between public and private international law in that “there is no legal order over and above the various national legal systems governing transborder relationships between individuals.” Ulrich Drobnig, *International Law*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1115 (R. Bernhart, ed.,1997).

its activities” for the “benefit of the Internet community as a whole,” the following paragraphs set forth my opinion as to ways in which it might be said that international law is “relevant.” I then offer a secondary meaning assuming that the IRP decides that it should undertake to transform international law principles so as to make them applicable to a private entity. Both of these possibilities represent a significant limitation on the scope of principles of international law referenced in Article 4. Finally, as discussed within, the fact that “relevant principles of international law” may have a limited effect compared to applicable international conventions or local law is not surprising, but rather may be precisely what was intended.

55. Looking first under California law to the ordinary meaning of the word, “relevant” is defined in Merriam-Webster as “having significant and demonstrable bearing on the matter at hand.”<sup>38</sup> Black’s Law Dictionary describes something “relevant” as being “logically connected and tending to prove or disprove a matter in issue.”<sup>39</sup> Under both definitions, relevant implies a strong relationship, a relationship that is “logically connected,” and “significant and demonstrable.”

56. To the extent one looks for principles with a “significant and demonstrable bearing on the matter at hand” or “logically connected,” then in my opinion the word “relevant” implies those principles of international law that are (1) addressed to the subject matter of the first sentence of Article 4, that is, relevant to the “activities” which are carried out so as to “operate for the benefit of the Internet community as a whole” as contemplated by Article 3; and (2) an international law principle applicable not only to States, but also to private non-profit corporations.

57. As discussed above, the phrase “carrying out its activities in conformity with relevant principles of international law” modifies the opening clause of Article 4, and in this sense “relevant” means that the principle in question must be “logically connected” to the action of the Board of Directors as they seek to operate for the benefit of the Internet community as a whole. It may bear on the manner in which the action or decision is taken

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<sup>38</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, at <http://www.merriam-webster.com/dictionary/relevant>.

<sup>39</sup> BLACK’S LAW DICTIONARY, 2<sup>ND</sup> POCKET EDITION 596 (2001).

for the benefit of the Internet community as a whole. The principle might also bear on the particular subject matter addressed or implicated in the action of the Broad.

58. In another sense of the term “relevant,” the “principles of international law” to be considered also are not those principles applicable solely to States, but rather those admittedly rare principles of international law intended to be applicable to private entities such as ICANN. ICM and its expert elide this question. But one would think that if Article 4 had instead said, for example, in conformity with relevant principles of French law, one would be pulled to examine French principles applicable to corporations rather than simply making the jump to transform principles of French law otherwise applicable only to French governmental agencies. It is true that international law between States is, in some national systems, transformed to be applicable to private entities as such law is incorporated into some national systems. Such a transformation is accomplished in the German Constitution at Article 25 for example, but there it is done explicitly.<sup>40</sup>

59. Professor Goldsmith asserts that, “It is perfectly appropriate to apply ‘general principles’ in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation,” because “ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation . . . .”<sup>41</sup> It is noteworthy how Professor Goldsmith in this passage describes ICANN as having “voluntarily subjected itself to these general principles.” However, although he may have been instructed not to address custom in his Report, surely if he is ascribing such an intent to ICANN, then that intent must also encompass not only general principles of law recognized by civilized nations, but also custom. In any event, ICANN is not a state. To imply that ICANN intended by Article 4 to transform international law so as to make it applicable to ICANN by analogy is a very substantial assumption in my opinion. ICM and Professor Goldsmith argue that the implication of such an intention is warranted because of the function of ICANN. It is to that possibility -- what I would regard as an alternate secondary meaning -- that I now turn.

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<sup>40</sup> Article 25 of the German Constitution declares that: “[t]he general rules of international law form part of the federal law. They prevail over statutes and create directly rights and duties for the inhabitants of the federal territory.”

<sup>41</sup> Expert Report of Jack Goldsmith, ¶ 26.

60. If the IRP makes the jump to transform international law principles so as to make them applicable to a private non-profit corporation, then the arguments raised by ICM and its expert in support of this jump suggest such transformation be limited to those principles applicable to the activities of international organizations rather than States generally – what I will describe as an alternative secondary meaning. In this alternative meaning, “relevant” in modifying the opening clause is seen as a direction to analogize the carrying out of activities by ICANN to the carrying out of activities by public international law organizations and therefore “relevant” is a reference to the principles of international law applicable to international organizations.

61. Although ICANN is not a sovereign state, ICM and its expert suggest that ICANN both in function and form operates on the international level, caretaking “a global shared resource.”<sup>42</sup> ICM writes, for example, that the ICANN Articles of Incorporation and Bylaws “are fitting for an organization that effectively functions as a global regulator, . . .”<sup>43</sup> From this functional observation, ICM and its expert argue that a proper interpretation of Article 4 impliedly requires that the duties of international law normally placed on States should be transformed and made applicable to ICANN. But if the interpretation of Article 4 is to involve an implied transformation of international law on the basis of a functional view of ICANN as an international regulator rather than an explicit textual interpretation looking to ICANN’s actual status as a California non-profit corporation, then in my opinion the appropriate analogy for ICANN under this functional view is not to a state, but rather to an international organization.<sup>44</sup>

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<sup>42</sup> ICM Memorial, ¶ 432.

<sup>43</sup> ICM Memorial, ¶ 343; *see also* ¶ 351 (stating “International regulator of one of the world’s most important resources”).

<sup>44</sup> P. Klein, *International Organizations or Institutions, Decision-Making Process*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, (R. Wolfrum, ed., OUP Online Version (2009)), ¶ 3 (“defining an international organization as “secondary objects of international law, in the sense that they have been created for specific purposes by the primary subjects of the international legal order, [i.e.] states.”); *see also* K. Schmalenbach, *International Organizations or Institutions, General Aspects*, in: *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, (R. Wolfrum, ed., OUP Online Version 2009), ¶ 76.

Professor Goldsmith contends that “ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe’s most important resources.” Goldsmith Report, ¶ 26. Simultaneously, despite these assertions, it is clear that ICANN, a California 501(c)(3) non-profit corporation, is not an international organization, such as the World Bank or the United Nations. The International Law Commission (ILC) defines an international organization as, “an international organization established by treaty or other instrument governed by international law and possessing its own legal personality.” Report of the International Law Commission, Fifty-fifth Session, GAOR

62. At the outset, it must be emphasized it is difficult to transform the law of international organizations and distill the principles applicable to a private non-profit corporation. In the following paragraphs I note two limitations.

63. First, it should be noted that the international law of international organizations is dictated in large part by the constitutive document establishing the organization. C. F. Amerasinghe writes that “the law relating to a particular organization will flow basically from conventional law, namely the constitution of that organization.”<sup>45</sup> In this sense, it is not easy to say there are principles of custom applicable to international organizations. Indeed, in the view of some, “the diverging legal nature of the internal legal order of international organizations and the domestic legal order of States” results in the fact that “the general principles of the laws of international organizations differ from those general principles of law addressed in Art. 38(1)(c) ICJ Statute.”<sup>46</sup> The “general principles of law recognized by civilized nations”<sup>47</sup> are deduced from national legal systems, for example from the right to be heard.<sup>48</sup> They may be applied by the organs of the international organization, but they will not transform into general principles of the law of international organizations until such time as “a multitude of organizations apply identical internal rules,” as has occurred with the implied power doctrine and the *ultra vires* doctrine.<sup>49</sup>

64. Second, “a large number of international customary rules are not relevant for the majority of international organizations due to the rules’ traditional focus on State-related issue, e.g., basic principles on the treatment of foreigners and human rights.”<sup>50</sup> Customary international law does apply to some organizations, however, that operate in the same

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58<sup>th</sup> Session Supp 10, 38 (2003). They can thus be understood as entities (1) established by a treaty or other instrument of international law, and (2) are capable of generating “autonomous will distinct from the will of ... its members.” K. Schmalenbach, *International Organizations or Institutions, General Aspects*, in: ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum, ed., OUP Online Version 2009), ¶ 3. Another distinction from private entities is that the membership of international organizations is of course primarily, if not exclusively, States. *Id.* ¶ 9.

<sup>45</sup> C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 20 (2<sup>nd</sup> ed., 2005).

<sup>46</sup> *Id.* ¶ 77.

<sup>47</sup> Statute of the International Court of Justice, Article 38(1)(c).

<sup>48</sup> K. Schmalenbach, *International Organizations or Institutions, General Aspects*, in: ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum, ed., OUP Online Version 2009) ¶ 77.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* ¶ 78.

domain and manner as States.<sup>51</sup> It is thus necessary to look to the powers of and restrictions on each organization to determine what rules apply to it and whether any modification must be made to those rules in light of the organization's charter. It is, for example, accepted that international organizations are governed by, *inter alia*, the law of treaties and the law of international responsibility with appropriate adaptations.<sup>52</sup>

65. Nonetheless, having pointed to these difficulties, it is thought that there exists a special branch of law applicable to international organizations whose sources are somewhat different from those in the international law governing relations between States. Amerasinghe lists these sources as:

- (i) the constitution of an organization and its interpretation;
- (ii) legislative texts of an organization . . . ;
- (iii) the law creating practice of an organization;
- (iv) general principles of law, such as are applied in international administrative law or in any relevant area;
- (v) customary international law, such as applies to the interpretation . . . and to the responsibility of and to organizations;
- (vi) conventional law, such as applies in the case of most open organizations to immunities and privileges;
- (vii) judicial decisions, insofar as they apply general principles, for example, in the interpretation of texts.<sup>53</sup>

This list demonstrates the difficulty just described in transforming the law applicable to international organizations to the situation under consideration. In the above list, only “(iv) general principles of law, such as are applied in international administrative law or in any relevant area” appear to be relevant to the role of international law in this proceeding.<sup>54</sup>

66. In conclusion, the word “relevant” limits the scope of the phrase “relevant principles of international law” both in the sense that the principle of international law must be one applicable to the actions of a private non-profit corporation and that principle must be related to the activities contemplated by the opening clause of Article 4 which in turn is related to the purposes set forth in Article 3. An alternative secondary meaning is that the word “relevant” limits the scope of the phrase “relevant principles of international law” both

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Other rules pertaining to human rights, humanitarian law and the law of *occupation bellico* still remain subject to controversy. *Id.*

<sup>53</sup> C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 21 (2<sup>nd</sup> ed., 2005)

<sup>54</sup> Items (v) and (vii) also appear possibly applicable, but I do not see their applicability to these proceedings.

in the sense that the principle of international law must be one applicable to the actions of an international organization and that principle must be related to the activities contemplated by the opening clause of Article 4 which in turn is related to the purposes set forth in Article 3.

### 3. The Meaning and Significance of the Word “principles”

67. The word “principles” also is a significant limitation on the meaning to be given “international law.” The significance of the use of the term “principles” turns on the fundamental distinction in form and obligation between “principles” and “rules” and the choice of ICANN to use the former rather than the latter term.

68. Stated broadly, rules of law are specific statements of obligation intended to apply to a defined class of situations. Principles, in contrast, are more abstract considerations that might be applied in the way that the common law would term equity, and that can serve as the abstract limits within which more specific rules are articulated. For Schwarzenberger, legal principles are “abstractions and generalizations from legal rules or individual cases.”<sup>55</sup> Professor Bin Cheng, whose scholarship is noted not only with frequency by Professor Goldsmith but also the larger academic community, explains that “this part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself.”<sup>56</sup> In other words, a principle is a general equitable obligation whose breadth can potentially embrace a number of rules with specific obligations.

69. The ICJ in the *Anglo-Norwegian Fisheries Case* describes the difference between rules and principles in the context of the delimiting of territorial seas. First, recognizing the existence of the distinction between rules and principles, the Court wrote, “It does not follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation . . . is not subject to certain principles which make it possible to judge as to its validity under international law.”<sup>57</sup> The Court continued

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<sup>55</sup> GEORG SCHWARZENBERGER, *THE INDUCTIVE APPROACH TO INTERNATIONAL LAW* 50 (1965).

<sup>56</sup> BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 24 (1953).

<sup>57</sup> *Anglo Norwegian Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 132 (Judgment of Dec. 18).



on to explain the function of these particular “principles”: “certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.”<sup>58</sup> Thus although Norway had not adopted the particular set of baseline rules utilized by the United Kingdom, the set of baselines rules adopted by Norway (that is, a system of straight baselines) did not breach the abstract principle applicable, namely that the baselines follow the general direction of the coastline.<sup>59</sup>

70. It is noteworthy that Professor Michael Reisman reflecting on the concept of softness in international law looked in particular to the *Anglo-Norwegian Fisheries Case*:

\* \* \*. In fact, law can be soft in all its dimensions: in terms of its content, in terms of its authority, and in terms of control intention.

Let me give you one example of a formula that is very soft in terms of its content. In 1951 the International Court of Justice, purporting to establish limits on what a state could do in establishing straight baselines, said as follows: “[W]hile such a state must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.” “General direction of the coast” is not defined, “appreciable extent” is not defined, “departure” is not defined; this becomes in many ways a very permissive formula. It is very soft in terms of content.<sup>60</sup>

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<sup>58</sup> *Id.*, p. 133.

<sup>59</sup> Thus the Court in this part of the Judgment found Norway to have not breach international law noting that this is not a case of “manifest abuse” and that the line “appears to the Court to have been kept within the bounds of what is moderate and reasonable.” *Id.*, p. 142. It is noteworthy that this reasoning suggests that in the case of a principle such as the general direction of the coastline, several baseline constructions would have been “reasonable and moderate.” A similar reasoning is present in Judge Schwebel’s Separate Opinion in the *Gulf of Maine* case where in the context of applying a law that involves equitable considerations he writes that:

Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line which my analysis produces, I have voted for the Chamber’s Judgment. I have done so . . . because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally – and certainly equitably – plausible interpretation. . . . On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations are dominant. . . . [I]t is to be expected that differences of judgment on the application of equitable principles will arise . . . .

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.A.) Judgment of 12 October 1984 (Separate Opinion of Judge Schwebel).

<sup>60</sup> “A Hard Look at Soft Law” 82 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 371-391 (1988) (Remarks of Michael Reisman).

Todd Weiler also expresses the idea that general principles of law, “because of their level of abstraction,” differ in their role in international dispute settlement from that “of a more precise legal rule, such as a treaty obligation.” Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUMBIA J. TRANSNATIONAL L. 35, 46 (2003). He writes:

71. This meaning to the word “principles” is confirmed by the wording of the entire phrase in Article 4. The three sources mentioned there are “relevant principles of international law, and applicable international conventions and local law.” A logical question asks why the drafters having already referred to international law, nonetheless included the category of “applicable international conventions.” In my opinion, the explanation is that in referring to “principles” of international law the drafters clearly did not refer to the “rules” of international law and that much of the possibly applicable treaty law would be a matter of rules and thus needed to be addressed separately.

72. Professor Goldsmith and ICM do not agree with this meaning of the word “principles.” Professor Goldsmith, for example, writes that “the general principles relevant here complement, *amplify, and give detail* to the requirements of independence, transparency, and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law.”<sup>61</sup> (My emphasis.) In my opinion, “principles” by their nature do not “amplify and give detail” to requirements. “Principles” under certain rules of interpretation may aid in the construction of an ambiguous provision. But even then, principles would not “give detail.” Principles provide the outer boundaries of a norm and in that context the details of a given situation can be assessed.

#### **4. Conclusion as to the Meaning of the Phrase “relevant principles of international law”**

73. The phrase “relevant principles of international law” means those principles (as opposed to rules) of international law that (1) are to be found in customary international law and on occasion in universal multilateral treaties as well as in general principles of law recognized by civilized nations, and (2) are applicable to the actions of a non-profit corporation and are logically related to the activities contemplated by the opening clause of Article 4 which in turn is related to the purposes of ICANN set forth in Article 3.

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The roles of a principle are to fill the lacunae that exist between more determinative rules and to assist the decision-maker in interpreting more particularized rules properly. The general principles of international law perform these functions as a complement to the application of customary international law, particularly in the absence of a governing treaty rule.

*Id.*, citing Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 DUKE J. COMP. & INT’L L. 35, 63 (1994).

<sup>61</sup> Expert Report of Jack Goldsmith, ¶ 27.

74. I observe that the meaning given here to “relevant principles of international law” means that that phrase will have a limited general effect compared to “applicable international conventions” or “local law.” This outcome is not surprising to me but rather in my opinion may be precisely what was intended. As stated above, the question before the IRP does not require that there be a hierarchy between the sources mentioned in Article 4. ICANN’s act must not be inconsistent with its carrying its activities in conformity with all three of the sources. But the fact that there is not a hierarchy does not mean that any one of the three sources cannot be more or less demanding than the other two. Both “applicable international conventions” and “local law” contain many rules, as well as possibly some principles. These rules are inherently more specific than principles. It is theoretically possible that satisfaction of all of the rules of applicable “international conventions” and “local law” might not also satisfy all “relevant principles of international law.” I would suspect that that would be a rare case, however.

#### **E. Conclusion as to the Meaning of Article 4**

75. The IRP is presented with a request to determine whether an action of the Board of Directors of ICANN is inconsistent with Article 4 of the Articles of Incorporation. In approaching this task, the IRP should ask whether the act is inconsistent with the statement that:

- The Corporation shall operate for the benefit of the Internet community as a whole in the sense that;
- it is “carrying out its activities,” meaning activities that follow from operating “for the benefit of the Internet community as a whole” and are contemplated by Article 3;
- that is “in conformity with,” meaning in a manner that corresponds in form, agrees in character or is in harmony, but need not be identical to or the same, with;
- “principles of international law,” meaning the principles (not the rules) of general international law to be found primarily in customary international law although some

may also be found in universal multilateral treaties as well as in general principles of law recognized by civilized nations;

- to the extent that such principles are “relevant,” meaning that those principles are applicable to a private non profit corporations and bearing on an activity contemplated by Article 3 and in dispute;

- [or as a secondary alternate meaning, that such principles are “relevant,” meaning those principles of international institutional law normally applicable to international organizations and bearing on an activity contemplated by Article 3 and in dispute];

- as well as being “in conformity with” both “applicable international conventions” and “local law.”

#### **IX. The Content of the Principles of International Law Raised by ICM**

76. In this Part, I consider the particular principles of international law raised in these proceedings. ICM focuses upon the principle of “good faith” arguing that the actions of the Board were inconsistent with this principle in several respects. I agree that there exists in customary international law a principle of good faith which is closely related to the concept of abuse of rights. In my opinion, however, ICM and its expert overstate as a general matter the specificity of the principle of good faith. In this sense, I disagree with Professor Goldsmith’s suggestion that “the general principles relevant here complement, *amplify, and give detail* to the requirements of independence, transparency, and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law.”<sup>62</sup> (My emphasis.) In my opinion, “principles” by their nature do not “amplify and give detail” to requirements.

77. To the extent that any principle is found by the IRP to be applicable in these proceedings, it is appropriate to also consider how the IRP or any tribunal is to assess whether the requirements of a principle have not been met. The key fundamental distinction in my opinion for the IRP to bear in mind is that between (1) the conduct which the

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<sup>62</sup> Expert Report of Jack Goldsmith, ¶ 27.

principle as a normative statement seeks to encourage (for example, one should act in good faith) and (2) the conclusion that the generalized abstract requirement of the principle has been breached (for example, that person did not act in good faith). The principle of good faith, for example, is much easier to state in the abstract than to examine in a particular case. In this vein, Bin Cheng writes, for example, that “since discretion implies subjective judgment, it is often difficult to determine categorically that the discretion has been abused.”<sup>63</sup> Indeed, many of the cases in which the term “good faith” appears do not involve a finding that a party did not act in good faith but rather is a term added seemingly as a reminder to the parties of the conduct required by the principle. Aristotle writes “it is possible to fail in many ways . . . while to succeed is possible in only one way (for which reason also one is easy and the other difficult – to miss the target easy, to hit it difficult).”<sup>64</sup> It is in the nature of principles that tribunals seeking to assess whether the requirements of a principle have not been met should not ask whether the conduct attains the epitome of the conduct encouraged by the principle (the center of the target) but rather whether the conduct may be reasonably said to fall within the outer limits of the principle (not missing the target altogether). Given that it is difficult to ascertain whether an act falls within such outer limits, it is in my view appropriate for tribunals to inquire as to whether the conduct clearly outside falls of the boundaries of the principle or, in other words, whether the act manifestly violates the principle?<sup>65</sup>

78. In addition, it is my opinion that ICM inappropriately utilizes mentions of good faith arising in autonomous instruments so as to find specific conventional understandings and duties in such instruments. This criticism applies to ICM’s arguments regarding duties to protect legitimate expectations and provide transparency. Currently, there is often raised in investor-state arbitration, questions as to scope of obligations on States under bilateral investment treaties to protect the legitimate expectations of investors and to provide transparency. Putting aside the question of whether these obligations are principles or rules, these obligations are most strongly expressed in arbitrations involving conventional rather than customary international law. As discussed within, ICM inappropriately relies

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<sup>63</sup> *Id.* .

<sup>64</sup> ETHICS 1106b 28.

<sup>65</sup> Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 142 (Judgment of Dec. 18)(“except in a case of manifest abuse”).

primarily on these conventional sources so as to allege principles of general international law. Clearly, there exists an obligation in customary international law to provide a minimum standard of treatment to foreigners.<sup>66</sup> This standard, however, is quite distinct from the detailed and specific duties to protect legitimate expectations and provide transparency articulated by ICM.

79. Finally, I consider the disagreement between the disputants as to whether a review of the decisions of the Board of Directors of ICANN should involve a degree of deference akin to that found in the business judgment rule present in the corporation law of the State of California, the law of other states of the United States and in analogs in other countries. To the extent that the IRP looks to relevant principles of international law in terms of the principles applicable to international organizations, I discuss the principle employed by international administrative tribunals reviewing the discretionary actions of international organizations where there is in that practice, in my opinion, a degree of deference that is supportive of the invocation by ICANN of the business judgment rule.

#### **A. The Customary International Law Principle of Good Faith**

80. With respect to the “relevant principles of international law” that ICM seeks to incorporate into this IRP, Professor Goldsmith focuses upon one: the principle of good faith.<sup>67</sup> He describes good faith as “a background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised.”<sup>68</sup> From this broad principle, he then asserts there are three “related applications” applicable to this proceeding: (1) “the requirement of good faith in complying with legal restrictions;” (2) “the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights;” and (3) the requirement of good faith in contractual negotiations.<sup>69</sup> And then he additionally asserts that “[t]he principle of good faith also encompasses the related principles of fairness, estoppel,

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<sup>66</sup> As to the well established customary standard, *see, e.g.*, S.D. Myers v. The United States of America, NAFTA, Partial Award (Nov. 13, 2000); *Mondev v. The United States of America*, NAFTA, Award (Oct. 11, 2002); *International Thunderbird Gaming v. United Mexican States*, NAFTA, Award (Jan. 26, 2006); all citing to the seminal case of *Neer v. Mexico*, 4 R. Int'l Arb. Awards (Oct. 15, 1926).

<sup>67</sup> Expert Report of Jack Goldsmith, ¶ 28, *et. seq.*

<sup>68</sup> *Id.* ¶ 32, quoting MALCOLM SHAW, INTERNATIONAL LAW 97 (2002).

<sup>69</sup> *Id.* ¶ 31.

and transparency.”<sup>70</sup> ICM also invokes the principle of good faith, putting its own faith squarely in this principle, and describing it as the “the foundation of all law and all conventions,”<sup>71</sup> ICM also raises the alleged principles of transparency and protection of legitimate expectations.

81. I agree with ICM and its expert that there exists a principle of good faith, although I would express it as a principle of general international law founded in customary international law. I agree with ICM and its expert that a concept closely related to the principle of good faith is the doctrine of non-abuse of rights,<sup>72</sup> which ICM describes, “as an omnibus term to describe certain ways of exercising power which are legally reprehensible,”<sup>73</sup> although of course this is a doctrine applicable to States.<sup>74</sup> I disagree with the specificity that ICM and its expert give to the principle of good faith, despite the very general definitions that they offer for it.

82. The *Anglo-Norwegian Fisheries* case states that the principle of good faith requires that every right be exercised honestly and loyally.<sup>75</sup> Professor Cheng explains that a discretionary power must be exercised in good faith, which means “reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.”<sup>76</sup> At root, a challenge based on a lack of observance of a principle of good faith, in my opinion, is an inquiry as to whether a particular action may be said to “reasonably” fit within the outer boundaries of the norm indicated by the abstract principle. As discussed above, given that it

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<sup>70</sup> *Id.* ¶ 33.

<sup>71</sup> ICM Memorial, ¶ 349, quoting BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105 (1953) (citations omitted).

<sup>72</sup> Expert Report of Jack Goldsmith, footnote 54, quoting Cheng, at 121 (noting that the abuse of rights principle “is merely an application of this [good faith] principle to the exercise of rights”).

<sup>73</sup> ICM Memorial, ¶ 427, quoting GDS Taylor, *The Context of the Rules Against Abuse of Rights in International Law*, 46 BRIT. Y.B. INT’L L. 323, 325 (1972-1973). The close relationship between good faith and abuse of rights as argued by ICM is clear in its statement within its arguments relating to abuse of rights that, “ICANN abused its discretion for not having acted in good faith; having taken into account of irrelevant factors; failing to take account of relevant ones; and acting for an improper purpose in a fictitious manner.”

<sup>74</sup> See Expert Report of Jack Goldsmith, ¶¶ 36-37 (describing that “[i]n all of these cases [that he cited for support of his conclusions], nations had legally circumscribed discretion to act, but this discretion was tempered by good faith.”) (emphasis added); See also *id.*, note 59, quoting Alexandre Kiss, *Abuse of Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4 (1992) (“In international law, abuse of rights refers to a *State* exercising a right ... for an end different from that for which the right was created, to the injury of another *state*.”) (emphasis added).

<sup>75</sup> *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

<sup>76</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 134 (1953).

is difficult to ascertain whether an act falls within such outer limits, it not uncommon for tribunals also to inquire as to the reverse: Namely, is the act clearly outside of the boundaries of the principle or, in other words, does the act manifestly violate the principle of good faith?<sup>77</sup>

83. The broad brush with which the principle of good faith operates is evident in Professor Goldsmith's exposition on the "related applications" he finds applicable to this review. In each section, at most only three paragraphs (and in the final section with respect to good faith in contract negotiations, only one) are devoted to expounding upon the legal premise for these specific implications. The first "related application"—good faith in complying with legal restrictions—is explained as generally requiring "that one party should be able to place confidence in the words of the other," and "promises should be scrupulously kept so that ... confidence ... may be reasonably placed upon them."<sup>78</sup> This requirement Goldsmith reads to require a state to uphold an investor's legitimate law-based expectations.<sup>79</sup> With respect to abuse of rights, Goldsmith provides more sources, but describes "its core meaning" as "the exercise of legal discretion or legal rights must be made in good faith."<sup>80</sup> Finally, with respect to the "related application" of good faith in contract negotiations, Goldsmith explains: "It is settled that "[a]s a general principle of law, contracts must be *negotiated* and performed in good faith"<sup>81</sup> and "each party must act in accordance with good faith and fair dealing in international trade."<sup>82</sup>

84. Although I appreciate Professor Goldsmith's intent to provide examples and applications of this principle of law, I find that his explanations for these "general applications," not to mention the "related principles of fairness, estoppel, and transparency," do not truly provide more beyond the broad requirement of reasonableness, honesty and conformity with the spirit of the law. As he and ICM suggest a series of rather specific

<sup>77</sup> Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 142 (Judgment of Dec. 18) ("except in a case of manifest abuse").

<sup>78</sup> Expert Report of Jack Goldsmith, ¶ 33, quoting Anthony D'Amato, *Good Faith*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, at 599 (1995).

<sup>79</sup> *Id.*, citing Bin Cheng, at 107, 119.

<sup>80</sup> *Id.* ¶ 35, citing Complaint by United States, *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 158 (1998).

<sup>81</sup> *Id.* ¶ 41, quoting SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES: 1945-1986, at 173-74 (1989).

<sup>82</sup> *Id.*, quoting UNIDROIT Principles 2004, Preamble.



requirements as emanating from the principle of good faith, I am reminded of the dangers of natural law and Woolsey's critique of Puffendorf: "[He] commits the faults of failing to distinguish sufficiently between natural justice and the law of nations; of spinning the web of a system out of his brain."<sup>83</sup> I agree with Goldsmith that the principle of good faith is applicable in numerous, if not all, situations, but I do not see specificity that is universally applied. Marion Panizzon writes:

There is a debate in the doctrine whether the principle of good faith is a moral principle devoid of normative content or whether it expresses normative values, such as a right, an obligation or standards and, thus constitutes a source of law. For the ILC, on the one hand, 'the expression "in good faith" should also certainly be retained, for those words were the very essence of the rule stated. The obligation was not only moral, but also a legal one.' For Zoller, on the other hand, good faith belongs to the realm of morality and policy.<sup>84</sup>

I do not contend that the principle of good faith is not a legal one, but rather find the mere existence of debate described to strongly support the abstract general character necessarily present in a principle.

85. To the extent that the principle of good faith is found to apply in this review, I believe its place as a practical matter comes after more specific rules and laws. Principles are intended to fill the interstices between rules, and the principle of good faith, perhaps the most broad and general of general principles of law, must indeed play second fiddle to those rules and obligations that specifically apply in this review. That is not to say that good faith should not be considered; the second fiddle is not mutually exclusive to the first in an orchestra, it merely plays in the background to the more refined and accomplished musicians ahead of it. Thus, to the extent that the rules and laws applicable in this review do not completely provide the basis for this Panel's consideration, it should look to the principle of good faith playing quietly in the background to determine if ICANN has carried out its "operati[ons] for the benefit of the Internet Community as whole" with honesty, reasonableness and in conformity with the spirit of law.

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<sup>83</sup> T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW §(5<sup>th</sup> ed., 1879).

<sup>84</sup> MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO 11-12 (2006).

86. ICM asserts that a relevant principle of international law related to the principle of good faith is that of estoppel. I observe that the place of estoppel as a principle or doctrine of international law has generated confusion. Müller and Cottier write that:

In international law the doctrine of estoppel or preclusion is a concept in evolution. . . . there is no doubt that estoppel is an operating doctrine in international law. Nevertheless, there is no consensus about the adequate source of the law. Most authors consider the doctrine to be a general principle of international law, founded in the broad concept of good faith. This foundation may well be accurate with respect to an extensive [i.e. they appear to mean generalized] doctrine of estoppel. . . . On the other hand, a restrictive concept [i.e. they appear to mean particularized] may hardly be constructed as a universally adopted legal rule.<sup>85</sup>

I do not argue that there is not a principle of estoppel, but rather note that, in my opinion, much of the confusion and debate surrounding the doctrine/principle is a result of the fact that the word “estoppel” is raised in a number of quite different contexts and that the concept of estoppel in its particulars is understood differently by the various legal systems.

87. In this sense, I find it useful to observe how ICM utilizes the concept of estoppel in these proceedings. And here, I note that ICM’s argument concerning estoppel is strikingly similar to its argument concerning that principle it asserts for the protection of legitimate expectations which I consider in the next section. In its approach to estoppel, ICM argues that “the good faith and estoppel principles are closely linked to the binding nature of unilateral statements.”<sup>86</sup> In this same vein, ICM writes: “Representations ... may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposed a certain state of act to exist.”<sup>87</sup> Both the binding nature of unilateral statements and the actions of the person to whom such statements are directed are at the heart of ICM’s legitimate expectations argument. For example, the previous quotes are similar to a quote from the Court of Arbitration for Sport that ICM offers as a part of its legitimate expectations section: “when conduct of one party has led to raise legitimate

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<sup>85</sup> Jörg Müller and Thomas Cottier, *Estoppel*, in II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 116, 118 (R. Bernhardt, ed. 1995).

<sup>86</sup> ICM Memorial, ¶ 456.

<sup>87</sup> *Id.*

expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party.”<sup>88</sup>

88. Given the questions that exist regarding the precise content of a principle of estoppel beyond that of good faith and given the fact that ICM’s reference to that principle appears to follow the form of its legitimate expectations argument, I consider both arguments in the context of the alleged principle of protection of legitimate expectations.

### **B. The Assertion of an International Law Principle of Protection of Legitimate Expectations**

89. ICM argues that “relevant principles of international law” include a “principle of legitimate expectations,”<sup>89</sup> which it asserts requires that “the applicable law should be applied in a manner which is compatible with the shared expectations of the parties.”<sup>90</sup> ICM cites numerous examples of various legal regimes that it argues have independently adopted an obligation for States to not upset legitimate expectations.

90. In my opinion, however, the duty as described by ICM does not arise under customary international law. ICM bases its argument for this duty by citing to several treaties and institutional agreements that it reads to include an obligation to protect legitimate expectations. I note, however, that there are, in general, two types of clauses in such international agreements: those that adopt autonomous language and those that incorporate customary international law. Examination of the first involves only the parsing of the language of the agreement as guided by Article 31(1) of the Vienna Convention; the latter requires an examination of custom and its requisite examination of State practice that is accompanied by *opinio juris*. Autonomous treaty language is simpler to determine, but is not transferable necessarily to other agreements; it is by its very meaning “autonomous” or “independent” and thus speaks solely to the specific language at hand. Custom, on the other hand, though more difficult to ascertain, applies generally to all States.

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<sup>88</sup> ICM Memorial, ¶ 445.

<sup>89</sup> ICM Memorial, ¶ 415.

<sup>90</sup> *Id.* ¶ 440, quoting Ian Brownlie, *Some Questions Concerning the Applicable Law in International Tribunals*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY, ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI* 768 (J. Majarczyk, ed, 1996).

91. In this case, ICM cites to several treaties and institutional agreements that it reads to include an obligation to protect legitimate expectations. ICM then attempts to extrapolate from these agreements a general principle of international law. A look at ICM's sources, however, illustrate that the mentions of such a "principle of legitimate expectations" are found within autonomous treaty language.

92. As an example, ICM's reliance on autonomous treaty language to find its "principle of legitimate expectations" is especially obvious in its assertion that a number of Investor-State tribunals have come to the conclusion that upsetting legitimate expectations constitutes a denial of fair and equitable treatment.<sup>91</sup> In *Tecmed*, for instance, the tribunal considered the guaranty of "just and equitable treatment" in a bilateral investment treaty (BIT) between Spain and Mexico.<sup>92</sup> The BIT itself, however, made no mention of customary international law and the *Tecmed* tribunal made clear that it understood "that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation . . .*"<sup>93</sup> Similarly, *Saluka v. Czech Republic*<sup>94</sup> is also based upon a BIT and, here too, the tribunal explained interpretation as an autonomous one which ICM uses as support for its contention of a principle of legitimate expectations:

Whichever the difference between the customary and the treaty standards may be, this tribunal has to limit itself to the interpretation of the "fair and equitable treatment" standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the "fair and equitable treatment" standard to the customary minimum standard.<sup>95</sup>

93. ICM does cite to *Waste Management*, an arbitration award addressing Article 1105(1) of the NAFTA, that Article being based upon customary international law.<sup>96</sup> A

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<sup>91</sup> ICM Memorial, ¶ 446.

<sup>92</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States ("Tecmed")*, ICSID Case no. ARB/(AF)/00/2, Award, (May 20, 2003) (interpreting the Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, Article IV(1)).

<sup>93</sup> *Tecmed*, Award, ¶ 155 (May 29, 2003) (emphasis added).

<sup>94</sup> Cited at ICM Memorial, ¶ 446.

<sup>95</sup> *Saluka Investments BV v. Czech Republic ("Saluka")*, UNCITRAL, Partial Award, ¶ 294 (Mar. 17, 2006) (interpreting the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and Slovak Federal Republic of Apr. 29, 1991).

<sup>96</sup> ICM Memorial, ¶ 447. See Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 2001), B(1) ("Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.").

closer look at the customary international law invoked, however, shows that the repudiation of legitimate expectations occasions a breach of international obligations only when the expectations are based on specific inducements in reliance upon which a claimant invested in the host country. In *Waste Management*, for instance, the Tribunal did not find a breach of NAFTA Article 1105(1) even when the claimant established a concession agreement with the City of Acapulco which provided for exclusivity in waste collection, but was not delivered, and which, prior to the commencement of service, the Government made significantly less profitable for the claimant by promulgating a new Regulation establishing new rules with respect to public cleaning services.<sup>97</sup>

94. Indeed, as *Waste Management* itself illustrates, the greatest proof that merely disappointed expectations do not violate customary international law is the general principle that a contract breach with a foreign investor does not warrant a finding of a violation of international obligations. Indeed, there is a “widely accepted principle ... that under general international law, a violation of a contract entered into by a State with an investor of another States, is not, by itself, a violation of international law . . . .”<sup>98</sup>

### **C. The Assertion of an International Law Principle of Openness and Transparency**

95. ICM further argues that there is a “principle of transparency” which arises from the principle of good faith.<sup>99</sup> The “core elements” of this principle, ICM argues, include “clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken.”<sup>100</sup>

96. The delineation between customary international law and autonomous interpretation discussed in the previous section indicates here as well that there is not a principle of customary international law, nor a general principle of international law, that

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<sup>97</sup> *Waste Management v. United Mexican States* (“*Waste Management*”), NAFTA/ICSID Case No. ARB/(AF)/00/3, Award, ¶¶ 40-44 (Apr. 30, 2004).

<sup>98</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award, ¶ 167 (Aug. 6, 2003).

<sup>99</sup> ICM Memorial, ¶ 356.

<sup>100</sup> *Id.*, citing Sacha Prechal and Madeleine de Leeuw, *Dimension of Transparency: the Building Blocks for a New Legal Principle?*, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 51 (2007). I would note that this article is a summing up of reasons and illustrations promoting transparency as a “principle of *Community* law,” in other words a push for general principle applied in European Union disputes, and thus its discussion and examples are limited to that context. *Id.* at 61 (emphasis added).

require openness and transparency as alleged by ICM.<sup>101</sup> Some BITs with autonomous language, like that considered in *Tecmed*, do include a requirement of transparency, though it is most often seen as only a requirement that the State make known “beforehand any and all rules and regulations that will govern.”<sup>102</sup> Other BITs include a general duty to provide a transparent and predictable framework, including the BIT considered in *Saluka* which, in addition to applying an autonomous standard, required significant breaches of international conduct to determine that the State failed to ensure a predictable and transparent business framework. In *Saluka*, for instance, the tribunal did not find a breach of international obligations based upon a failure to ensure a predictable and transparent framework, even after the Czech government changed its policy of non-assistance in contravention of assurances by the Minister of Finance, and provided aid to the other three banks in the sector, and not Saluka’s, and then took over Saluka’s bank through forced administration and finally transferred ownership to a third party.<sup>103</sup>

97. ICM also relies on the *Metalclad* Award, an early NAFTA Chapter 11 case, to support the existence of obligation of transparency and openness under customary international law. ICM notes that this portion of the award was set aside by the Supreme Court of British Columbia that found that the tribunal “misstated the applicable law to include transparency obligations.”<sup>104</sup> ICM discounts the significance of the British Columbian decision, however, stating that it “has been widely criticized as having virtually no value in the international context.”<sup>105</sup> ICM appears to base its conclusion on the argument that a national court should not be afforded weight in such international matters. I note, however, that the NAFTA tribunal in *Feldman v. Mexico* wrote of Judge Tysoe’s opinion that

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<sup>101</sup> ICM Memorial, ¶ 358, *et seq.*

<sup>102</sup> *Tecmed*, ¶ 154. ICM provides only part of the tribunal’s quote which, when read in its entirety, reveals that the requirement that the State “act in a consistent manner ... and totally transparently” is for the purpose of the investor knowing “beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”

<sup>103</sup> *Saluka*, Award (May 7, 2004), ¶¶ 331, 351, 500. The Tribunal did, however, find the BIT’s fair and equitable treatment obligations violated by this “unfair and inequitable” treatment. *Id.* ¶ 497.

<sup>104</sup> ICM Memorial, footnote 726; *United Mexican States v. Metalclad Corp.*, 5 ICSID Rep. 236, ¶ 70 (Sup. Ct. B.C. May 2, 2001) (Judge Tysoe).

<sup>105</sup> ICM Memorial, footnote 726.

“[w]hile this Tribunal is not required to reach the same result as the British Columbia Supreme Court, it finds this aspect of their decision instructive.”<sup>106</sup>

98. The Organization for Economic Co-Operation and Development (“OECD”), in its study of the fair and equitable treatment standard in international investment law, confirms that transparency is not a customary international law standard. It found that, “[i]n a few recent cases, Arbitral Tribunals has denied ‘fair and equitable treatment’ drawing upon a relatively new concept not generally considered a customary international law standard: transparency.”<sup>107</sup>

#### **D. The International Institutional Law Principle Regarding Deference in Review of the Exercise of Discretionary Authority**

99. Principles do not exist in a vacuum; often the demands of a principle require accommodation with another principle. A principle present in the law of international institutions is of particular relevance to the IRP process in this regard: The principle that international tribunals in reviewing discretionary acts of international organizations (or of national agencies) do not substitute their own judgment for that of the agency under review but rather look for “an egregious error that calls into question the good faith” of the body reviewed.<sup>108</sup> In this proceeding, ICANN argues that the business judgment rule or some analog to it is appropriate for an IRP review of discretionary actions of the Board of Directors. ICM disagrees. To the extent that IRP finds it appropriate to analogize ICANN to an international organization for the purposes of Article 4, then it is important to recall that an analog to the business judgment rule, not surprisingly, is found in international administrative law when international administrative tribunals review discretionary acts of an international organization.

100. In particular, international administrative law tribunals are on occasion, in a variety of situations, called upon to review the exercise of discretionary power of an international organization. C.F. Amerasinghe observing such review writes:

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<sup>106</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award, ¶ 133 (Dec. 16, 2002). *See also Waste Management*, Award, ¶ 154 (Apr. 30, 2004) (explaining the decision of the Supreme Court of British Columbia in its reasoning).

<sup>107</sup> OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, p. 37 (2004/3) (Sept. 2004)

<sup>108</sup> The EC–Hormone dispute *discussed infra* at para. 101.

In exercising control over the exercise of discretionary power by administrative authorities, tribunals will not substitute their own assessment or judgments for those of administrative authorities.

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The control is not as extensive as in the case of a purely obligatory power or a quasi-judicial power. It may broadly be defined in terms of the prevention of ‘arbitrary’ conduct on the part of administrative authorities. It is sufficiently substantial to protect the interests of staff members while not impeding the execution of the administrative or management function by international organizations.<sup>109</sup>

Thus the observed practice in international organizations is similar in both rationale and structure to what is known as the “business judgment” rule found in the corporation law of the State of California and in other States of the United States as well other countries.

101. In the World Trade Organization, the question of reviewing the discretion of another body arises in the context of the Appellate Body reviewing the decision of a Panel. In the EC–Hormone dispute, the Appellate Body held:

132. Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. \*\*\*. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

133. The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. \*\*\*. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. \*\*\*. “Disregard” and “distortion” and “misrepresentation” of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.<sup>110</sup>

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<sup>109</sup> *Id.* at 301-302.

<sup>110</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, AB Report (16 January 1998) at paras 132-133.



Interestingly, in this line of reasoning, the decision of the panel is to be respected or to receive some measure of deference because it is assumed that the Panel *prima facie* acted in good faith. In other words, only if the Panel did not assess the facts of the case in good faith, then the Appellate Body could undertake a *de novo* review of the Panel's decision. A Panel has not assessed the facts in good faith if the Panel disregarded, distorted or misrepresented the evidence before it.<sup>111</sup>

102. The more recent WTO Appellate Body decision in the US – Cotton Yarn dispute is also illuminating. In that case the Appellate Body addressed the standard to be used by a DSU Panel in reviewing the decision of a Member State:

74. Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.<sup>112</sup>

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<sup>111</sup> A similar example of a reviewing court requiring that evidence overcome a presumption of good faith on the part of the official exercising discretionary authority can be found in the International Court of Justice's Advisory Opinion in *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, I.C.J. Reports 77 (1956). In that Opinion, the view was taken that the ILO Tribunal could base its judgment on abuse of right only if the evidence showed that the Director-General of UNESCO had acted in bad faith, arbitrarily, capriciously or unconscionably.

<sup>112</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, AB-2001-03, AB Report (8 October 2001) at para. 74. Similarly a Panel reviewing U.S. restrictions on imports of tuna held in the Tuna-Dolphin case that:

The reasonableness inherent in the interpretation of necessary was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgement for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second guessing of such actions.

Dispute Settlement Panel, *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R, para. 3.73 (1994). As the WTO generally, see Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AMJ. INT'L L. 193 (1996).

103. A similar practice of deference in reviewing the acts of an agency can be found in the practice of the European Court of Justice, itself an international organization. In *Fedesa*, the European Court of Justice in 1990 reviewing a decision of the Council wrote:

Even if it were to be held, as the applicants in the main proceedings have argued, that the principle of legal certainty requires any measure adopted by the Community institutions to be founded on a rational and objective basis, judicial review must, having regard to the discretionary power conferred on the Council in the implementation of the common agricultural policy, be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion.<sup>113</sup>

Likewise, in the recent 1999 case of *Upjohn*, the European Court summarized its practice as follows:

According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion (see, in particular, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, Case 55/75 *Balkan-Import Export v Hauptzollamt Berlin-Packhof* [1976] ECR 19, paragraph 8, Case 9/82 *Øhrgaard and Delvaux v Commission* [1983] ECR 2379, paragraph 14, Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraphs 24 and 25, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 39).<sup>114</sup>

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<sup>113</sup> Case C-331/88 *Fedesa* [1990] ECR I-4023 (discussing the standard of review of a Council's decision in agricultural matters [prohibition of the use in livestock farming of certain substances having a hormonal action], para 8. *Accord* Case C-405/92 *Mondiet* [1993] ECR I-6133 (discussing the standard of review of a Council's decision in matters concerning the common agricultural policy [measures for the conservation of fishery resources]) para. 32.

<sup>114</sup> Case C-120/97 *Upjohn* [1999] ECR I-223 (discussing whether Community law requires the Member States to establish a procedure for judicial review of national decisions revoking marketing authorizations which involves a more extensive review than that carried out by the European Court of Justice in similar cases) para. 34. *See also* Case C-180/96 *United Kingdom v Commission* [1996] ECR I-3903 (discussing the standard of review of a Commission's decision in the common agricultural policy, in particular in the veterinary and zootechnical field) at para. 97.

104. Both the practice of the WTO and the European Court of Justice are supportive of the observations made regarding the practice in international administrative law of affording a degree of deference when reviewing a decision made under the discretionary authority of an international organization.

**X. Conclusion**

105. The various conclusions of this Opinion are summarized at paragraph 12 above. In closing, I emphasize three things. First, the distinction between principles and rules is of critical and fundamental importance to the interpretation and application of Article 4. Second, given the distinction between principles and rules, it is not at all surprising that the more exacting requirements of Article 4 are provided by the specific rules present in applicable international conventions and local law rather than by principles of international law. Third, to the extent that it is argued that ICAAN should be viewed as analogous to an international organization, it is important to bear in mind that decisions of an international organization taken within its discretionary authority would be afforded a degree of deference by a reviewing authority.



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David D. Caron  
C. William Maxeiner Distinguished Professor of Law  
University of California at Berkeley  
Berkeley, California  
May 5, 2009

Attachments

1. The Articles of Incorporation of ICAAN
2. The Text of Article IV, section 3, of the ICANN Bylaws
3. Résumé of David D. Caron
4. Publications of David D. Caron

**Attachment 1 – The Articles of Incorporation of ICAAN**

**ARTICLES OF INCORPORATION  
OF INTERNET CORPORATION FOR ASSIGNED NAMES  
AND NUMBERS**

As Revised November 21, 1998

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “Corporation”).

2. The name of the Corporation's initial agent for service of process in the State of California, United States of America is C T Corporation System.

3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any further United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government 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).

4. 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

5. Notwithstanding any other provision (other than Article 8) of these Articles:
  - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501 (c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.
  - b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.
  - c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
  - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.
  - e. In no event shall the Corporation be controlled directly or indirectly by one or more “disqualified persons” (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.
6. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members, should the Corporation elect to have members in the future, for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 6 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
7. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 3 hereof and, if possible, to a § 501 (c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no

such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

8. Notwithstanding anything to the contrary in these Articles, if the Corporation determines that it will not be treated as a corporation exempt from federal income tax under § 501(c)(3) of the Code, all references herein to § 501(c)(3) of the Code shall be deemed to refer to § 501(c)(6) of the Code and Article 5(a)(ii), (b), (c) and (e) shall be deemed not to be a part of these Articles.

9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.

**Attachment 2 – The Text of Article IV, section 3, of the ICANN Bylaws**

Article IV

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.

**Attachment 3 – Résumé of David D. Caron**

**DAVID D. CARON**

C. William Maxeiner Distinguished Professor of International Law  
School of Law, Boalt Hall, University of California at Berkeley  
Berkeley, California 94720

(510) 642-7249; facsimile, (510) 643-2673; e-mail, ddcaron@law.berkeley.edu

**PRESENT POSITIONS**

- Faculty of Law, University of California at Berkeley, since 1987.
- President-Elect, American Society of International Law, since 2009.
- Chair, Institute for Transnational Arbitration, since 2005.
- Member, U.S. Secretary of State's Advisory Committee on Public International Law, since 1993.
- Member, Global Agenda Council, World Economic Forum, since 2008.
- Member, Board of Editors, American Journal of International Law, 1990 to 2005, 2008 to present
- Co-Director, Law of the Sea Institute, since 2002.
- Co-Editor, WORLD ARBITRATION AND MEDIATION REPORTS, since 2008.

**EDUCATION**

- Dr. jur. and Doctorandus (International Law), Leiden University.
- Diploma, Hague Academy of International Law.
- J.D., Boalt Hall School of Law, University of California at Berkeley. Member, Order of the Coif. Co-Recipient, Thelen-Marrin Writing Prize. Editor-in-Chief, ECOLOGY LAW QUARTERLY.
- Fulbright Scholar & M.Sc., University of Wales Center Marine Law & Policy, Cardiff, Wales, U.K.
- B.S. with High Honors, U. S. Coast Guard Academy, New London, Connecticut. Emphases in Physics and Political Science. Brigade Commander, Corps of Cadets.

**EXPERIENCE**

***American Society of International Law and American Journal of International Law***

- President Elect, American Society of International Law
- Vice President, American Society of International Law, 2005 to 2007.
- Editor, International Decisions Section of American Journal of International Law, 2003 to 2005.
- Member, Panel on State Responsibility, American Society of International Law, since 1988.
- President, Association of Student International Law Societies (ILSA since 1987), 1982 to 1983

***American Association of Law Schools***

- Chair, AALS-ASIL Joint Conference on International Law, 2007
- Chair, Section on International Law, 1995-1996

***Hague Academy of International Law***

- Lecturer, Public International Session, Summer 2006
- Director of Research (English-speaking), Centre for Research, Fall 1995.
- Director of Studies (English-speaking), Public International Law Session, Summer 1987.
- Recipient, Diploma in Public International Law, Summer 1985.

***Institute for Transnational Arbitration, a Division of the Center for American and International Law***

- Chair, Advisory Council, 2005-2009

***International Law Association***

- Member, International Committee on Diplomatic Protection.
- Member, International Study Group on State Responsibility.

***International Courts and Tribunals – Practice***

- Member, NAFTA Chapter 11 Panel in the *Glamis Gold v. United States of America* dispute, since 2004.
- Member, NAFTA Chapter 11 Panel in the *Cargill v. United Mexican States* dispute, since 2005.
- Listed as one of the top international arbitrators in CHAMBERS USA, 2005- 09.
- President, ISCID Tribunal in the *Aguas del Tunari v. Bolivia* dispute, 2001-2006.
- Counsel for Ethiopia before the Eritrea - Ethiopia Claims Commission, The Hague, 2004-2005.
- Commissioner, Precedent Panel, United Nations Compensation Commission, for claims arising out of the 1991 Gulf War, Geneva, 1996 to 2003.

- Member (U.S. appointee), Property Claims Commission under the German Forced Labor Settlement Agreement, Geneva, 2000-2001.
- Expert Opinion provided in *The Loewen Group Inc. v. The United States of America* as part of Respondent's submission on preliminary issues, 2000.
- Counsel, Defender of the Fund, Marshall Islands Nuclear Claims Tribunal, 1994 -1996.
- Attorney with Pillsbury, Madison & Sutro, San Francisco, with practice in transnational litigation, and ICC and JCAA international arbitration, 1986-1987.
- Legal Assistant successively to Judges Charles N. Brower and Richard M. Mosk, The Iran-United States Claims Tribunal, The Hague, 1983-1986.

***International Courts and Tribunals – Organizations***

- Member and Founding Fellow, College of Commercial Arbitrators, since 2000.
- Member and Past President, Northern California Int'l Arbitration Club, since 2003.
- Member, Board of Directors, African Inst. Arb., Mediation, Conciliation & Research, since 2003.
- Member, Editorial Board, LAW & PRACTICE OF INTERNATIONAL COURTS, since 2001.
- Member, Advisory Council, Procedural Aspects of International Law Institute, since 1995.
- Member, Steering Committee, Mass Claims Processes, Permanent Court of Arbitration, since 2000.
- Member, Panel of Commercial Arbitrators, American Arbitration Association, since 1988.
- Member, ICC Arbitration Committee, United States Comm. for International Business, since 1995.
- Member, Academic Council, Foundation for Int'l Commercial Arbitration and ADR, since 2002.

***Research Posts, Visiting Faculty Positions and Fellowships***

- Visiting Professor, University of Hawaii Richardson School of Law, January 2009
- Distinguished Visiting Professor, Taiwan National Security Council, June 2007
- Visiting Professor, University of San Francisco Program, Udayana University, Bali, Summer 1997.
- Visiting Professor, Hastings College of the Law, San Francisco, 1996.
- Katherine C. Ryan Distinguished Visiting Professor, St. Mary's University Institute on World Legal Problems, Innsbruck, Austria, Summer 1995.
- Visiting Professor of International Law, Cornell University, Fall 1990.
- Senior Research Fellow, Max Planck Institute for International Law, Heidelberg, 1985-1986.
- Research and Teaching Assistant to Professor Stefan A. Riesenfeld, School of Law, University of California at Berkeley, 1982-1983
- Environmental Conservation Fellow, National Wildlife Federation, 1980-1981.

***University of California***

- Member, University of California (System-Wide) Marine Council, 1999 to 2002
- Member, Executive Committee, Institute of International Studies.
- Member, Executive Committee, Energy & Resources Group.
- Member, Faculty Advisory Board, BERKELEY JOURNAL OF INTERNATIONAL LAW
- Member, Advisory Committee, Peace & Conflict Studies.
- Member, Advisory Committee, Human Rights Center.

***United States Coast Guard***

- Assistant Chief, Marine Environmental Protection & Port Security, N. California, 1976-1979.
- Navigator and Salvage Diving Officer, USCGC POLAR STAR, 1974-1976

**HONORS**

- Recipient, the 2000 Stefan A. Riesenfeld Memorial Award for contribution to international law.
- Recipient, the 1991 Francis Deak Prize for outstanding scholarship by a younger scholar.

**OTHER POSITIONS AND AFFILIATIONS**

- Member, California State Bar, since 1983.
- Third Mate, U.S. Merchant Marine, and Ship Salvage Diving Officer, U.S. Navy.

**Attachment 4 – Publications of David D. Caron**

**DAVID D. CARON**

C. William Maxeiner Distinguished Professor of International Law  
University of California at Berkeley

LIST OF PUBLICATIONS

A. BOOKS

THE 2010 UNCITRAL ARBITRATION RULES: A COMMENTARY (forthcoming Oxford University Press, 2010) (co-authored with Lee Caplan).

THE OCEANS IN THE NUCLEAR AGE (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, forthcoming 2009).

THE UNCITRAL ARBITRATION RULES: A COMMENTARY (Oxford University Press, 2006) (co-authored with Lee Caplan and Matti Pellonpää).

BRINGING NEW LAW TO OCEAN WATERS (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, 2004).

LES ASPECTS INTERNATIONAUX DES CATASTROPHES NATURELLES ET INDUSTRIELLES/ THE INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES (David D. Caron & Charles H. Leben, eds., The Hague Academy of International Law, 2001).

THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (David D. Caron & John R. Crook, eds., Transnational Publishers, 2000).

THE ECOLOGICAL AND SOCIAL DIMENSIONS OF GLOBAL CHANGE (David D. Caron, Terry Chapin, Joan Donoghue, Mary Firestone, John Harte & Lisa Wells, eds., Institute of International Studies, University of California at Berkeley, 1994).

THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1994) (co-authored with Matti Pellonpää).

CHALLENGES AND ISSUES IN OCEAN GOVERNANCE (David D. Caron, Christopher Carr & Harry N. Scheiber, eds., Ocean Governance Study Group, 1993).

PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA (Charles L.O. Buderl & David D. Caron, eds., Law of the Sea Institute, 1985).

LAW OF THE SEA: U.S. POLICY DILEMMA (Bernard H. Oxman, David D. Caron & Charles L.O. Buderl, eds., Institute for Contemporary Studies Press, 1983).

B. ARTICLES, NOTES AND CHAPTERS IN BOOKS

93. "The Oceans in the Nuclear Age: Impacts, Observations and the Agenda Ahead," forthcoming in *THE OCEANS IN THE NUCLEAR AGE* (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, forthcoming 2009).
92. "Assessing the Impact of the Nuclear Age on the Oceans and Its Legal Regime" (coauthored with Harry N. Scheiber) forthcoming in *THE OCEANS IN THE NUCLEAR AGE* (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, forthcoming 2009).
91. "The Law and Politics of a Changing Arctic: Three Images and The Agendas They Suggest," forthcoming in *THE WORLD OCEAN IN GLOBALIZATION: CHALLENGES AND RESPONSES* (Davor Vidas and Peter Johan Schei, eds, Martinus Nijhof, 2009).
90. "Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy" forthcoming in *SUFFOLK TRANSNATIONAL LAW REVIEW* (2009).
89. "The Law of the Sea," forthcoming in *THE INTERNATIONAL ENCYCLOPEDIA OF PEACE* (Oxford University Press, 2009).
88. "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict," 1-17 *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* (Seoung-Yong Hong and Jon M. Van Dyke, eds., Martinus Nijhof, 2009).
87. "Anticipating the 2009 Fairness in Arbitration Act," 2:3 *WORLD ARBITRATION & MEDIATION REPORTS* 15-22 (2008).
86. "Politics, Law and Three Images of the Arctic," forthcoming in *PROCEEDINGS, 102TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* (2008).
85. "Are the ICSID Rules Governing Nationality and Investment Working? – A Discussion," in *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 119-141 (TJ Gierson Weiler, ed., Juris, 2008).
84. "Introduction to Investment Treaty Arbitration in the 21<sup>st</sup> Century," the Seventeenth Annual Workshop of the Institute for Transnational Arbitration, 24 *ARBITRATION INTERNATIONAL* 1-3 (2008).
83. "The United States and the 1982 Law of the Sea Treaty," 12 *ASIL INSIGHT*, Issue 4 (June 11, 2007) (co-authored with Harry N. Scheiber).
82. "Towards A Political Theory of International Courts and Tribunals," 24 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 401-423 (2007).

81. "The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT," in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INTERNATIONAL AND INVESTOR-STATE ARBITRATION* 375-383 (Christopher Drahozal & Christopher Gibson, eds., Oxford University Press, 2007).
80. "Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial," in *PROCEEDINGS, 100TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 55-62 (2006).
79. "Justice Alito and Arbitration: His Concurrence in *China Minmetals*," *NEWS AND NOTES, THE NEWSLETTER OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION* (2006) (coauthored with Rebecca J. Wright).
78. "Foreword," in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* xix-xxi (Cambridge University Press, Russell A. Miller & Rebecca Bratspies, eds., 2006).
77. "If Afghanistan has Failed, Then Afghanistan is Dead: 'Failed States' and the Inappropriate Substitution of Legal Conclusion for Political Description," in *THE TORTURE DEBATE IN AMERICA* 214-222 (Cambridge University Press, Karen J. Greenberg, ed., 2005).
76. "The United Nations Compensation Commission for Claims Arising Out of the 1991 Gulf War: The 'Arising Prior To' Decision," *14 FLORIDA STATE UNIVERSITY INTERNATIONAL LAW JOURNAL* 309-334 (2005).
75. "State Crimes: Looking at Municipal Experience with Organizational Crime," in *INTERNATIONAL RESPONSIBILITY TODAY, ESSAYS IN HONOR OF OSCAR SCHACTER* 23-30 (Cambridge University Press, Maurizio Ragazzi, ed., 2005).
74. "The Reconstruction of Iraq: Dealing with Debt," *11 U.C. DAVIS JOURNAL INTERNATIONAL LAW & POLICY* 123-143 (2004).
73. "Does International Law Matter," in *PROCEEDINGS, 98TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 311-314 (2004).
72. "The Rule–Outcome Paradox, Madness Cascades and the Fog of Preemption: Seeking the 'Best Rule' for Use of Force," *27 HASTINGS INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 481-496 (2004).
71. "The United Nations Compensation Commission and Marine Environmental Damages Arising from the Gulf War: Tribunal or Foundation?" in *BRINGING NEW LAW TO OCEAN WATERS* 393-415 (Harry N. Scheiber and David D. Caron, eds., 2004).
70. "Bringing New Law to Ocean Waters" (coauthored with Harry N. Scheiber) in *BRINGING NEW LAW TO OCEAN WATERS* 3-14 (David D. Caron and Harry N. Scheiber, eds., 2004).
69. "Louis Henkin's Integrity, Brilliance and 'Felicity of Expression': Remarks on his Receipt of

the 2003 Stefan A. Riesenfeld Prize,” 22 BERKELEY JOURNAL OF INTERNATIONAL LAW 1-7 (2004).

68. “The World of Intellectual Property and the Decision to Arbitrate,” 19 ARBITRATION INTERNATIONAL 441-449 (2003). *Translated into Chinese* by Lin Yifei of the China International Economic and Trade Arbitration Commission. *Translated into Portuguese* by Marcos Fontes and published as *O Mundo da Propriedade Intelectual e a Decisão pela Arbitragem* in REVISTA DE ARBITRAGEM (2007).

67. “Between Empire and Community -- The United States and Multilateralism 2001-2003: A Mid Term Assessment,” 21 BERKELEY JOURNAL OF INTERNATIONAL LAW 395- 404 (2003).

66. “The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances,” 21 BERKELEY JOURNAL OF INTERNATIONAL LAW 159-184 (2003).

65. “The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority,” 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 857-873 (2002). *Reprinted at* 3 TRANSNATIONAL DISPUTE MANAGEMENT (December 2006).

64. “The State of State Responsibility,” PROCEEDINGS, 96TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 168-180 (2002).

63. “The United Nations Compensation Commission: Practical Justice, Not Retribution,” 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183-199 (2002) (Coauthored with Brian Morris).

62. “Addressing Catastrophes: Conflicting Images of Solidarity and Self Interest,” in LES ASPECTS INTERNATIONAUX DES CATASTROPHES NATURELLES ET INDUSTRIELLES/ THE INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES (David D. Caron & Charles H. Leben, eds., The Hague Academy of International Law, 2001).

61. “International Tribunals and the Role of the Host Country,” in THE IRAN-UNITED STATES CLAIMS TRIBUNAL : ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 27-36(David D. Caron & John R. Crook eds., Transnational Publishers, 2000).

60. Chapters 1, 2, 9, 22, and 26 in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 3-7, 11-17, 133-148, 331-338, and 363-369 (David D. Caron & John R. Crook, eds., Transnational Publishers, 2000)(Coauthored with John Crook).

59. “War and International Adjudication: Reflections on the 1899 Peace Conference,” 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 4-30 (2000).

58. “U.S. Litigation Concerning Japanese Forced Labor in World War II” AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHT (October 2000) (coauthored with Adam Schneider).

57. "The Place of the Environment in International Tribunals," in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC AND SCIENTIFIC PERSPECTIVES* 250-263 (Jay E. Austin & Carl E. Bruch, eds., Cambridge University Press, 2000).
56. "Remarks" in *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY* 79-81, 146-148 (Rainer Hoffman ed., Duncker & Humblot Publishers, 1999).
55. "The Long-Term Contribution of the Tribunal to International Law," in *REVOLUTIONARY DAYS: THE IRAN HOSTAGE CRISIS AND THE HAGUE CLAIMS TRIBUNAL – A LOOK BACK* 173-177 (Andreas Lowenfeld, Lawrence W. Newman and John W. Walker, Jr. eds., Juris Publishing, 1999).
54. "Stefan Albrecht Riesenfeld (1908-1999)," 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 465-467 (1999).
53. "Ships: Nationality and Status," 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (1999).
52. "Stefan A. Riesenfeld, International Law and the University of California," 16 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 1-9 (1998) (co-authored with Richard M. Buxbaum).
51. "Protecting Trade and Turtles: The WTO and the Coherency of International Law," 1 *TRANSLEX* 3, 15 (December 1998) (co-authored with Hans Rudolf Trüb).
50. "State Crimes in the ILC Draft Articles on State Responsibility: Insights from Municipal Experience with Corporate Crimes," in *PROCEEDINGS, 92TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 307-312 (1998).
49. "The Basis of Responsibility: Attribution and Other Transsubstantive Rules of State Responsibility," in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 109-184 (Richard B. Lillich & Daniel B. Magraw, eds., 1998).
48. "Decisions 36 Through 42 and Associated Panel Reports of the United Nations Compensation Commission," 36 *INTERNATIONAL LEGAL MATERIALS* 1279-90 (1997).
47. "The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research," in *REPORT ON THE WORK OF 1995 SESSION OF THE HAGUE ACADEMY CENTRE FOR RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS ON "INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES"* 1-28 (1996).
46. "Decisions 24 Through 35 and Associated Panel Reports of the United Nations Compensation Commission," 35 *INTERNATIONAL LEGAL MATERIALS* 939-953 (1996).
45. "The International Whaling Commission & The North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion for Consensual Structures," 89 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 154-174 (1995).



44. "Post Award Proceedings Under the UNCITRAL Rules of Arbitration," 11 ARBITRATION INTERNATIONAL 429-454 (1995) (co-authored with Lucy F. Reed).
43. "Peaceful Settlement of Disputes Through the Rule of Law," in BEYOND CONFRONTATION INTERNATIONAL LAW FOR THE POST COLD-WAR ERA, 309-334 (Lori F. Damrosch, Gennady Danilenko & Rein Müllerson eds., 1995) (co-authored with Galina Shinkaretskaya, Institute of State and Law, Moscow).
42. "The UNCC and the Search for Practical Justice," in THE UNITED NATIONS COMPENSATION COMMISSION, 367-378 (Richard B. Lillich ed., 1995).
41. "The Law of the Sea and the United States: Reflections Given the Small Likelihood of Ratification in 1995," in IMPLICATIONS OF ENTRY INTO FORCE OF THE LAW OF THE SEA TREATY FOR U.S. OCEAN GOVERNANCE 14-16 (Biliana Cicin-Sain & Robert Knecht, eds. 1995).
40. "Decisions 14 Through 23 of the United Nations Compensation Commission," 33 INTERNATIONAL LEGAL MATERIALS 235-242 (1995).
39. "Governance and Collective Legitimation in the New World Order," 6 HAGUE YEARBOOK OF INTERNATIONAL LAW 29-44 (1994).
38. "Addendum" to the entry on "United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)," in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1222-1229 (2000) (co-authored with Stefan A. Riesenfeld).
37. "The Institutional Risks of Coerced 'Greening' in a Consensual World," in MOVING AHEAD ON OCEAN GOVERNANCE 29-30 (Biliana Cicin-Sain & Robert Knecht, eds. 1994).
36. "Analyzing and Understanding Treaties in the Area of International Environmental Law," in TEACHING INTERNATIONAL ENVIRONMENTAL LAW: IDEAS AND EXPERIENCES FROM THE SEMINAR ROOM AND THE LECTURE HALL 8-16 (E. Howard ed., World Wildlife Fund, 1994).
35. "The Legitimacy of the Collective Authority of the Security Council," 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 552-588 (1993).

*Selected for inclusion in COLLECTIVE SECURITY LAW, a volume in The Library of Essays in International Law (Robert McCorquodale, ed., Ashgate Publishing), as an "important and influential" essay.*

*Selected for inclusion in "The United Nations" (Paul Taylor and Sam Daws eds., 1997), a volume in The International Library of Politics and Comparative Government (David Arter, ed., Dartmouth Publishing), as an "important and influential essay in political and social science."*

34. "Towards an Arctic Environmental Regime," 24 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 377-392 (1993).
33. "The Attribution of Acts of Parastatals: The Significance of the Practice of the Iran-U.S. Claims Tribunal," PROCEEDINGS OF THE SECOND JOINT AMERICAN SOCIETY OF

INTERNATIONAL LAW AND NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT CONFERENCE 6-9 (1993).

32. "The Permanent Court of Arbitration: 'Seeking the Most Effective Means of...a Real and Lasting Peace'," PROCEEDINGS OF THE SECOND JOINT AMERICAN SOCIETY OF INTERNATIONAL LAW AND NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT CONFERENCE 166-169 (1993).

31. "Initiatives Affecting Ocean Governance in the Arctic," in CHALLENGES AND ISSUES IN OCEAN GOVERNANCE 31-40 (David D. Caron, Christopher Carr and Harry N. Scheiber eds., 1993).

30. "Strengthening the Collective Authority of the Security Council," PROCEEDINGS, 87<sup>TH</sup> ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 303-310 (1993).

29. "The Arctic," 3 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 305-309 (1993) (co-authored with James Aquilina).

28. "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal," 7 ICSID FOREIGN INVESTMENT LAW JOURNAL 21-56 (1992).

27. "International Dispute Resolution: Comparing the Roles Accorded the Parties and the Community Surrounding Them," PROCEEDINGS, 85<sup>TH</sup> ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 65-71 (1992).

26 "Responses to Aggression in the New World Order," in CONFRONTATION IN THE GULF: UNIVERSITY OF CALIFORNIA PROFESSORS TALK ABOUT THE WAR 143-154 (H. Kreisler ed., Institute of International Studies, University of California at Berkeley, 1992).

25. "The Frog That Wouldn't Leap: The International Law Commission and Its Work on International Watercourses," 3 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 269-279 (1992).

24. "Decisions and Report of the United Nations Compensation Commission," 31 INTERNATIONAL LEGAL MATERIALS 1009-1017 (1992).

23. "The Arctic," 2 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 195-199 (1992) (with Christopher Carr).

22. "Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law-Making," 14 HASTINGS INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 755-780 (1991).

*Selected for inclusion in 23 LAND USE & ENVIRONMENT LAW REVIEW (1992) at 681-706 "as one of the best articles published within the last year."*

*Selected for inclusion in INTERNATIONAL ENVIRONMENTAL LAW (Paula M. Peavato ed., 2003), a volume in The Library of Essays in International Law (Robert McCorquodale, ed., Ashgate Publishing), as an "important and influential" essay.*

21. "Iraq and the Force of Law: Why Give a Shield of Immunity?," 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 89-92 (1991).

20. "Attribution Amidst Revolution: The Experience of the Iran-United States Claims Tribunal," PROCEEDINGS, 84TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 64-71 (1991).

19. "Wheaton's Elements," 'Notes from the Editor' for the Gryphon Press 1991 Facsimile Edition of HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (R. H. Dana, Jr., ed. 1866), 34 pp.

18. "The Gulf War, the United Nations Compensation Commission and the Search for Practical Justice," 24 THE TRANSCRIPT 26-30 (Fall 1991).

17. "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution," 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 104-156 (1990).

*Awarded the 1991 Francis Deák Prize by the American Society of International Law.*

*Selected for inclusion in INTERNATIONAL DISPUTE SETTLEMENT (Mary Ellen O'Connell ed., 2003), a volume in The Library of Essays in International Law (Robert McCorquodale, ed., Ashgate Publishing), as an "important and influential" essay.*

16. "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level," 17 ECOLOGY LAW QUARTERLY 621-653 (1990).

15. "Choice and Duty in Foreign Affairs: The Reflagging of the Kuwaiti Tankers," in THE IRAN-IRAQ WAR: LESSONS FOR STRATEGY, DIPLOMACY & LAW 153-172 (C. Joyner ed., Greenwood Press, 1990). Also published in part at HARVARD INTERNATIONAL REVIEW 34 (Winter 1989).

14. "La protection de la couche d'ozone stratospherique et la structure de l'activite normative internationale en matiere d'environnement," 36 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 704-726 (1990).

13. "The Arctic," 1 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 181-185 (1990).

12. "International Sanctions, Ocean Management and the Law of the Sea: A Study of Denial of Access to Fishing," 16 ECOLOGY LAW QUARTERLY 311-354 (1989).

11. "The Law of the Environment: A Symbolic Step of Modest Value," 14 YALE JOURNAL OF INTERNATIONAL LAW 528-541 (1989).

10. "Ships: Nationality and Status," 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 289-297 (1989).
9. "Flags of Vessels," 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 127-128 (1989).
8. "Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal," 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 465-518 (1986).
7. "Iran-U.S. Claims Tribunal," 10 YEARBOOK COMMERCIAL ARBITRATION 175-324 (1985). A summary of the work of the Tribunal with extracts of its major decisions for the period November 1, 1983 to October 31, 1984.
6. "Liability for Transnational Pollution Arising from Offshore Oil Development A Methodological Approach" 10 ECOLOGY LAW QUARTERLY 641-683 (1983).  
  
*Co-recipient, 1983 Thelen-Marrin Prize by the School of Law, University of California at Berkeley.*
5. "Reconciling Domestic Principles and International Cooperation," in LAW OF THE SEA: U.S. POLICY DILEMMA 3 -10 (Bernard H. Oxman; David D. Caron & Charles L.O. Buderer eds., ICS Press, 1983).
4. "Ocean Disposal of Radioactive Wastes: International Law and California," in 2 OCEAN STUDIES SYMPOSIUM 591-613 (California Coastal Commission, ed., 1983).
3. "Deep Seabed Mining: A Comparative Study of Municipal Legislation by the United States of America and the Federal Republic of Germany," 4-16 MARINE POLICY 4 (1981).
2. "Municipal Legislation for Exploitation of the Deep Seabed," 8 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 259-297 (1980).
1. "Emergency Disposal of Oil Spill Wastes in Northern and Central California," in DISPOSAL OF OIL AND DEBRIS RESULTING FROM A SPILL CLEANUP OPERATION 62-75 (Farlow, J.S. & Swanson, D., eds.) (1980).

C. BOOK REVIEWS, EDITORIALS, OTHER PUBLICATIONS AND ARBITRAL DECISIONS

THE ICSID CONVENTION: A COMMENTARY by Christoph H. Scheuer, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 219-220 (2004).

THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, by James Crawford, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 474-475 (2003).

THE NEW UN PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR by Steven R. Ratner, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 335-37 (1996).

INTERNATIONAL LAW AND POLLUTION edited by Daniel Magraw, 2 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 365 (1991).

LA PLATFOMA CONTINENTAL Y SU LÍMITE EXTERIOR by Orlando Rubén Rebagliati, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 404 (1988).

EL ARBITRAJE INTERNACIONAL EN LA PRACTICA CONVENCIONAL ESPANOLA (1794-1978) by M.P. Andres Saenz de Santa Maria, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW 839 (1985).

MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA by Alfred Soons, 31 NETHERLANDS INTERNATIONAL LAW REVIEW 277 (1984).

\* \* \* \*

“A Pre-emptive Pardon for Those Who Tortured Could Backfire,” SAN FRANCISCO DAILY JOURNAL and LOS ANGELES DAILY JOURNAL (January 15, 2009)(with Ariel Meyerstein).

“Council Comment: Reform Priorities at International Trade and Investment Institutions,” 21 ASIL NEWSLETTER 6-7 (Aug/Oct 2005).

“Catastrophes afflict poor the most,” SAN FRANCISCO CHRONICLE (January 5, 2005) at B9.

“Emergency rule leaves us morally ill at ease,” SAN FRANCISCO CHRONICLE (June 15, 2004) at B9.

“Ignore Soaring Costs--It’s Impossible to Cancel Iraqi Debts from Kuwait War but Not Forgive Its Earlier Obligations,” LOS ANGELES DAILY JOURNAL (2003).

\* \* \* \*

Brief of Professors of International Law as *Amici Curiae* in Support of Respondents before the U.S. Supreme Court in *Republic of the Philippines v. Mariano J. Pimentel* (2008)(with William J. Aceves, M. Cherif Bassiouni, Sherri Burr, John Cerone, Roger S. Clark, Connie De la Vega, Hurst Hannum, Bert Lockwood, Linda A. Malone, James A.R. Nafziger, Ved Nanda, Jordan J. Paust, Carole Petersen, John Quigley, Naomi Roht-Arriaza, Lelia Nadya Sadat, Michael Scharf, Harry N. Scheiber, Dinah Shelton, Barbara Stark, Beth Stephens, Johan D. Van der Vyver, David Weissbrodt, and Burns H. Weston).

Brief of Federal Courts and International Law Professors as *Amici Curiae* in Support of Petitioners before the U.S. Supreme Court in *Lakhdar Boumediene v. George Bush and Khaled Al Odah v. United States of America* (2007)(with Stephen Vladeck, David Vladeck, Lori Damrosch, Mark Drumbl, Deborah Pearlstein, Edward Purcell, John Quigley, Lauren Robel and Beth Stephens).

Brief for Arbitration Scholars and Experts as *Amici Curiae* in Support of Appellant before the United States Court of Appeals for the Second Circuit in *United States of America v. Jeffrey Stein, et al.* (2007) (with Thomas E. Carbonneau, Christopher Gibson, Robert B. von Mehren, and Arthur W. Rovine).

Brief of International Law and Jurisdiction Professors as *Amici Curiae* in support of the Petitioners before the U.S. Supreme Court in *Shafiq Rasul v. George W. Bush* (2004) (with John Barton, Barry Carter and Anne-Marie Slaugther).

Brief of April 13, 1998 of International Law Professors as *Amicus Curiae* in support of Petitioner in *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390) (with George A. Bermann, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne Marie Slaught, and Edith Brown Weiss.)

\* \* \* \*

*Agua del Tunari, S. A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (David D. Caron, President; Henri C. Alvarez, Member; and Jose Luis Alberro-Semerena, Member). Decision on Respondent's Objections to Jurisdiction (21 October 2005), available at the ICSID website at [http://www.worldbank.org/icsid/cases/AdT\\_Decision-en.pdf](http://www.worldbank.org/icsid/cases/AdT_Decision-en.pdf); reprinted at 18 WORLD TRADE AND ARBITRATION MATERIALS 271-376 (April 2006) and 20 ICSID REVIEW FOREIGN INVESTMENT LAW JOURNAL 450-554 (Fall 2006).